No. 24-1367

United States Court of Appeals
for the Sixth Circuit

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; and the GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS EMPLOYEE WELFARE FUND

Plaintiffs-Appellants,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

On Appeal from the United States District Court
Eastern District of Michigan, Southern Division
in Case No. 5:14-cv-11349

BRIEF OF APPELLANTS GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS and the GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS EMPLOYEE WELFARE FUND

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-1367 Case Name: Grand Traverse Band, et al. v BCBSM

Name of counsel: Herman D. Hofman

Pursuant to 6th Cir. R. 26.1, Grand Traverse Band of Ottawa and Chippewa Indians
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-1367 Case Name: Grand Traverse Band, et al. v BCBSM

Name of counsel: Herman D. Hofman

Pursuant to 6th Cir. R. 26.1, Grand Traverse Band of Ottawa and Chippewa Indians Employee Welfare Plan
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs/Appellants the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB") and the Grand Traverse Band of Ottawa and Chippewa Indians Employee Welfare Fund (the "Plan") (collectively "Plaintiffs") request oral argument. This appeal raises significant issues about correctly interpreting and applying the statute of limitations provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1113, and correctly interpreting and applying the Michigan Healthcare False Claims Act ("HCFCA"). Proper resolution of this appeal is of interest not just to ERISA plan fiduciaries and plans, but also to many thousands of ERISA plan participants and beneficiaries, who look to the courts to protect their ERISA benefits. Oral argument will help this Court understand the district court's errors when it disregarded this Court's precedents, misinterpreted ERISA, and misconstrued the Plaintiffs' First Amended Complaint ("FAC"), letting Defendant/Appellee Blue Cross Blue Shield of Michigan ("BCBSM") escape liability for Plaintiffs' claims under ERISA, Michigan common law, and the HCFCA.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under federal law (ERISA), and 18 U.S.C. § 1362 because GTB is a federally recognized Indian Tribe. The District Court had supplemental jurisdiction over Plaintiffs' state-law claims under 28 U.S.C. § 1367.

This Court has jurisdiction under 28 U.S.C. § 1291. The District Court entered final judgment on March 29, 2024. Plaintiffs timely appealed on April 26, 2024.

STATEMENT OF ISSUES

1. Whether the District Court erroneously dismissed—at the pleadings stage—ERISA and common law breach-of-fiduciary-duty claims as time-barred after BCBSM concealed those claims, Plaintiffs did not know the material facts establishing BCBSM's breaches until 2013, and Plaintiffs sued in 2014.

2. Whether the District Court erroneously granted summary judgment against Plaintiffs' HCFCA claim when it misinterpreted Plaintiffs' FAC as alleging BCBSM "violated" federal Medicare-Like-Rates ("MLR") regulations when Plaintiffs actually alleged BCBSM violated the HCFCA by: (1) misrepresenting its payment rates as "better than" or "close to" MLR, and (2) fraudulently inducing Plaintiffs to enter the Facility Claims Processing Agreement ("FCPA").

3. Whether the District Court erroneously denied Plaintiffs leave to file their Second Amended Complaint ("SAC").

4. Whether the District Court erroneously denied Plaintiffs summary judgment on BCBSM's liability for violating the HCFCA when BCBSM's false statements, implied certification of compliance with the MLR regulations, and fraudulent inducement of Plaintiffs to enter the FCPA was unrefuted.

5. Whether the District Court erroneously held the MLR regulations do not relate to BCBSM's healthcare claims payments for GTB using tribal funds, when

five regulations describe requirements applicable to claims payments using tribal funds.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. BCBSM ADMINISTERED GTB'S PLANS AS A FIDUCIARYY.

BCBSM administered GTB's self-insured plans covering eligible Contract Health Services ("CHS") tribal members (Group 01020) and employees (Group 01019) under an Administrative Services Contract ("ASC"). ASC, (RE155-2). Using tribal funds, BCBSM decided which claims to pay and how much to pay. *Id.* at Art. II, Sections A, C (PageID#4015-16). BCBSM had "a fiduciary duty to manage the Plan with plaintiffs' best interest in mind . . . and not squander plan assets." Order, (RE122, PageID#3266-67); Order, (RE99, PageID#2925-35).

BCBSM secretly paid itself hidden fees as "additional compensation" from tribal plan assets, at amounts calculated as a percentage of Plaintiffs' claims expense. *See Hi-Lex Controls Inc. v. BCBSM*, No. 11-12557, 2013 WL 2285453, at *4-5 (E.D. Mich. May 23, 2013), *aff'd sub nom. Hi-Lex Controls, Inc. v. BCBSM*, 751 F.3d 740 (6th Cir. 2014); *see also* 1/29/2014 E-mail (RE156-5, PageID#4355) (describing hidden fees BCBSM collected from GTB); Compl., at ¶¶29-103 (RE1, PageID#8-22). The more BCBSM paid (using tribal funds) in claims expense, the more in hidden fees it pocketed. *See id.* Unbeknownst to GTB, BCBSM was self-interested in paying more, not less, in claims expense (using tribal funds). This Court has previously affirmed such conduct by BCBSM constituted self-dealing and a breach

of ERISA fiduciary duties to its self-funded customers like GTB. *See Hi-Lex Controls*, 751 F.3d at 750 ("BCBSM's use of fees it discretionarily charged for its own account is exactly the sort of self-dealing that ERISA prohibits fiduciaries from engaging in" (citation and quotation marks omitted)). The parties settled Plaintiffs' claim for the hidden fees BCBSM secretly collected from GTB.

B. MLR Regulations Took Effect.

In July 2007, the Department of Health and Human Services ("DHHS") promulgated regulations governing "[p]ayment to Medicare-participating hospitals for authorized Contract Health Services." 42 C.F.R. § 136.30. The rate for hospital claims authorized by a CHS program was "Medicare-Like Rates" or what "the Medicare program would pay under a prospective payment system." *Id.*, § 136.30(c)-(e).

An "[e]xception" to this "payment calculation" applies where "an amount has been negotiated with the hospital or its agent[.]" *Id.*, § 136.30(f). Then, the CHS program "will pay the lesser of: The amount determined under paragraph (e) of this section [(MLR),] or the amount negotiated with the hospital or its agent[.]" *Id.* Thus, the MLR regulations require "[t]he [tribe's] payment will not exceed" MLR "or the contracted amount . . . whichever is less[.]"*Id.*, § 136.30(g)(4). "All Medicare-participating hospitals," must accept "no more than the rates of payment under the

methodology described in" the MLR regulations "as payment in full for all items and services authorized by [GTB's CHS program]." *Id.*, § 136.30(a).

C. BCBSM KNEW THE MLR REGULATIONS APPLIED.

As the fiduciary paying Plaintiffs' CHS program claims, BCBSM knew about the MLR regulations. 9/17/2007 E-mail, (RE155-18, PageID#4214) (discussing "GTB Tribal Members Medicare rate entitlement"). BCBSM acknowledged its obligation to pay CHS-eligible claims at the lower of MLR or its contractual rates. Its Regional Manager knew "[a] recent Indian Health Service ruling mandates tribal members are to receive Medicare-like rates at acute care hospitals," 2/11/2008 E-mail, (RE155-19, PageID#4218), and the MLR regulations are "a mandate, so there is no way around this." 10/10/2008 E-mail (RE155-20, PageID#4220). BCBSM admitted "[f]ederal law entitling tribal members to Medicare Like Rates is the reason the re-pricing is necessary," 11/8/2012 E-mail (RE155-23, PageID#4229), meaning "the law says the tribes are entitled to the lower of BCBSM vs. Medicare." 9/4/2012 E-mail, (RE155-24, PageID#4237).

BCBSM admitted it must pay claims for Plaintiffs at MLR or lower. In 2007, it recognized the MLR regulations "entitle[] [Plaintiffs'] contract health enrollees ([BCBSM's] [G]roup 01020) to [M]edicare rates at the hospital." 8/16/2007 E-mail, (RE155-25, PageID#4246). According to BCBSM Account Manager Dan Deiss,

Plaintiffs were "legally entitled to Medicare Like Rates for facility claims." 2/24/2011 E-mail, (RE155-27, PageID#4252).

D. BCBSM COULD ADMINISTER MLR.

In 2007, BCBSM confirmed its Blue Care Network (BCN) system could process claims at MLR. 10/25/07 E-mail (RE164-3, PageID5014) ("BCN can process claims like Medicare"). In January 2008, BCBSM's Minnesota affiliate offered to help it do so for tribal clients. 1/21/08 E-mail, (RE156-8, PageID#4368).

E. BCBSM IGNORED MLR.

BCBSM ignored the regulations to maximize profits. Its President of West Michigan Operations instructed employees to "determine the financial impact at [M]edicare versus [BCBSM's] rates" because complying with the MLR regulations "would be more costs" for BCBSM and would "take[] away [BCBSM's] competitive position on price!" 10/8/2007 E-mail, (RE156-3, PageID#4298). BCBSM knew, if tribes got MLR discounts, hospitals would seek price increases from BCBSM to offset lost revenue. Root Dep., (RE156-4, PageID#4325-4327). BCBSM also knew paying claims at MLR would lower profits: its secret collection of hidden fees were calculated as a percentage of claims expense. *See* 1/29/2014 E-mail (RE156-5, PageID#4355) (BCBSM Senior Analyst stating "01020 is an ASC group," and "[i]f the Medicare rate is lesser, then the ASC fee is less."). Accordingly, if BCBSM took advantage of the MLR discounts for GTB, it would pay less in claims expense and

collect less hidden fees. *See id.* BCBSM decided it was not "worth keeping the business and not getting any money for it[.]" 7/28/2013 E-mail, (RE156-9, PageID#4372).

And BCBSM was motivated by prejudice:

> Majority of the business that falls into the #3 bucket is tribal members . . . ***but please keep in mind this business represents individuals who current [sic] DON'T have health care and have care rendered through medicine men who live on the reseuorive. [sic] Hence, Underwriting hasn't really wanted to get into this business.***

9/17/2012 E-mail, (RE156-6, PageID#4360) (emphasis added). BCBSM ignored consultant Gallagher Benefits Services' warning that BCBSM's "charter specifically states that they will not discriminate against the rights of those covered under BCBS policies." 1/28/2013 E-mail, (RE156-7, PageID#4365).

F. BCBSM CONCEALED THE RATES AT WHICH IT PAID CLAIMS.

BCBSM's secret decision to ignore MLR worked because it concealed its payment rates. Per BCBSM: "information about BCBSM's hospital reimbursement rates" is "confidential." Johnson Decl., ¶¶6-7 (RE164-4, PageID#5020). BCBSM "[keeps] the rate information and margin rate confidential from its competitors." *Shane Grp., Inc. v. BCBSM*, No. 2:10-CV-14360, 2018 WL 1811471, at *3-4 (E.D. Mich. Apr. 17, 2018). BCBSM takes "substantial measures to guard the secrecy of" its "highly confidential pricing and reimbursement rate information," including:

- "[S]uch information is disclosed only to particular employees of BCBSM."

- "The database and the information contained therein is not made available to the public in any way."
- "It would be virtually impossible for BCBSM's competitors or other outside persons to access or recreate the information contained in the documents."
- "Unauthorized access to information in the database is strictly prohibited by BCBSM."

BCBSM Motion, (RE164-5, PageID#5031-32).

BCBSM never informed GTB "how much was actually billed, how much was discounted, and . . . how much was actually paid" (using tribal funds) for claims, despite GTB's many requests. Andrews Dep., (RE156-10, PageID#4381-83, 4396); Zotigh Dep., (RE156-12, PageID#4448); Petoskey Dep., (RE156-13, PageID#4473-75, 4483-84); 1/28/2008 E-mail (RE164-7, PageID#5063). BCBSM considered this information "proprietary" that would not be shared. Zotigh Dep., (RE156-12, PageID#4448); Petoskey Dep., (RE156-13, PageID#4473-75, 4483-84). GTB did not know BCBSM's payment rates, what MLR was, or how they compared (except as addressed below). Harter Dep., (RE164-8, PageID#5083); Swallows Dep., (RE164-9, PageID#5100).

G. BCBSM LIED ABOUT ITS NETWORK RATES VIS-À-VIS MLR.

When GTB asked how BCBSM's rates compared to MLR, BCBSM lied that its discounts were as good, if not better. As GTB's Benefits Manager testified, "[BCBSM Account Manager] Dan Deiss would always tell us, verbally, that we were getting better than Medicare-like rates, you know when I would inquire on CHS."

Andrews Dep., (RE156-10, PageID#4396-99). GTB's former CFO and Tribal Manager asked Mr. Deiss whether Plaintiffs were "getting better than Medicare-like rates through their network" and Mr. Deiss's response was "Yes." Oien Dep., (RE156-11, PageID#4431). GTB's then-Tribal Manager testified BCBSM "always tried to provide us that Blue Cross and Blue Shield's discounts were greater than, meaning better than, the Medicare-Like Rates discounts. That nobody could beat Blue Cross and Blue Shield." Zotigh Dep., (RE156-12, PageID#4455-56). Per GTB's in-house counsel, BCBSM's response to inquiries about MLR pricing was "that the prices [Plaintiffs were] receiving -- that the Tribe was receiving from Blue Cross/Blue Shield under its agreed-upon pricing system with Munson, was lower or similar to Medicare-like rates." Petoskey Dep., (RE156-13, PageID#4473, 4483-84).

H. BCBSM Concealed That Its Rates Usually Exceeded MLR.

These representations were knowingly false. After the regulations took effect, BCBSM determined its network rates were, on average, significantly higher than MLR. In January 2008, Director of Hospital Contracting and Reimbursement "re-priced the facility charges for the top 10 hospitals used by [Group 20] (739 contracts)" and knew "the Medicare vs. BCBSM savings would have been $200,000 for 7/06–6/07." 2/1/2008 E-mail, (RE155-26, PageID#4248). Mr. Deiss concluded: "I see from this report that BCBSM has the ability to determine the percentage

difference between our payments and Medicare payments specific to the GTB." 1/29/2008 E-mail, (RE156-15, PageID#4510-12). BCBSM's analysis for 2009-2010 demonstrated similar savings using MLR. *See* 9/20/2011 E-mail, (RE156-16, PageID#4516-17).

BCBSM's management instructed employees to keep this information from GTB. In an e-mail stating "THE ATTACHED BCBSM DISCOUNT INFORMATION IS CONFIDENTIAL," Mr. Deiss was directed to hide from GTB the difference between BCBSM's rates and MLR: "[Y]ou cannot give [GTB] the hospital specific Blue Cross discounts from this spread sheet. Of course you cannot give them the Medicare discount and the difference because that would allow them to calculate the BCBSM discount." 1/29/2008 E-mail (RE156-15, PageID#4510). Similarly, regarding a third-party analysis of BCBSM's "network performance" for GTB, BCBSM noted "it would be very bad for this account if" GTB discovered BCBSM didn't "have the edge;" that "news would spread quickly." 4/7/2008 E-mail (RE156-17, PageID#4521).

I. GTB ASKED BCBSM FOR PROOF ITS NETWORK RATES WERE "BETTER THAN" MLR; BCBSM KEPT LYING.

GTB periodically asked whether BCBSM's network rates were "better than" MLR. Andrews Dep., (RE156-10, PageID#4381-83, 4396); Zotigh Dep., (RE156-12, PageID#4448). BCBSM kept lying. Its Healthcare Contracting and Revenue Cycle Executive proposed to arrange for "the hospital [Munson] 'convince' the Tribe

that Medicare is x% less than BCBSM PPO rates, and then have the special processing unit . . . pay the claims using standard BCBSM rules and rates, except apply the x% discount." 4/11/2008 E-mail (RE156-18, PageID#4523). BCBSM retained "the responsibility" and "control" over what the "x%" number would be, however, not Munson. 10/16/2008 E-mail (RE156-19, PageID#4529).

BCBSM's efforts to dupe GTB into believing it was achieving MLR or better led to the FCPA, drafted by BCBSM attorneys and presented to GTB by BCBSM representatives. 8/22/2008 E-mail (RE156-20, PageID#4532, 4536); 1/29/2009-1/30/2009 E-mails (RE156-21, PageID#4540); Petoskey Dep., (RE156-13, PageID#4471). The "x%" number was invented by BCBSM and affirmed by Munson, who together settled on "8%". Noxon Dep., (RE156-14, PageID.4495, 4498); Deiss Dep., (RE157-3, PageID#4609); 3/9/2009 E-mail, (RE156-22, PageID#4542); 3/16/2009 E-mail, (RE156-23, PageID#4544); Leach Dep., (RE156-24, PageID#4553-4555).

BCBSM lured GTB into signing the FCPA by misrepresenting GTB would receive BCBSM's discounts ***and*** MLR. Oien Dep., (RE156-11, PageID#4406-07); Zotigh Dep., (RE156-12, PageID#4448-49, 4453-56); Petoskey Dep., (RE156-13, PageID#4476,4483); 12/4/2013 Memo, (RE156-25, PageID#4566) ("BCBSM entered into contract on MLR through a facility claim processing agreement, always stating that the 8% + BCBS discounts would be equal to MLR for hospitalization

expenses for eligible Tribal members."); 12/2/2013 Memo (RE156-26, PageID.4571); 3/4/2011 E-mail, (RE96-4, PageID#2750).

BCBSM touted the FCPA as a "Medicare-Like Rate Agreement" giving Plaintiffs MLR-equivalent on Munson claims. *See* 5/21/2008 E-mail (RE164-10, PageID#5111); 3/24/2009 E-mail (RE164-12, PageID#5119) (FCPA would result in BCBSM "applying Medicare like rates to claims incurred at Munson Medical Center by Grand Traverse Band Tribal members (Group 01020)."); 3/28/2009 E-mail (RE164-13, PageID#5124) (same). It said the FCPA would yield the "actual differential" between BCBSM's network rates and MLR:

> "***The tribe will receive in the GTB plan year, which is also a calendar year, the actual differential on the Munson Medicare Cost Report for the most recent Munson fiscal year which is July through June.*** So, for the balance of 2009 GTB will receive the differential from the 7/07 through 6/08 Munson fiscal year. Next January the differential will be adjusted to the 7/08 – 6/09 Munson fiscal year results and so on."

2/16/2009 E-mail, (RE164-14, PageID#5131-32). This was false; BCBSM's Director, discussing the "GTB Proposed Agreement" with Mr. Deiss, said BCBSM would ***not*** "settle to actual" because "no one [at BCBSM was] prepared to" do that. 3/16/2009 E-mail, (RE164-15, PageID#5138). BCBSM misrepresented the FCPA as going "beyond what the [MLR] rule requires" and "BCBSM and Munson believe[d] that they [we]re fully compliant with the law" under the FCPA. 12/18/2012 E-mail, (RE164-16, PageID#5143).

After GTB signed the FCPA, BCBSM representatives congratulated themselves for having "saved [the] bacon on this one!" 1/29/2009-1/30/2009 E-mails (RE156-21, PageID#4539-40). And Mr. Deiss thanked Munson "for [its] help with this." 3/26/2009 E-mail (RE164-17, PageID#5145).

The 2009 FCPA promised that for 2009 MLR was a discount of 8% over BCBSM's rates. FCPA, (RE156-28, PageID#4576-79). In later years, that differential would be adjusted, and BCBSM implied its discounts could be better than MLR. *Id.* The actual difference between MLR and BCBSM's network rate for 2009 Munson claims was 19.22%, which GTB only learned through discovery. Reid Decl., (RE157, PageID#4583).

BCBSM intentionally omitted from the FCPA any mention of "who will be responsible" for the discounts, stating that "wouldn't go in the contract." 5/13/2008–5/29/2008 E-mails (RE157-1, PageID#4586). In the same discussion about "reconciliation" of the FCPA discounts, BCBSM's management enlisted "Kim" who "***does the dirty work when no one else will or can.***" *Id.* (emphasis added). This "dirty work" ensured the FCPA "discount" was never adjusted to reflect the true difference between BCBSM's rates and MLR. Deiss Dep., (RE157-3, PageID#4598-4600, 4611) ("There was – there was only one settlement, so I would say that [the situation] was not -- it was not rectified."). In fact, BCBSM never provided any "discount" other than in 2011 for the 2009 plan year, despite GTB's

many reminders. *See* 5/14/2010 E-mail (RE157-4, PageID#4620); 3/31/2011 E-mail (RE157-5, PageID#4622). In 2011, BCBSM incorrectly credited 8% of the amount ***paid*** by BCBSM in 2011, not 8% of the amount ***charged*** by Munson, as the FCPA required. *See* FCPA, (RE156-28, PageID#4576-79); 11/10/2011 E-mail, (RE157-6, PageID#4626-27).

J. BCBSM CONCEALED ITS LIES.

Contradicting its misrepresentations to GTB, BCBSM knew the FCPA's "8%" number and representations about the FCPA discounts were false and hid that from GTB. Deiss Dep., (RE157-3, PageID.4611) (FCPA's differential "was mischaracterized"). "BCBSM data"—first revealed to GTB in 2014—"show[ed] that [the FCPA rate] is 14 to 18%, rather than the negotiated 8%." 3/24/2014 Meeting Summary, (RE157-8, PageID#4635).

BCBSM's Senior Analyst noted internally "***the 8% may not have been all that accurate***." 2/1/2013 E-mail (RE157-9, PageID#4638) (emphasis added). His analysis showed "30.17% of [Plaintiffs'] actual payment/approved was too high," which "represents a lot of money" compared to the "8% [that] was used per the group/hospital." 2/6/2013 E-mail (RE157-10, PageID#4642). BCBSM knew the FCPA was "***not as good at being able to administer these tribal groups as a Medicare like member.***" 10/11/2011 E-mail (RE157-11, PageID#4645) (emphasis added).

BCBSM's misrepresentations and concealment deceived GTB into believing it was receiving MLR-equivalent pricing from BCBSM. *See* Gardner Dep., (RE157-12, PageID#4655) ("Initially, when I started working with Grand Traverse, and this was on their PRC program, they had their agreements with Blue Cross Blue Shield. They were certain that they were getting a Medicare-Like Rate."); 3/21/2011 E-mail (RE157-13, PageID#4663) (Tribal Manager noting her mistaken belief that "[w]e as a Tribe are already receiving Medicare like rates for our Tribal members that are CHS eligible").

K. GTB DISCOVERED BCBSM'S LIES.

In late 2012, Forest County Potawatomi Insurance approached GTB about MLR. 2/27/2013 E-mail (RE157-14, PageID#4665). Since signing the FCPA, BCBSM had never given GTB data supporting its assurances of MLR-equivalent pricing. *See* Oien Dep., (RE156-11, PageID#4406-07); 12/2/2013 Memo (RE156-26, PageID#4571); 12/4/2013 Memo (RE156-25, PageID#4566); 3/4/2011 E-mail, (RE96-4, PageID#2750). So, in early 2013, Forest County audited hospital claims BCBSM processed in 2012.

Forest County found "duplicate billing and no MLR applied" by BCBSM. 12/4/2013 Memo (RE156-25, PageID#4566). It found BCBSM caused Plaintiffs to pay $137,667.98 on sample claims where MLR totaled $74,341.80. 11/26/2013 Memo, (RE157-15, PageID#4667-68). This audit showed MLR yielded discounts

substantially larger than the 8% discount BCBSM misrepresented was "close to" MLR: "***the exact discount [was] at least 23-25% off the EOB and when MLR applied to eligible expenses at least a 50% savings.***" 12/4/2013 Memo, (RE156-25, PageID#4566) (emphasis added); Gardner Dep., (RE157-12, PageID#4660).

Upon learning this, GTB terminated BCBSM. 2/12/2013 Letter, (RE157-16, PageID#4672-73). Forest County started paying CHS claims at MLR or better, which all providers, including Munson, accepted as payment in full. Leach Dep., (RE156-24, PageID#4562-63); Gardner Dep., (RE157-12, PageID#4656, 4660). The savings obtained through Forest County were, on average, 68%, or $800,000 for a 10-month period. 12/4/2013 Memo (RE156-25, PageID#4566).

After BCBSM—for the first time in this litigation—produced limited payment data, audit experts discovered BCBSM overpaid (using tribal funds), on average, by 28 percent, or $1,744,586.84 for 6,588 audited claims. Myrick Decl., (RE164-19, PageID#5159-72).

L. PLAINTIFFS SUED BCBSM.

After discovering BCBSM's misconduct in 2013, Plaintiffs sued in 2014 for breach of fiduciary duties under ERISA and Michigan common law and for violating the HCFCA, among other claims. FAC, ¶¶65-91 (RE90, PageID#2554-58). As the FAC alleged, BCBSM "was responsible for determining whether or not the claim should be paid for by Plaintiffs and, if so, how much the medical provider would be

paid from Plan funds." *Id.*, ¶3 (PageID#2539). The MLR regulations required BCBSM to pay "at the lesser of the Medicare-Like Rate or the contractual rate negotiated with the hospital." *Id.*, ¶8 (PageID#2541). BCBSM falsely "represented that it could provide a rate which it promised would be 'close to that which would be payable under the New Regulations[.]'" *Id.*, ¶51 (PageID#2552).

Unbeknownst to GTB, BCBSM did not provide discounts as promised and "caused Plaintiffs to pay far more than the Medicare-Like Rate" on claims. *Id.*, ¶59 (PageID#2552-2554). BCBSM provided "misleading and inaccurate information to Plaintiffs" and "engag[ed] in a pattern of conduct designed to mislead, confuse, deceive and otherwise trick Plaintiffs into paying more for its services than Plaintiffs were obligated to pay" causing Plaintiffs millions of dollars in damages. *Id.*, ¶¶11, 67 (PageID#2542, 2555).

M. PROCEDURAL HISTORY

BCBSM moved to dismiss Plaintiffs' breach-of-fiduciary-duty claims as time-barred. The District Court agreed, holding " plaintiffs did not plead facts in the complaint that would plausibly indicate they lacked actual knowledge in 2009 or that defendant made misrepresentations to them regarding MLR . . . ." 7/21/2017 Order (RE99, PageID#2935-38); 5/20/2019 Order, (RE122, PageID#3269-74). The District Court denied Plaintiffs' motion for reconsideration and denied their motion for leave to amend as "futile." 12/26/2017 Order (RE107, PageID#3127-41).

Thereafter, the parties conducted discovery on Plaintiffs' HCFCA claim and filed cross-motions for partial summary judgment. The District Court ruled for BCBSM. 8/3/2022 Order, (RE196, PageID#5863-97). That ruling hinged on a mischaracterization: that the ***legal theory*** underlying Plaintiffs' HCFCA claim was about BCBSM's "violation" of the MLR regulations, (*id.*, PageID#5871-97), when it really concerned BCBSM's misrepresentations about network rates vis-à-vis MLR and BCBSM's fraudulent inducement of Plaintiffs to enter the FCPA. *See* FAC, (RE90, PageID#2538-60). Plaintiffs' motion for reconsideration was denied. Order, (RE203, PageID#5986-6022).

STANDARD OF REVIEW

This Court reviews *de novo* dismissal of Plaintiffs' ERISA and common law breach-of-fiduciary-duty claims under Rule 12(b)(6) as time-barred, accepting all allegations as true and drawing all reasonable inferences in Plaintiffs' favor. *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). Similarly, regarding Plaintiffs' HCFCA claim, this Court reviews "de novo a district court's grant of summary judgment, drawing all reasonable inferences in favor of the non-moving party." *Regions Bank v. Fletcher*, 67 F.4th 797, 802 (6th Cir. 2023).

SUMMARY OF THE ARGUMENT

The FAC alleges plan administrator and fiduciary BCBSM overpaid claims using tribal funds, falsely representing to GTB it was achieving discounts "better

than" or "close to" MLR. FAC, (RE90, PageID#2538-61). Each allegation was incorporated into Plaintiffs' ERISA and common-law breach-of-fiduciary-duty claims and their HCFCA claim. *Id.* Evidence obtained during discovery confirmed these allegations. BCBSM's lies are well-documented in e-mails and sworn testimony, and its overpayments are undisputed.

Facing bad facts, BCBSM mischaracterized Plaintiffs' legal claims. It persuaded the District Court to construe the FAC as alleging BCBSM "violated the MLR regulations" and consider the MLR regulations inapplicable to BCBSM. But Plaintiffs never alleged a "violation of MLR regulations;" the FAC alleged BCBSM ***lied*** about obtaining MLR discounts, which it ***promised*** to obtain because its network rates were as good as or close to MLR, and ***knowingly overpaid claims*** costing Plaintiffs millions of dollars, breaching its fiduciary duties. It further alleged BCBSM submitted false healthcare claims to Plaintiffs in violation of the HCFCA. That is why the parties and District Court focused on BCBSM's years-long mendacity. Plaintiffs' allegations of misrepresentations and fraudulent inducement were incorporated into the FAC's Counts. Those facts were addressed at multiple hearings, numerous discovery requests and depositions, and Plaintiffs' summary judgment motion. That focus throughout this ten-year-old case contrasts with BCBSM's belated summary judgment argument that Plaintiffs alleged "violation of the MLR regulations." BCBSM's argument that the MLR regulations do not apply

to it was first raised at summary judgment, too. Considering BCBSM's years-long delay in raising these "defenses," the District Court should have rejected them. It was manifestly unjust for the District Court to deny Plaintiffs their day in court using a mischaracterization of what they litigated consistently for years while allowing BCBSM to defend itself with a theory first raised at summary judgment.

The District Court's decisions are also wrong. It dismissed Plaintiffs' breach-of-fiduciary-duty claims on the pleadings as time-barred based on speculation GTB knew about BCBSM's misconduct in 2009. But the FAC alleged, and discovery corroborated, GTB did not actually know BCBSM's rates, what MLR was, or how they compared until a 2013 audit, and it was impossible for GTB to know any earlier BCBSM was wasting Plan assets by overpaying claims. Further, BCBSM concealed its payment rates from GTB and misrepresented its rates as "better than" or "close to" MLR. In a case involving a similar plaintiff (tribal plan sponsor), the same claim (breach of fiduciary duty), law (ERISA and common law), defendant (BCBSM), type of plan (benefit plan), and misconduct (squandering tribal plan assets), this Court already decided "when the Tribe had actual knowledge of the breach and whether Blue Cross's actions amounted to fraud or concealment" created a "dispute of material fact . . . as to the application of statutes of limitations . . . ." *SCIT v. BCBSM*, 32 F.4th 548, 564-65 (6th Cir. 2022). That precedent is controlling.

The District Court also erroneously dismissed Plaintiffs' HCFCA claim, opining BCBSM had no duty to obey MLR regulations. This ruling misconstrues Plaintiffs' claim, which is not that BCBSM "violated the MLR regulations," but presented Plaintiffs with false claims by knowingly misrepresenting it paid claims at "better than" or "close to" MLR. This Court already held that question—"whether Blue Cross violated the Michigan Health Care False Claim Act (HCFCA)" in similar parallel litigation—presents "disputes of law and material fact" unsuitable for summary judgment. *Id.* at 564. This precedent also requires reversal.

ARGUMENT

I. PLAINTIFFS' CLAIMS WERE TIMELY.

The District Court wrongly dismissed Plaintiffs' breach-of-fiduciary duty claims at the pleadings stage as time-barred under ERISA § 1113(2) and Michigan's statute of limitations, MCL § 600.5805(2).

A. GTB HAD NO ACTUAL KNOWLEDGE OF BCBSM'S FIDUCIARY BREACHES UNTIL 2013, RENDERING ITS 2014 FAC TIMELY.

"[A] plaintiff has no obligation under Rule 8 to plead compliance with the statute of limitations." *Michalak v. LVNV Funding, LLC*, 604 F. App'x 492, 493 (6th Cir. 2015). The statute of limitations is an affirmative defense BCBSM must plead and prove. *Rembisz v. Lew*, 590 F. App'x 501, 503 (6th Cir. 2014). "[C]ourts should not dismiss complaints on statute-of-limitations grounds" where "there are disputed factual questions relating to the accrual date," including "claims that the defendant

fraudulently concealed facts, thereby preventing the plaintiff from learning of its injury, and complex issues about whether information in the plaintiff's possession sufficed to alert it of the claim." *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016).

ERISA "requires plaintiffs with 'actual knowledge' of an alleged fiduciary breach to file suit within three years of gaining that knowledge rather than within the 6-year period that would otherwise apply."[1] *Intel Corp. Investment Pol'y Comm. v. Sulyma*, 589 U.S. --, 140 S. Ct. 768, 773 (2020) (quoting 29 U.S.C. § 1113). This means three years from "when the plaintiff gains 'actual knowledge' of the breach." *Id.* at 774. "Actual knowledge" under ERISA "is when a plaintiff is actually aware of the relevant facts, not when he should be." *Id.* at 778. Accordingly, "§ 1113(2) requires more than evidence of disclosure alone." *Id.* at 777. "To charge [the plaintiff] with actual knowledge of an ERISA violation, it is not enough that he notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues." *Rogers v. Millan*, No. 89-3707, 1990 WL 61120, at *4 (6th Cir. 1990) (citation and quotation marks omitted).

[1] "Michigan law imposes a similar statute of limitations" of three years. *SCIT*, 32 F.4th at 564; *see also* MCL § 600.5805(2).

Section 1113(2) "sets a high standard for barring claims against fiduciaries prior to the expiration of the section's six-year limitations period." *Stockwell v. Hamilton*, 163 F. Supp. 3d 484, 487-88 (E.D. Mich. 2016). The Supreme Court has noted "it may well be" that "administrators will rarely get the benefit of § 1113(2)." *Intel Corp.*, 140 S. Ct. at 778. "Congress evidently did not desire that those who violate [ERISA fiduciary] trust could easily find refuge in a time bar." *Rogers*, No. 89-3707, 1990 WL 61120, at *4. This is not the "rare" case where an administrator may benefit from § 1113(2). As alleged, GTB did not actually know about BCBSM's fiduciary breaches until 2013, rendering its 2014 Complaint timely. FAC, ¶¶53-57, 69-70, 90-91 (RE90, PageID#2552-55, 2558).

Plaintiffs' ERISA and Michigan common law breach-of-fiduciary-duty claims are based on BCBSM's failure to act prudently and in Plaintiffs' best interests when it "systematically failed to take advantage of Medicare-Like Rate discounts available to Plaintiffs when administering health care claims on behalf of Plaintiffs, instead consistently overpaying claims from Plan assets." *Id.*, ¶¶10, 65-70, 86-91 (RE90, PageID#2541-42, 2554-55, 2557-58). In another MLR case, this Court similarly characterized the tribe's claims: "BCBSM failed to preserve plan assets by consistently causing the Tribe to overpay on claims that were eligible for a lower, Medicare-Like Rate." *SCIT v. BCBSM*, 748 F. App'x 12, 21 (6th Cir. 2018). Importantly, Plaintiffs' breach-of-fiduciary-duty claims are ***not***—despite the District

Court's incorrect framing—about a mere "failure to provide MLR." Order, (RE107, PageID#3132-34).

GTB did not know BCBSM was squandering Plan assets by overpaying eligible claims at amounts exceeding MLR until it "performed an audit of a sample of Plaintiffs' hospital claims" in early 2013, which "revealed that, contrary to BCBSM's representations, Plaintiffs were not paying anything 'close to MLR' on claims eligible for the FCPA Discount." FAC, ¶¶56-57, 69-70, 90-91 (RE90, PageID#2552-55, 2558). Before then, GTB did not know MLR pricing was generally much lower than BCBSM's network pricing. *Id.*, ¶¶53-57 (PageID#2552-53). Whenever GTB asked, BCBSM misrepresented its payment rates were "close to" MLR. *Id.*, ¶¶51, 57 (PageID#2552-53). And in the FCPA, BCBSM implied MLR could be worse than BCBSM's rates. *See* FCPA, ¶3 (RE90-4, PageID#2590) ("If the average percentage discount is 0% or less, the Prospective Differential shall be 0.").

Thinking of BCBSM's misconduct as a "failure to provide MLR," Order, (RE99, PageID#2936-38); Order, (RE122, 3269-74), reflects a misunderstanding of the regulatory text. "Apply[ing] MLR" is not what the MLR regulations require; they cap "payment at ***the lesser of the Medicare-Like Rate or the contractual rate negotiated with the hospital[.]***" FAC, ¶8 (RE90, PageID#2541) (emphasis added) (citing 42 C.F.R. § 136.30(f)). The regulations do not require MLR if BCBSM's

network rate is lower, say $50 whereas MLR is $100. In that instance, BCBSM preserves plan assets by paying its network rate. If the reverse is true and BCBSM's network rate is $100 while MLR is $50, then BCBSM squanders Plan assets and breaches its fiduciary duty by not applying the available MLR. The facts proving Plaintiffs' breach-of-fiduciary-duty claims—and the facts Plaintiffs must therefore have actually known for their claims to accrue—are that BCBSM's "ongoing performance" in failing to take advantage of MLR discounts ***failed to preserve Plan assets***, making its conduct imprudent. *See Smith v. CommonSpirit*, 37 F.4th 1160, 1166 (6th Cir. 2022). For GTB to actually know those facts, it had to know: (1) what MLR was; (2) what BCBSM's pricing was; and (3) the difference between the two, on average. Because GTB could not have known those material facts until 2013, *see* FAC, ¶¶53-57, 69-70, 90-91 (PageID#2552-55, 2558), Plaintiffs' claims accrued in 2013 and their 2014 Complaint is timely.

The District Court compounded its error by misconstruing the FAC's allegation that BCBSM misrepresented "it could not adjust its entire system to calculate MLR" in 2009 to mean the limitations clock started then. Order, (RE99, PageID#2936-38); Order, (RE122, 3269-74). BCBSM's 2009 misrepresentation "that it could not adjust its entire system" was how BCBSM misled Plaintiffs into believing MLR was not the most cost-effective and prudent approach. *See* FAC, ¶¶51-55 (RE90, PageID2552). Saying nothing about what GTB ***actually knew***,

BCBSM's misrepresentation (ignored by the District Court) was that it "could provide GTB a rate which it promised would be 'close to that which would be payable under the New Regulations.'" *Id.* BCBSM made Plaintiffs believe BCBSM was offering MLR-equivalent rates and ***not*** squandering Plan assets. *Id.*

In a case involving a similar plaintiff (tribal plan sponsor), the same claim (breach of fiduciary duty), law (ERISA and common law), defendant (BCBSM), plan type (ERISA welfare benefit plan), and misconduct (squandering tribal plan assets), this Court decided "when the Tribe had actual knowledge of the breach and whether Blue Cross's actions amounted to fraud or concealment" created a "dispute of material fact . . . as to the application of statutes of limitations." *SCIT*, 32 F.4th at 564-65. That precedent controls; the District Court's opposite conclusion should be reversed. *See id.*; *see also Stockwell*, 163 F. Supp. 3d at 489 (ERISA breach-of-fiduciary-duty claim not time-barred where "[p]laintiffs allege in their proposed First Amended Complaint that they had actual knowledge of the claimed breaches or violations of Defendants' fiduciary duties less than three years before filing this lawsuit.").

B. BCBSM COMMITTED FRAUD OR CONCEALMENT.

Plaintiffs' ERISA and Michigan common law breach-of-fiduciary-duty claims are also timely because—as alleged—BCBSM committed fraud or concealment. ERISA § 1113(2) "provides an exception for a case involving 'fraud or concealment,'

extending the filing period to a date no later than six years after the time of discovery of the violation."[2] *Hi-Lex Controls,* , 751 F.3d at 747 (quoting 29 U.S.C. § 1113). ERISA's fraud or concealment exception applies where a fiduciary "(1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190, 192 (2d Cir. 2001) (cited with approval in *Cataldo*, 676 F.3d at 550–51).

The FAC alleges "BCBSM fraudulently concealed its ERISA violations." FAC, ¶¶69-70, 90-91 (RE90, PageID#2555, 2558). Specifically, in 2009, BCBSM "represented that it could provide GTB a rate which it promised would be 'close to that which would be payable under the New Regulations[.]'" *Id.*, ¶51 (PageID#2552). BCBSM "falsely represent[ed] that the FCPA Discount was 'close to' the Medicare-Like Rate discount available to Plaintiffs." *Id.*, ¶¶17, 51-55 (PageID#2544, 2552). "Plaintiffs did not know that BCBSM's representation that the FCPA Discount would be 'close to that which would be payable under the New Regulations' was false." *Id.*, ¶53. These representations "fraudulently induced

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[2] Michigan law contains a similar "fraud or concealment" exception to the statute of limitations, tolling the deadline for bringing a claim until "2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim." *See* MCL § 600.5855.

Plaintiffs not to switch to a different plan administrator sooner and not to pursue legal action against BCBSM sooner" by concealing the actual rates at which BCBSM was paying Plan claims and by concealing its failure to preserve Plan assets. *Id.*, ¶¶17, 52-55 (PageID#2544, 2552). Because Plaintiffs have alleged "the time, place, and content of the alleged misrepresentation on which the Plan relied, the allegedly fraudulent scheme and intent and the injury resulting from the alleged fraud," they "met [their] burden of pleading an exception to the statute of limitations based on fraud or concealment." *McGuire v. Metro. Life Ins. Co.*, 899 F. Supp. 2d 645, 662–63 (E.D. Mich. 2012).

The District Court incorrectly held this exception inapplicable. It speculated "Plaintiffs knew they were not getting MLR in 2009" (they actually believed the opposite) and opined BCBSM's misrepresentations regarding how its pricing compared to MLR could therefore be ignored (they cannot). Order, (RE99, PageID#2938); Order, (RE107, PageID#3134-35). The FAC's allegations and inferences establish Plaintiffs did ***not*** know: (1) BCBSM's payments rates; (2) MLR; (3) how they differed; (4) that BCBSM had lied; and (5) BCBSM wasted Plan assets by overpaying claims. FAC, ¶¶17, 51-55, 69-70, 90-91 (RE90, PageID2544, 2552, 2555, 2558). BCBSM's misleading information about payment rates and MLR establishes fraud or concealment. *See SCIT*, 32 F.4th at 564-65 (dispute of material fact existed as to application of fraud or concealment exception to statute of

limitations for the tribe's identical MLR claims); *Hi-Lex*, 751 F.3d at 748 (ERISA's fraud or concealment exception applied where BCBSM misrepresented and omitted material information about pricing in contract documents).

C. PLAINTIFFS EXERCISED REASONABLE DILIGENCE.

The District Court also posited the fraud or concealment provision was unavailable because Plaintiffs "wait[ed] over three and a half years to audit their agreement with BCBSM." Order, (RE107, PageID#3135). That is incorrect and contradicted by the FAC. The District Court ignored the nature of the parties' relationship, and the diligence Plaintiffs took to safeguard Plan assets.

First, BCBSM was Plaintiffs' fiduciary and Plaintiffs had no knowledge of wrongdoing. *See* FAC, ¶¶4, 52-61 (RE90, PageID#2539-40, 2552-54); *see also In re Merck & Co.*, 543 F.3d 150, 164 (3d Cir. 2008) (diligence depends on whether plaintiffs "had sufficient information of possible wrongdoing to place them on inquiry notice"). Just the opposite; the FCPA suggested BCBSM was acting prudently; BCBSM represented to GTB it would be "processing claims by Enrollees for services at Munson Medical Center at a price they believe is close to that which would be payable under the New Regulations." FCPA (RE90-4, PageID#2589). Further, BCBSM represented it would recalculate and credit Plaintiffs any difference between its rates and MLR each year. *Id.*, ¶3 (PageID#2590). Given Plaintiffs' trust in BCBSM, which by 2009 had managed their plan assets as a fiduciary for nine

years, FAC, ¶¶3-4 (RE90, PageID#2539-40), Plaintiffs had no reason to—and did not—question BCBSM's representations. *Id.*, ¶¶53-55 (PageID#2552). BCBSM's actions led GTB to believe BCBSM was acting prudently, and Plaintiffs were receiving MLR or its equivalent. *Id.*

Second, Plaintiffs satisfied "hypothetical diligence." *See Hi-Lex*, (where due diligence is required, plaintiffs need only show "hypothetical diligence"). In 2008, "Plaintiffs asked BCBSM to ensure that Plaintiffs were obtaining Medicare-Like Rate discounts as part of BCBSM's administration of Plaintiffs' self-insured Plan," to which BCBSM (falsely) responded its system could not calculate the exact MLR differential, but "it could provide GTB a rate which it promised would be 'close to that which would be payable under the New Regulations[.]" FAC, ¶¶50-51 (RE90, PageID#2551-52). In 2008-2009, Plaintiffs secured a contractual commitment from BCBSM "whereby BCBSM agreed to process Plaintiffs' claims for services at Munson at a discount (the 'FCPA Discount') on top of the BCBSM standard contractual rate." *Id.*, ¶52 (PageID#2552). "In 2012 GTB [took] its Plan out to market to obtain a comparison of the costs," which in 2013 for the first time "revealed that, contrary to BCBSM's representations, Plaintiffs were not paying anything 'close to MLR' on claims eligible for the FCPA discount." *Id.*, ¶¶56-57 (PageID#2552-53). Immediately upon discovering this, Plaintiffs "switch[ed] to a new third-party administrator," secured ERISA counsel, and sued BCBSM. *Id.*, ¶61

(PageID#2554). Plaintiffs' extensive efforts to safeguard Plan assets went beyond requirements. *See Holland v. Florida*, 560 U.S. 631, 653-54 (2010) (tolling standard requires "reasonable diligence, not maximum feasible diligence") (internal quotations and citations omitted).

II. BCBSM VIOLATED THE HCFCA

The District Court erroneously dismissed Plaintiffs' HCFCA claim, caused by fundamental mischaracterizations of Plaintiffs' FAC.

A. THE DISTRICT COURT MISCONSTRUED PLAINTIFFS' HCFCA CLAIM.

The FAC alleges BCBSM misrepresented to GTB that BCBSM's contractual discounts were better than or at least close to those Plaintiffs were entitled to under the MLR regulations. FAC, ¶¶17, 51-55 (RE90, PageID#2544). The FAC also alleges "BCBSM fraudulently induced Plaintiffs to enter into the FCPA," which promised a contractual discount yielding a payment rate "'close to' the Medicare-Like Rate discount available to Plaintiffs." *Id.* Those allegations were incorporated into Plaintiffs' HCFCA Count and form its basis. *Id.*, ¶71 (PageID#2556).

The District Court ignored those ***factual*** allegations and adopted—as Plaintiffs' sole alleged ***legal theory***—a mischaracterization that "BCBSM has violated the MLR regulations." Order, (RE196, PageID5868, 5883); Order, (RE201, PageID#5962).

The "Federal Rules of Civil Procedure are designed to discourage battles over mere form of statement" and "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (citation and quotation marks omitted). "[A]s a general rule, a plaintiff's complaint need not expressly plead legal theories; it is sufficient to plead factual allegations that can establish a viable theory." *Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 606 (6th Cir. 2022). "***It is only after the moving party seeks summary judgment that a responding party must come forward with every legal theory on which he relied.***" *Lunneen v. Vill. of Berrien Springs, Michigan*, No. 22-2044, 2023 WL 6162876, at *13 (6th Cir. Sept. 21, 2023) (emphasis added) (citation and quotation marks omitted); *see also Dibrell v. City of Knoxville, Tennessee*, 984 F.3d 1156, 1160 (6th Cir. 2021) (only after defendants "sought summary judgment, was plaintiff "required to come forward with every legal theory on which he relied." (citation and quotation marks omitted)).

The District Court ignored BCBSM's (alleged) misrepresentations of its rates vis-à-vis MLR and its fraudulent inducement of Plaintiffs to enter the FCPA:

> 17. In addition, ***by falsely representing that the FCPA Discount was "close to" the Medicare-Like Rate discount available to Plaintiffs, BCBSM fraudulently induced Plaintiffs to enter into the FCPA*** and fraudulently induced Plaintiffs not to switch to a different plan administrator sooner and not to pursue legal action against BCBSM sooner.
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> ***

49. BCBSM was fully aware of the new MLR regulations at or around the time the regulations went into effect in July 2007.

50. . . . . Plaintiffs asked BCBSM to ensure that Plaintiffs were obtaining Medicare-Like Rate discounts as part of BCBSM's administration of Plaintiffs' self-insured Plan.

51. BCBSM replied that it could not adjust its entire system to calculate MLR on those claims eligible for MLR discounts, ***but represented that it could provide GTB a rate which it promised would be 'close to that which would be payable under the New Regulations' by providing a discount on Plaintiffs' claims for hospital services at Munson Medical Center ('Munson') to Plan participants in Group #01020, one of three administrative groupings of Plan participants***...

52. In reliance on this representation, on March 1, 2009, GTB entered into a contract with BCBSM and Munson, whereby BCBSM agreed to process Plaintiffs' claims for services at Munson at a discount (the 'FCPA Discount') on top of the BCBSM standard contractual rate.

53. Plaintiffs did not know that BCBSM's representation that the FCPA Discount would be 'close to that which would be payable under the New Regulations' was false.

54. BCBSM failed to provide Plaintiffs with the FCPA Discount.

55. Plaintiffs did not know that BCBSM failed to provide Plaintiffs with the FCPA Discount.

56. In 2012, GTB decided to take its Plan out to market to obtain a comparison of the costs of going with a different third-party administrator.

57. Through this process, a BCBSM competitor performed an audit of a sample of Plaintiffs' hospital claims. ***The audit revealed that,***

> ***contrary to BCBSM's representations, Plaintiffs were not paying anything 'close to MLR' on claims eligible for the FCPA Discount.***

FAC, ¶¶17, 49-57 (RE90, PageID#2544, 2551-53) (emphasis added). Count II "incorporate[d] by reference the allegations contained in the preceding paragraphs," including those quoted above. *Id.*, ¶71 (PageID#2556).

The District Court erroneously stated, "Plaintiffs chose not to include similar averments [regarding BCBSM's misrepresentations of its rates vis-à-vis MLR] in their pleaded HCFCA claim . . . ." Order, (RE196, PageID#5877). But Plaintiffs' FAC alleged BCBSM's lies about its payment rates, and Plaintiffs incorporated those into the HCFCA Count. *See* FAC, ¶¶17, 49-78 (RE90, PageID#2544, 2551-56). Plaintiffs' FAC also alleged BCBSM fraudulently induced it to enter the FCPA, *see id.*, and "incorporate[d] by reference the allegations contained in the preceding paragraphs," included each factual allegation quoted above, into Plaintiffs' HCFCA Count. *Id.*, ¶71 (PageID#2556). "Federal Rule of Civil Procedure 10(c) permits the pleader to use an incorporation by reference of prior allegations in order to encourage pleadings that are short, concise, and ***free of unwarranted repetition*** as well as to promote convenience in pleading." Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1326 Adoption by Reference Permitted (4th ed.) (emphasis added).

The District Court mistakenly posited it could ignore the FAC's "[r]eference[s] to Defendant BCBSM's false representations regarding the FCPA Discount" and "concealment of the true nature of the rates as charged" because they

were only "used to support Plaintiffs' breach of contract, fraud, and silent fraud claims." Order, (RE196, PageID#5876); Order (RE203, PageID5996-6000). But Count II expressly "incorporate[d] by reference the allegations contained in the preceding paragraphs," including ***all*** well-pleaded factual allegations quoted above. FAC, ¶71 (RE90, PageID#2556). "When the pleader asserts several claims for relief or defenses that rest on a common factual pattern, incorporation by reference eliminates any unnecessary repetition of the transactions and events upon which the pleader relies." Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1326 Adoption by Reference Permitted (4th ed.). That Plaintiffs' other claims ***also*** incorporated or repeated BCBSM's lies does not matter: "Incorporation has been held permissible ***even when the references were to facts set forth in inconsistent counts.***" *Id.* (emphasis added). What the District Court did was an abuse of discretion. *See Dassault Systemes, SA v. Childress*, 828 F. App'x 229, 239-240 (6th Cir. 2020) (district court "abused its discretion" when it "did not consider [a party's] complaint as a whole, instead limiting the contents of its review to . . . allegations under the . . . counterclaim heading of his FAACC.") The District Court erred by limiting Plaintiffs' HCFCA claim to BCBSM's misstatement of a single phrase in Count II and ignoring factual allegations incorporated therein. *See id.*

The District Court's reliance on Rule 9(b)'s heightened pleading standard for its restrictive interpretation is misplaced. That rule emphasizes the importance of

considering factual particulars; it does not suggest ***ignoring*** incorporated allegations. *See* Fed. R. Civ. P. 9(b). The FAC alleged the particulars of BCBSM's misrepresentations: BCBSM misrepresented to GTB the nature of its payment rates vis-à-vis MLR and fraudulently induced GTB into entering the FCPA. *See* FAC, ¶¶17, 49-78 (RE90, PageID#2544, 2551-56). That is all Rule 9(b) requires, and BCBSM conceded as much. (RE196, PageID#5873).

This Court "has rejected a strict reading of Rule 9(b)." *Ballan v. Upjohn Co.*, 814 F. Supp. 1375, 1385 (W.D. Mich. 1992) (citing *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988)). In the context of interpreting a complaint, "[c]ourts must be sensitive to the fact that application of Rule 9(b) prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud." *Id.* Where the suit is a complex case spanning a significant time, with no opportunity for discovery before the complaint is filed, "the specificity requirements of Rule 9(b) [should] be applied less stringently." *JAC Holding Enterprises, Inc. v. Atrium Capital Partners, LLC*, 997 F. Supp. 2d 710, 727 (E.D. Mich. 2014).

Plaintiffs moved to amend their FAC to add *factual* allegations regarding BCBSM's misrepresentations and fraudulent inducement. (RE102, PageID.2966-2983). Plaintiffs' proposed SAC ***deleted the phrase in Plaintiffs' HCFCA count***

BCBSM and the District Court used to mischaracterize that claim and ***added the following regarding BCBSM's lies, to be incorporated into the HCFCA count:***

> 58. Following the execution of the FCPA on March 1, 2009, ***BCBSM continued to assure Plaintiffs that it was using due care, skill, prudence and diligence to develop a procedure for processing claims at Medicare-Like Rates and that, in the meantime, BCBSM was providing Plaintiffs with rates that were as good or better than Medicare like rates.*** By way of example:
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> ***
>
> (b) ***In March of 2011, BCBSM also told Plaintiffs that BCBSM was providing Plaintiffs with rates that were better than Medicare Like Rates.***
>
> (c) ***In April of 2011, BCBSM represented to Plaintiffs that BCBSM was going to compile all hospital charges for Tribe members and invoice Munson for reimbursement according to Medicare-Like Rates.***
>
> 59. . . . . ***BCBSM also led Plaintiffs to believe that the FCPA was providing interim pricing that was 'close to' Medicare-Like Rates if not even better than MLR.***

SAC, ¶¶58-59 (RE102-2, PageID#3007-08) (emphasis added). In the first paragraph of the HCFCA Count, Plaintiffs "incorporate[d] by reference the allegations contained in the preceding paragraphs," including each factual allegation quoted above. *Id.*, ¶80 (PageID#3012).

The District Court denied Plaintiffs' motion as "futile." Order, (RE107, PageID#3141). But after discovery, the District Court granted BCBSM's summary

judgment motion because those factual allegations were supposedly necessary. Order, (RE196, PageID#5877). It is manifestly unjust to penalize Plaintiffs for not having certain factual allegations that Plaintiffs were denied leave to add at the pleadings stage.

Contrary to the District Court's opinion, Plaintiffs' proposed SAC did not relate only to their ERISA claims and not their HCFCA claim. Order, (RE203, PageID6003-04). The amendment Plaintiffs sought clarified the factual predicate for Plaintiffs' HCFCA claim *and* their other claims because ***all*** preceding factual allegations were incorporated by reference into each Count. SAC, ¶¶58-59, ¶80 (RE102-2, PageID#3007-08, 3012). It is manifestly unjust to penalize Plaintiffs with dismissal of their lawsuit based on a mischaracterization of a legal conclusion and the purported absence of factual allegations when Plaintiffs were denied leave to clarify those ***exact*** allegations at the pleadings stage.

B. THE DISTRICT COURT INCORRECTLY HELD PLAINTIFFS' LEGAL THEORIES MAY NOT BE REFINED THROUGH DISCOVERY.

Given the FAC's factual allegations, when Plaintiffs' summary judgment briefing accused BCBSM of misrepresenting the nature of its rates vis-à-vis MLR and fraudulently inducing GTB to enter the FCPA, Plaintiffs were not changing the basis of their HCFCA claim; Plaintiffs were buttressing that. *See* FAC (RE90, PageID#2544-2556). BCBSM knew Plaintiffs considered BCBSM liable for misrepresentations and fraudulent inducement, which is all Plaintiffs were required

to do. *See Boshaw*, 32 F.4th at 606 (plaintiffs only required to plead facts, not legal theories).

Developing a claim with discovery materials is permissible and appropriate. *See CMFG Life Ins. Co. v. RBS Sec., Inc.*, 799 F.3d 729, 743–44 (7th Cir. 2015) (plaintiff is "entitled to refine its rescission theory at summary judgment"). Under the federal notice pleading regime, "[a] complaint need not identify legal theories." *Id.* at 744. In *CMFG*, a purchaser of mortgage-backed securities sued the selling underwriter for fraud, alleging the underwriter fraudulently induced the purchase. *Id.* at 734–35. Opposing summary judgment, the purchaser identified written and oral misrepresentations. *Id.* at 739. The district court held oral misrepresentations presented "a new, independent theory of liability" that impermissibly expanded the claims' scope. *CMFG Life Ins. Co. v. RBS Sec., Inc.*, 2014 WL 3696233, at *17 (N.D. Ill. July 23, 2014). The Seventh Circuit reversed. Oral representations, it held, were "simply another factual basis" supporting the plaintiff's preexisting theory it was entitled to "rescission based on misrepresentation," and the complaint could be read to encompass both. *CMFG*, 799 F.3d at 743. Plaintiffs were "entitled to refine [their] rescission theory at summary judgment based on evidence produced in discovery." *Id.* at 743-44.

Plaintiffs' summary judgment briefs added detail learned during discovery as the federal rules contemplate. *See* Fed. R. Civ. P. 26 advisory committee's note to

the 1946 amendment ("The purpose of discovery is to allow a broad search for facts . . . which may aid a party in the preparation or presentation of his case."). Contrary to what the District Court held, Plaintiffs did not "advance . . . [a] new theory of liability on summary judgment." Order, (RE196, PageID#5882). Besides, "a plaintiff's complaint need not expressly plead legal theories . . . ." *Boshaw*, 32 F.4th at 606. And "[w]hen a plaintiff does plead legal theories, ***it can later alter those theories.***" *Chessie Logistics Company v. Krinos Holdings, Inc.*, 867 F.3d 852, 859 (7th Cir. 2017) (emphasis added).

In *Bard v. Brown County, Ohio*, 970 F.3d 738 (6th Cir. 2020), this Court accepted the plaintiff's switch from a "homicidal strangulation" theory in her complaint to a "specific self-strangulation theory" in her summary judgment brief. *Id.* at 750. Under either theory, the claim focused on the same set of facts—"the officers' actions inside cell 15 that led to Goldson's death." *Id.* Plaintiffs did not change legal theories, but regardless the allegations of BCBSM's misrepresentations and fraudulent inducement persisted from the start. *See* FAC, ¶¶17, 51-55 (RE90, PageID#2544, 2552).

Accordingly, the District Court wrongly held Plaintiffs could not refine their HCFCA claim at summary judgment. *See Johnson*, 574 U.S. at 11 (summarily reversing district court's summary judgment grant to defendant based on plaintiffs' failure to include legal theory in their complaint); *Grinnell v. City of Taylor,*

Michigan, No. 21-2748, 2022 WL 1562291, at *5 (6th Cir. May 18, 2022) (plaintiff adequately pleaded claim even though different words were used in complaint than in summary judgment response); *Bard*, 970 F.3d at 750.

C. THE COURSE OF THE PROCEEDINGS CONFIRMED PLAINTIFFS' HCFCA CLAIM CHALLENGED BCBSM'S MISREPRESENTATIONS AND FRAUDULENT INDUCEMENT.

BCBSM was not prejudiced by having to defend its misrepresentations and fraudulent inducement. The course of the proceedings establish it was always on notice it would have to do so in defending the HCFCA claim. *See Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir. 2001) (en banc) (plaintiff's ambiguous complaint "is not fatal if the course of the proceedings otherwise indicate that the defendant received sufficient notice"). *First*, the FAC provided ample notice, as discussed above.

Second, during the June 7, 2017, hearing on BCBSM's Motion to Dismiss the FAC (including the HCFCA claim), the District Court repeatedly asked BCBSM's counsel about his client's misrepresentations:

- "***Are you suggesting then that your client informed Grand Traverse these are the rates we've negotiated and these are the rates that apply to this plan? Or that you then said we will attempt to achieve a Medicare-like rate discount for you on top of that?***" Transcript, 6:20-24 (RE98, PageID#2855) (emphasis added).

- "But [the FAC] also references that the facility claims process[ing] agreement ***where Blue Cross in the recitals indicate that it's aware of the Medicare-like rate regulation and that it will -- that both sides desire to afford plaintiffs most***

of the pricing benefits of the new regulation and that Blue Cross is willing to accommodate the desire of Munson and plaintiffs to process services at a price they believe is close to that. So you've told them in the recitals we're going to try to do this . . . . But you said we're going to try to do even more." *Id.*, 8:1-11 (PageID#2857).

- "***[B]ut here the plaintiffs are saying we can tell you what the better deal is. It's MLR. And you promised us that you would do your best to get as close to that as you could and you didn't.***" *Id.*, 13:3-6 (PageID#2862).

- ***Well, they say in their footnote they know they're not – they don't know if they're getting better or worse than Medicare-like rates in '09."*** *Id.*, 23:15-23 (PageID#2872).

During that hearing, BCBSM's counsel acknowledged Plaintiffs' claims, including the HCFCA claim, turned on BCBSM's misrepresentations:

- "***If we look at the FCPA, and plaintiffs' allegations, they continuously allege, Blue Cross, you told us in the context of the FCPA that you were going to get us something that is, quote, close to Medicare-like rates.***" *Id.*, 8:18-22 (PageID#2857).

- "***The basis for the fraud is what's actually contained in the FCPA. The basis of the fraud is the close to language.***" *Id.*, 25:2-6 (PageID#2874).

Plaintiffs' counsel, on the other hand, explained how Plaintiffs' claims were based on BCBSM's misrepresentations:

- "***Grand Traverse Band doesn't know anything about what's the Medicare-like rate, what's the contract rate. What's better than another. They don't have any -- they don't know what Medicare prices are for a particular service. They don't know what the contract rate is between Blue Cross and Munson.***" *Id.*, 45:20-24 (PageID#2894).

- "***Blue Cross . . . is making that representation that the pricing that was put forth within the facilities claims processing agreement would be close to Medicare-***

> ***like rates. And that induced us to sign a facilities claims processing agreement as alleged in the complaint. And we later learned, not until that audit at the end of 2012 -- we later learned that that was just completely false. That, in fact, the actual pricing difference was closer to 50 percent than 8 percent. And that plan assets were being squandered as a result.***" *Id.*, 47:21-48:6 (PageID#2896-97).

The District Court, in its July 21, 2017 Order, noted the FAC alleged BCBSM made false representations about the nature of its contractual rates vis-à-vis MLR, and the reason Plaintiffs "filed suit alleging five state law claims[,]" including "breach of Health Care False Claims Act" was "[b]ecause plaintiffs were allegedly not receiving the ***promised*** discount that would make their payments ***'close to MLR***'." Order, (RE99, PageID#2921-24) (emphasis added).

The District Court overlooked everyone's above-quoted, on-the-record understanding (in 2017) of the factual predicate for Plaintiffs' claims by opining (in 2024) "Plaintiffs' excerpts address claims other than the HCFCA claim." Order, (RE203, PageID6012-14). Yet, the subject of the 2017 hearing—BCBSM's Motion to Dismiss—***sought to dismiss the entire FAC, including Plaintiffs' HCFCA claim***, which BCBSM expressly discussed in its briefing. BCBSM's Brief, (RE94, PageID#2601-02, 2624-25). There were no siloed discussions regarding non-HCFCA claims, as the District Court later theorized. Further, BCBSM's contemporaneous briefing expressly stated Plaintiffs' HCFCA claim ***as pleaded in the FAC*** is "***based on the same 'operative facts' as Plaintiffs' ERISA claim (alleging a fiduciary duty to process claims at MLRs)***." *Id.*, (PageID#2625)

(emphasis added). And the District Court's July 7, 2017, Order on BCBSM's Motion to Dismiss addressed all claims, including Plaintiffs' HCFCA claim, when it stated the factual predicate for all claims was BCBSM's broken promise it would pay claims at rates "close to MLR":

> Because plaintiffs were allegedly not receiving the promised discount that would make their payments 'close to MLR,' they filed suit alleging five state-law claims: breach of the Health Care False Claims Act; breach of contract, and alternatively, covenant of good faith and fair dealing; breach of common law fiduciary duty; fraud/misrepresentation; and silent fraud. (Dkt. 90 at 22).

Order, (RE99, PageID#2923).

Finally, during discovery on Plaintiffs' HCFCA claim ***only***, BCBSM's counsel repeatedly deposed Plaintiffs' witnesses about what BCBSM represented concerning BCBSM's network rates versus MLR. (RE168-2, PageID.5398-5416); Zotigh Dep., (RE156-12, PageID#4449, 4459); Swallows Dep., (RE164-9, PageID#5099-5100); Chambers Dep., (RE155-8, PageID#4095); Oien Dep., (RE156-11, PageID#4406-07, 4414); Andrews Dep., (RE156-10, PageID#4398); Bussey Dep., (154-3, PageID#3822); Fox Dep., (RE164-6, PageID#5055-56). ***Specifically, BCBSM's counsel asked some variant of this question over 23 times to over 10 Band employees.*** *See id.* Defense Counsel's questions reveal BCBSM always knew Plaintiffs' HCFCA claim was about BCBSM's misrepresentations of its rates vis-à-vis MLR; thus, Plaintiffs should have been permitted to proceed on their HCFCA claim. *See id.*; *see also Harris v. Bornhorst*, 513 F.3d 503, 516 (6th Cir. 2008)

(defendant had notice of claims where plaintiff and his counsel's depositions statements "demonstrate[d] that both sides understood" the suit to encompass even claims "not explicitly set forth in the complaint.").

D. THE DISTRICT COURT WRONGLY CONSIDERED BCBSM'S UNTIMELY AFFIRMATIVE DEFENSE.

The District Court's not letting Plaintiffs litigate their HCFCA claim on theories expressly pleaded in the FAC is stunning given its dismissal of Plaintiffs' HCFCA claim based on an affirmative defense BCBSM never raised until summary judgment. When BCBSM argued the MLR regulations do not apply to it, the District Court should have rejected BCBSM's the argument as untimely.

BCBSM's new summary judgment argument that the MLR regulations did not apply to it, and thus its claims were not false under its mischaracterization of Plaintiffs' HCFCA claim, is an *affirmative defense* or *avoidance* BCBSM should have pleaded in its Answer. *See* Fed. R. Civ. P. 8(c)(1); Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1271 Affirmative Defenses—Defenses Not Mentioned in Rule 8(c) (4th ed.) ("The argument that an employee is not covered by the Fair Labor Standards Act because she falls under the exemption in the Motor Carrier Act is an affirmative defense."); *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (party claiming benefit of exception to statutory prohibition bears burden of proof). "It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as

required by Federal Rule of Civil Procedure 8(c) results in the waiver of that defense and its exclusion from the case." Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1278 Effect of Failure to Plead an Affirmative Defense (4th ed.) (citing cases); *see also Wallace v. Coffee Cnty.*, 852 F. App'x 871, 875 (6th Cir. 2021) ("Failure to plead an affirmative defense in the first responsive pleading to a complaint generally results in a waiver of that defense."). This rule ***always*** applies "where there is unfair prejudice, a party is taken by surprise, ***or*** unnecessary delay"; only "where there is no unfair prejudice, surprise or delay [is] the general waiver rule left to the district court's discretion." *Rogers v. Internal Revenue Serv.*, 822 F.3d 854, 865 (6th Cir. 2016) (emphasis added).

BCBSM answered Plaintiffs' Complaint on March 3, 2015 (RE37). It answered the FAC on July 18, 2019 (RE128). Neither pleading asserted MLR regulations do not apply, even though facts underlying that defense were well-known to BCBSM. Additionally, BCBSM moved for judgment on the pleadings on January 16, 2016 (RE61) and moved to dismiss the FAC on February 23, 2017 (RE94), never arguing the MLR regulations do not apply. BCBSM waited ***over seven years*** before first raising this affirmative defense at summary judgment. "The Sixth Circuit has held that such extreme delay results in the forfeiture of defenses that could and should have been asserted earlier in the case." *Can IV Packard Square LLC v. Schubiner*, No. 19-CV-12360, 2021 WL 3621324, at *7 (E.D. Mich. Aug. 16, 2021)

(citing cases); *see also U.S. Fire Ins. Co. v. City of Warren*, 87 F. App'x 485, 491 (6th Cir. 2003) (defendant waived affirmative defense where it "waited almost six months from the time the suit was filed to set forth its answer and more than thirteen months before it raised its equitable estoppel claim.").

BCBSM's delay was intentional. At the summary judgment hearing, BCBSM's counsel admitted it could have raised this defense earlier but decided not to: "And so we made a decision to proceed with discovery on the claim as pled to save for another day the argument that, you know, the MLR regulations do not apply." Transcript, (RE189, PageID#5768-69). The District Court was required to "presume[e] prejudice" to Plaintiffs accordingly and find BCBSM waived this affirmative defense. *See Henricks v. Pickaway Correctional Inst.*, 782 F.3d 744, 750-51 (6th Cir. 2015) (defendant waived affirmative defense "even without a showing of prejudice" where it didn't raise defense until summary judgment and had no justification for its tardiness); *Travelers Cas. And Sur. Co. of America v. J.O.A. Const.*, 479 F. App'x 684, 690 (6th Cir. 2012) (finding defendants "forfeited their bad faith affirmative defense by failing to plead it in their answer"). It erred by not doing so. *See id.*

BCBSM's decision to omit this defense from its Answer unfairly prejudiced Plaintiffs by subjecting them to something they did not anticipate rebutting. Discovery was over. "Finding waiver is particularly appropriate in such a situation

because it can be inferred that the plaintiff would be unfairly prejudiced by permitting the defendant to tardily raise the defense." *Henricks*, 782 F.3d at 751.

This Court's decision in *Wallace v. Coffee County*, 852 F. App'x 871, 875 (6th Cir. 2021), is on point. Eerily presaging this case, this Court reversed the district court's holding, reasoning "[t]his decision was erroneous because [the defendant] did not raise the statute of limitations defense in its answer and therefore forfeited it." *Id.* This Court declined to consider "whether [the plaintiff] properly characterized his alleged violation as a continuing one" in his complaint, holding it was unnecessary given the defendant's forfeiture of its affirmative defense. *Id.* *Wallace* applies here. Because BCBSM forfeited its affirmative defense that MLR does not apply, the District Court should not have considered BCBSM's argument that Plaintiffs supposedly changed the theory underlying their HCFCA claim; it was unnecessary given BCBSM's forfeiture of its only defense. *See id.*

E. PLAINTIFFS DESERVE SUMMARY JUDGMENT ON THEIR HCFCA CLAIM.

When Plaintiffs' HCFCA claim is correctly construed, they are entitled to summary judgment on BCBSM's liability under the HCFCA.

1. BCBSM violated the HCFCA by misrepresenting the nature of its network rates vis-à-vis MLR.

As alleged in Plaintiffs' FAC, BCBSM lied to GTB about the difference between its network rates and MLR, thereby inducing GTB into the FCPA and

violating the HCFCA. FAC, ¶¶17, 49-57, 71 (RE90, PageID#2544, 2551-53, 56). The evidence uncovered during discovery confirmed BCBSM misrepresented the nature of its network rates compared to MLR. *See* Andrews Dep., (RE156-10, PageID#4381-83, 4396); Zotigh Dep., (RE156-12, PageID#4448); Petoskey Dep., (RE156-13, PageID#4473-75, 4483-84); 1/28/2008 E-mail (RE164-7, PageID#5063). GTB was kept in the dark about the difference between BCBSM's rates and MLR, letting BCBSM pay claims at inflated rates. *See id.*

BCBSM's false description of its network rates vis-à-vis MLR easily meets the HCFCA's broad definitions of "false" and "deceptive." *See* MCL 752.1002(c) (defining "false" as "wholly or partially untrue or deceptive"); MCL 752.1002(b) (defining "deceptive" in part as not revealing a material fact and causing belief that the state of affairs is something other than it actually is). BCBSM's many lies are an independent basis for holding it liable under the HCFCA. *See United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) ("the paradigmatic case" of a false claim under analogous "presentment" provision of the FCA "involves an incorrect description of goods or services provided").

2. BCBSM violated the HCFCA by impliedly certifying compliance with the MLR regulations.

An independent basis for holding BCBSM liable under the HCFCA is the implied certification theory. Under this theory, claims containing "half-truths" or not disclosing violations of statutory or regulatory provisions violate the analogous

"false claims" provision of the FCA. *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 186-89 (2016). No "express certifications" are required to establish BCBSM's liability under this theory; all that is required is a "show[ing] that the contractor withheld information about its noncompliance with material contractual [or regulatory] requirements." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010).

BCBSM expressly certified to GTB, repeatedly, its paying claims at or near MLR. *First*, BCBSM falsely represented to GTB it was paying Plaintiffs' claims at rates "better than MLR," thus lying to GTB it was paying at rates ***better than*** what the MLR regulations required. *See* Andrews Dep., (RE156-10, PageID#4396-99); Oien Dep., (RE156-11, PageID#4431); Zotigh Dep., (RE156-12, PageID#4455-56); Petoskey Dep., (RE156-13, PageID#4473, 4483-84). When that position became untenable, BCBSM repeatedly misrepresented the FCPA gave Plaintiffs "close to" MLR. *See* Oien Dep., (RE156-11, PageID#4406-07); Zotigh Dep., (RE156-12, PageID#4448-49, 4453-56); Petoskey Dep., (RE156-13, PageID#4476,4483); 12/4/2013 Memo, (RE156-25, PageID#4566); 12/2/2013 Memo (RE156-26, PageID#4571); 3/4/2011 E-mail, (RE96-4, PageID#2750); *See* 5/21/2008 E-mail (RE164-10, PageID#5111); 3/24/2009 E-mail (RE164-12, PageID#5119); 3/28/2009 E-mail (RE164-13, PageID#5124); 2/16/2009 E-mail, (RE164-14, PageID#5131-32). BCBSM also misrepresented that its arrangement "goes beyond

what the [MLR] rule requires" and "BCBSM and Munson believe[d] that they [we]re fully compliant with the law" under the FCPA. 12/18/2012 E-mail, (RE164-16, PageID#5143). BCBSM expressly and impliedly certified its compliance by withholding material information about its noncompliance—the actual nature of its network rates vis-à-vis MLR. *See id*. These false representations were material, resulting in Plaintiffs overpaying, on average, by at least 28 percent. Myrick Decl., (RE164-19, PageID#5159-72).

Accordingly, BCBSM violated the HCFCA. *See United States ex rel. Prather v. Brookdale Senior Living Comm., Inc.*, 838 F.3d 750, 774-75 (6th Cir. 2016) (causing overpayments in violation of Medicare regulations violated analogous FCA presentment provision); *United States ex rel. Morsell v. Symantec Corp.*, 130 F. Supp. 3d 106, 120 (D.D.C. 2015) (plaintiff stated presentment claim under analogous FCA provision where contractor falsely implied it was offering government lowest price); *United States ex rel. Shemesh v. CA, Inc.*, 89 F. Supp. 3d 36, 46 (D.D.C. 2015) (plaintiff stated presentment claim under analogous FCA provision where contractor provided government with inaccurate discounts, resulting in the plaintiff paying higher prices than it was entitled to).

3. BCBSM violated the HCFCA via fraudulent inducement.

BCBSM also violated the HCFCA through fraudulent inducement. A defendant is liable when it obtains a contract through false statements or fraudulent

conduct. *See United States v. United Techs. Corp.*, 626 F.3d 313, 320 (6th Cir. 2010) (affirming FCA liability where false cost data provided during negotiations influenced government's decision to sign contract).

Here, BCBSM fraudulently concealed the true nature of its network rates vis-à-vis MLR prices during and after negotiations of the FCPA and renewals of the ASC, misrepresenting it was giving Plaintiffs "close to" or "better than" MLR when BCBSM knew that was false. *See* Oien Dep., (RE156-11, PageID#4406-07); Zotigh Dep., (RE156-12, PageID#4448-49, 4453-56); Petoskey Dep., (RE156-13, PageID#4476,4483); 12/4/2013 Memo, (RE156-25, PageID#4566); 12/2/2013 Memo (RE156-26, PageID.4571); 3/4/2011 E-mail, (RE96-4, PageID#2750); *See* 5/21/2008 E-mail (RE164-10, PageID#5111); 3/24/2009 E-mail (RE164-12, PageID#5119); 3/28/2009 E-mail (RE164-13, PageID#5124); 2/16/2009 E-mail, (RE164-14, PageID#5131-32). GTB relied on BCBSM's representations and would not have agreed to renew the ASCs, sign the FCPA, and continue under those agreements absent BCBSM's misrepresentations about the nature of its discounts compared to MLR. *See id.* As a result, Plaintiffs overpaid for healthcare services administered by BCBSM. *See* Myrick Decl., (RE164-19, PageID#5159-72).

Accordingly, BCBSM is liable to Plaintiffs for violating the HCFCA under a fraudulent inducement theory. *See BAE Sys. Tactical Vehicle Sys*, No. 15-12225, 2016 WL 894567, at *3 (E.D. Mich. Apr. 25, 2017) (affirming FCA claims based

on defendant's knowingly concealing its cost and pricing data during negotiations for a supply contract); *United States ex rel. Shemesh v. CA, Inc.*, 89 F. Supp. 3d 36, 45-53 (D.D.C. 2015) (defendant's knowing provision to GSA of price lists and discounts containing false information in order to induce GSA to enter into contracts stated claim under FCA).

F. THE DISTRICT COURT INCORRECTLY HELD THE MLR REGULATIONS INAPPLICABLE TO BCBSM'S PLAN ADMINISTRATION.

Importantly, correctly construing Plaintiffs' HCFCA claim to be about BCBSM's ***promises*** and ***misrepresentations*** to GTB that its payment rates were "better than" or "close to" MLR renders BCBSM's affirmative defense—that the MLR regulations do not apply to it—entirely irrelevant. In other words, when correctly construed, it does not matter to Plaintiffs' HCFCA claim whether the MLR regulations apply to BCBSM; what matters is that BCBSM falsely represented to GTB it was complying with the MLR regulations by paying Plaintiffs' claims at "better than" or "close to" MLR.

However, even assuming the District Court correctly construed Plaintiffs' HCFCA claim as being about a "violation of the MLR regulations" (it did not), the District Court's decision should still be reversed because it erroneously held the regulations inapplicable to BCBSM's misconduct. Order, (RE196, PageID#5868). It reasoned "TPAs are never referenced in the entirety of § 136.30." *Id.*, (PageID#5893). But the question is not whether the regulations *identify* TPAs, but

whether they apply to BCBSM's *conduct*—payment of claims for CHS care using tribal plan assets.

The MLR regulations clearly govern payment of claims for CHS care using tribal plans assets, which BCBSM did as Plaintiffs' fiduciary. Five subsections (42 C.F.R. § 136.30(c)-(g)) of the MLR regulations govern the rates at which BCBSM was required to pay claims on behalf of Plaintiffs to providers using tribal funds. Per its title, the MLR regulations govern "[p]ayment to Medicare-participating hospitals for authorized Contract Health Services," 42 C.F.R. § 136.30, which is BCBSM's conduct at issue here. The MLR regulations required BCBSM, as Plaintiffs' fiduciary and agent paid to administer claims, to pay at rates based on what "the Medicare program would pay under a prospective payment system." 42 C.F.R. § 136.30(c)-(e). BCBSM was further required to consider the "[e]xception" to this "payment calculation" because it "negotiated with the hospital" rates sometimes better than MLR. *See id.*, § 136.30(f). Under this subsection, BCBSM was required to pay (using tribal funds) "the lesser of: The amount determined under paragraph (e) of this section [(the Medicare-Like Rate),] or the amount negotiated with the hospital or its agent[.]" *Id.* The MLR regulations require that BCBSM ensure "[t]he [Tribe's] payment will not exceed" MLR "or the contracted amount (plus applicable cost sharing), whichever is less[.]" *Id.*, § 136.30(g)(4).

This was confirmed in *SCIT v. BCBSM*, 32 F.4th 548, 557 (6th Cir. 2022). There, the district court held "the regulation defining the applicability of Medicare-like rates does not extend those rates to payments made through insurance plans like the Member and Employee Plans." *Id.* This Court reversed, answering yes to whether "Medicare-like rates were . . . available for services authorized by the Tribe's CHS program ***and billed through the Blue Cross plans.***" *Id.* (emphasis added). When the question is posed correctly, precedent requires reversal of the District Court's decision.

Even the District Court held in a prior opinion that BCBSM is bound by the MLR regulations. It previously noted the MLR regulations "directly affect how [BCBSM] administers and manages plan assets." Order, (RE99, PageID#2933). Further "that defendant should have taken the MLR regulations into account when determining how much to pay out of plan assets boils down to a basic legal proposition that is neither novel nor controversial: fiduciaries must administer plans in compliance with federal laws." *Id.* The District Court earlier held "***the issue of whether defendant should have sought a discounted rate in connection with the MLR regulations appears to be a question of fact, not of law.***" (RE99, PageID#2927) (emphasis added). Its flip-flop on this issue is self-contradictory.

CONCLUSION

Plaintiffs respectfully ask this Court to reverse the District Court's Orders (RE99, 107, 122, 196, and 203), and Judgment (RE204), and remand with instructions to complete discovery on Plaintiffs' breach-of-fiduciary-duty claims. Additionally, Plaintiffs respectfully request this Court enter summary judgment in Plaintiffs' favor on BCBSM's liability for Plaintiffs' HCFCA claim.

Respectfully Submitted,

VARNUM LLP

Dated: July 8, 2024

/s/ Herman D. Hofman

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Date: July 8, 2024

By: */s/ Herman D. Hofman*

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CERTIFICATE OF SERVICE

I certify that on July 8, 2024, 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.

Date: July 8, 2024

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The relevant documents to this appeal are part of the electronic record in the Eastern District of Michigan, Southern Division. To facilitate the Court's reference to the electronic record, said documents, as referred to herein above, are as follows:

ECF No.	DESCRIPTION OF DOCUMENT	PAGE ID #
1	Complaint	1-98
37	Answer to Complaint with Affirmative Defenses	1265-1299
61	Motion for Judgment on the Pleadings	1609-1638
90	First Amended Complaint	2538-2563
90-4	Facility Claims Processing Agreement	2588-2592
94	Motion to Dismiss Plaintiff's First Amended Complaint	2601-2631
96-4	3/4/2011 E-mail	2747-2751
98	Transcript of Motion Hearing held 6/7/2017	2850-2917
99	7/21/2017 Order	2918-2942
102	Motion for Leave to File Second Amended Complaint	2966-2984
102-2	Exhibit A - Second Amended Complaint	2986-3049
107	12/26/2017 Order	3127-3142
122	5/20/2019 Opinion and Order	3249-3275
128	Amended Answer to Complaint	3372-3379
154-3	Bussey Deposition Excerpts	3810-3824
155-2	ASC - 2000 Administrative Services Contract	4013-4030
155-8	Chambers Deposition Transcript	4070-4114
155-18	9/17/2007 E-mail	4213-4215

155-19	2/11/2008 E-mail	4216-4218
155-20	10/10/2008 E-mail	4219-4222
155-23	11/8/2012 E-mail	4228-4235
155-24	9/4/2012 E-mail	4236-4243
155-25	8/16/2007 E-mail	4244-4246
155-26	2/1/2008 E-mail	4247-4250
155-27	2/24/2011 E-mail	4251-4252
156-3	10/8/2007 E-mail	4297-4302
156-4	Root Deposition Transcript	4303-4353
156-5	1/29/2014 E-mail	4354-4358
156-6	9/17/2012 E-mail	4359-4362
156-7	1/28/2013 E-mail	4363-4366
156-8	1/21/08 E-mail	4367-4369
156-9	7/28/2013 E-mail	4370-4373
156-10	Andrews Deposition Transcript	4374-4401
156-11	Oien Deposition Transcript	4402-4432
156-12	Zotigh Deposition Transcript	4433-4460
156-13	Petoskey Deposition Transcript	4461-4489
156-14	Noxon Deposition Transcript	4490-4508
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