UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Matthew T. Zilhaver, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. UnitedHealth Group, Inc., et al., Defendants.	Court File No. 06-2237 JMR/FLN **DECLARATION OF KELLY A. MOFFITT**

1. I, Kelly A. Moffitt, an attorney for Defendant William McGuire in the above captioned case, make the following Declaration, under penalty of perjury, in support of Defendant William W. McGuire's Reply to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss.

2. Attached hereto as Exhibit A is a true and correct copy of the case *Kalda v. Sioux Valley Physician Partners, Inc.*, No. 06-1277, -- F.3d --, 2007 WL 925245 (8th Cir. Mar. 29, 2007).

3. Attached hereto as Exhibit B is a true and correct copy of the case *Pipefitters Local 636 v. Blue Cross & Blue Shield of Mich.*, No. 05-2580, 2007 WL 128773 (6th Cir. Jan. 17, 2007).

FURTHER DECLARANT SAYETH NOT.

Dated: April 16, 2007

s/Kelly A. Moffitt
Kelly A. Moffitt

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Only the Westlaw citation is currently available.

United States Court of Appeals,
Eighth Circuit.
Ellison KALDA, M.D.; Robert K. Dahl, M.D.; Marilyn McFarlane, P.A. David H.
Hylland, Ed.D.; Richard G. Whitten, Ph.D.; Cynthia L. Pilkington, Ph.D.; Mary
K. Kunde, Ph.D. Individually and for their individual plan accounts and on
behalf of The Central Plains Clinic, Ltd. Mone Purchase Pension and Profit
Sharing Plan and The Central Plains Clinic, Ltd. 401(k) Plan, Appellants,
v.
SIOUX VALLEY PHYSICIAN PARTNERS, INC., formerly known as Central Plain Clinic,
Ltd.; Sioux Valley Hospital; T.A. Schultz, M.D.; Richard Hardie, M.D.; Gene
Burrish, M.D.; David Danielson; Michael Farritor, M.D.; John Rittmann, M.D.;
Steven Salmela, M.D., Appellees.
No. 06-1277.

Submitted: Oct. 19, 2006.
Filed: March 29, 2007.

Background: Former employees of medical clinic brought declaratory judgment action against former employer and its officers and directors to recover under Employee Retirement Income Security Act (ERISA) for breach of pension and profit sharing plans and breaches of fiduciary duty. The United States District Court for the District of South Dakota, Lawrence L. Piersol, Chief Judge, 394 F.Supp.2d 1107, dismissed on fiduciary duty claim and entered summary judgment for defendants. Former employees appealed.

Holdings: The Court of Appeals, Bowman, Circuit Judge, held that:
(1) employer's statements that it would fund pension and profit sharing plans when it became financially stable were not misrepresentations and did not breach fiduciary duty as ERISA plan administrator;
(2) employer's decision to merge with buyer, rather than company that would have make pension contributions not made by former employer during prior two years, did not breach fiduciary duties; and
(3) contributions owed to plans were not "plan assets," and, thus, employer did not breach duty to manage plan assets.
Affirmed.

[1] Federal Courts 759.1

170Bk759.1 Most Cited Cases

[1] Federal Courts 776
170Bk776 Most Cited Cases
The Court of Appeals reviews a summary judgment de novo and may affirm the judgment on any grounds supported by the record.

[2] Federal Civil Procedure 2470
170Ak2470 Most Cited Cases

[2] Federal Civil Procedure 2470.4
170Ak2470.4 Most Cited Cases
Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[3] Labor and Employment 482
231Hk482 Most Cited Cases
Employer's statements that it would fund pension and profit sharing plans when it became financially stable were not misrepresentations and did not breach fiduciary duty as ERISA plan administrator, even if employer was acting as administrator when it made the statements; the statements merely expressed a future hope or goal after employer ended the contributions and were too vague to qualify as unequivocal promises, the employer did not promise to again fund the plans upon merger, and the employees could not reasonably rely on the statements when making decisions about their benefits. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[4] Labor and Employment 475

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231Hk475 Most Cited Cases

[4] Labor and Employment 482
231Hk482 Most Cited Cases
An ERISA fiduciary must comply with the common-law duty of loyalty, including the obligation to deal fairly and honestly with all plan members, and may not, when discussing a plan, affirmatively miscommunicate or mislead plan participants about material matters regarding the plan. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[5] Labor and Employment 482
231Hk482 Most Cited Cases
An ERISA plan fiduciary's statement is materially misleading if there is a substantial likelihood that it would mislead a reasonable employee in the process of making an adequately informed decision regarding benefits to which she might be entitled. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[6] Labor and Employment 482
231Hk482 Most Cited Cases
An ERISA plan fiduciary has a duty to inform when it knows that silence may be harmful and cannot remain silent if it knows or should know that the beneficiary is laboring under a material misunderstanding of plan benefits. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[7] Labor and Employment 482
231Hk482 Most Cited Cases
The duty of loyalty requires an ERISA plan fiduciary to disclose any material information that could adversely affect a participant's interests. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[8] Labor and Employment 462
231Hk462 Most Cited Cases
An employer-fiduciary must wear the fiduciary hat when making fiduciary decisions about ERISA plan. Employee Retirement Income Security Act of 1974, § 3(21)(A), 29 U.S.C.A. § 1002(21)(A).

[9] Labor and Employment 473
231Hk473 Most Cited Cases
Former employer's decision to merge with buyer, rather than company that would have make pension contributions not made by former employer during prior two years, did not breach fiduciary duties as ERISA plan administrator; negotiating the merger and ultimately declining to pursue an agreement with company were business decisions that did not trigger ERISA's fiduciary provisions. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[10] Federal Courts 712
170Bk712 Most Cited Cases
The Court of Appeals does not address claims that have been raised for the first time on appeal.

[11] Labor and Employment 473
231Hk473 Most Cited Cases
While a fiduciary must discharge his duties with respect to a plan solely in the interest of the participants, the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits; thus, normal business decisions with potential collateral effects on prospective, contingent benefits need not be made in the interest of plan participants. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[12] Labor and Employment 473
231Hk473 Most Cited Cases
ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

[13] Labor and Employment 476
231Hk476 Most Cited Cases
Unpaid contributions that employer owed to pension and profit sharing plans after adopting amendment that reduced pension plan contributions to zero were not "plan assets," and, thus, employer did not breach duty to manage plan assets in connection with merger; even though balance sheets tracked amounts that employer would have contributed, the employer

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simply recorded the amounts as ledger entries with the possibility of future repayment, it would be unreasonable to conclude from the sheets that the plans had acquired a beneficial interest in the unpaid contributions under ordinary notions of property rights, and no plan document contained vesting language that obligated employer to make payments to either plan. Employee Retirement Income Security Act of 1974, § 3(21)(A), (23)(A), 29 U.S.C.A. § 1002(21)(A), (23)(A); 29 C.F.R. § 2510.3-102(a).

[14] Administrative Law and Procedure 413
15Ak413 Most Cited Cases
Agency interpretations in opinion letters are entitled to respect to the extent that they have the power to persuade.

[15] Administrative Law and Procedure 413
15Ak413 Most Cited Cases
Whether an agency letter has the power to persuade and is entitled to respect by court is based on factors such as the thoroughness evident in the agency's consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.

[16] Labor and Employment 446
231Hk446 Most Cited Cases
Pension and profit sharing plans to which employer had stopped contributing were not amended by oral statements or balance sheets to require retroactive funding; ERISA generally prohibited oral amendment, and the balance sheets showing unpaid contributions did not purport to amend the plans. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B).

[17] Labor and Employment 478
231Hk478 Most Cited Cases
In general, an employer's decision to amend a pension plan concerns the
composition or design of the plan itself and does not implicate the employer's fiduciary duties. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001, et seq.

[18] Federal Courts 634
170Bk634 Most Cited Cases
Court of Appeals would not further consider unappealed decision disposing of claim that employer breached fiduciary duty in amending pension plan.

[19] Federal Courts 642
170Bk642 Most Cited Cases
Judgment.
Former employees' claims were not properly preserved for appeal as they were first raised in the motion for reconsideration on ground that amendment to pension plan deprived former employees of accrued benefits and that former employer failed to comply with ERISA's notice-of-amendment procedure. Employee Retirement Income Security Act of 1974, § 204(g, h), 29 U.S.C.A. § 1054(g, h).
N. Dean Nasser, argued, Sioux Falls, SD (Gregory A. Eiesland, on the brief), for appellant.

Roberto A. Lange, argued, Davenport & Evans, Sioux Falls, SD, for appellees.

Before SMITH, BOWMAN, and COLLOTON, Circuit Judges.

BOWMAN, Circuit Judge.

***1** The plaintiffs brought this action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2000), alleging that the defendants breached several fiduciary duties and violated the terms of two ERISA plans. The District Court [FN1] granted the defendants' motion to dismiss one breach-offiduciary-duty claim and granted the defendants' motion for summary judgment on all remaining claims. We affirm the judgment of the District Court.

I.

This case results from the events leading up to the merger of Central Plains Clinic, Ltd. (CPC) with Sioux Valley Physician Partners, Inc. (SVC). The plaintiffs are former employees of CPC whose employment ended prior to the merger. [FN2] CPC administered two ERISA plans in which the plaintiffs participated--a Money Purchase Pension Plan (MPPP) and a Profit Sharing Plan (PSP). The PSP was discretionarily funded by CPC, while the MPPP was a defined-benefit plan that provided for contributions by CPC based on a percentage of a participant-employee's compensation. CPC reserved the right to

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amend, modify, terminate, or suspend contributions to the MPPP at any time.

In response to financial difficulties, on December 11, 1998, CPC adopted an amendment to the MPPP that reduced CPC's contributions to the MPPP from twenty-five percent of each participant's compensation to zero. CPC informed participants that it hoped to resume contributions to the MPPP in the future if CPC became financially stable. CPC maintained balance sheets that tracked the amounts that it would have contributed to the MPPP from 1998 to 2001 if not for the zero-funding amendment. For the calendar year 1998, CPC contributed to the PSP an amount equal to what it would have contributed to the MPPP if not for the zero-funding amendment. CPC made no contributions to either plan for the calendar years 1999, 2000, and 2001.

In 2000, CPC separately met with SVC and Avera McKenna Hospital to explore financial options, including a sale or merger. CPC elected to pursue a merger with SVC, and on December 18, 2000, the parties executed a letter of intent to merge. As part of the proposed merger, SVC offered retention-incentive bonuses to CPC employees who transferred to SVC in amounts equal to the amounts that would have been contributed to the MPPP if not for the zero-funding amendment. On March 26, 2001, CPC adopted a merger and stock-purchase agreement, subject to shareholder approval. This agreement provided that physicians who remained with SVC for two years after the merger and other employees who remained with SVC for thirty days after the merger qualified for the bonuses. The agreement did not provide for retroactive funding of either plan.

Meanwhile, CPC's largest lender had urged Avera to make an alternative proposal to CPC. In a proposal made to CPC shareholders on March 30, 2001, Avera stated that it would pay physicians "[a]ll pension contributions not made during the past two years." J.A. at 956. SVC then agreed to pay CPC's debt to the lender, and the CPC board of directors approved and executed the agreement with SVC on April 4, 2001. The CPC board conducted a side-by-side evaluation of the SVC and Avera proposals on April 12, 2001, and reaffirmed its decision to proceed with the SVC merger. On April 17, 2001, CPC shareholders approved the merger. Because the plaintiffs' employment with CPC ended prior to the merger's approval, they were ineligible for the retention-incentive bonuses.

***2** [1][2] The plaintiffs commenced this action asserting various ERISA theories, including breaches of the plans, *see* 29 U.S.C. § 1132(a)(1)(B), and breaches of fiduciary duties, *see* 29 U.S.C. §§ 1104 and 1106. The plaintiffs sought funding of the MPPP and PSP and funding of the participants' accounts for unpaid contributions, a declaratory judgment, an equitable accounting, and disgorgement of improper benefits. The District Court granted the defendants' motion to dismiss a claim alleging that the zero-funding amendment was a breach of fiduciary duty. The plaintiffs do not appeal from that portion of the final judgment. The District Court later granted the defendants' motion for summary judgment on all remaining claims. The District Court denied the plaintiffs' motion for reconsideration of the summary-judgment order. Plaintiffs appeal with respect to the entry of summary judgment. We review the grant of summary judgment de novo and may affirm the judgment on any grounds supported by the record. *Bass v. SBC Commc'ns, Inc.,* 418 F.3d 870, 872 (8th Cir.2005). Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*

II.

[3] The plaintiffs claim that the defendants made an "unequivocal promise" that once CPC became financially stable, it would fund the plans in the amount that would have been contributed to the MPPP absent the zero-funding amendment. Appellants' Br. at 26. According to the plaintiffs, because CPC knew that this re-funding would not occur, the promise amounted to a misrepresentation. The District Court held that CPC's statements, when viewed in the light most favorable to the plaintiffs, were not misrepresentations. The plaintiffs assert that the District Court erred in granting summary judgment because a genuine issue of material fact exists as to whether these statements constitute misrepresentations.

In deposition testimony, the plaintiffs stated that CPC

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made several statements between 1998 and 2000 that support their misrepresentation claim, such as: "[CPC] said they were going to keep track of [the amount of unpaid contributions], and potentially if we got healed--when we got healed we'd get it back," J.A. at 220; "[O]nce the financial stability of the clinic improved, [the PSP] would be funded," *id.* at 221; and "[T]hey also told us [the amount of unpaid MPPP contributions] was going on the books and when they became financially stable they would pay it," *id.* at 222. The plaintiffs contrast these statements with a memorandum summarizing a merger proposed on October 30, 2000 that included a reference to the payment of retention-incentive bonuses "instead of profit sharing contributions," *id.* at 302, and the December 18, 2000, letter of intent to merge that stated SVC would either make a contribution to the PSP or provide employees compensation "in lieu of" a PSP contribution, *id.* at 985. The plaintiffs therefore conclude that CPC knowingly promised PSP or MPPP re-funding when it knew that re-funding would not occur.

***3** [4][5][6][7] An ERISA fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), and must comply with the common-law duty of loyalty, including the "obligation to deal fairly and honestly with all plan members," *Shea v. Esensten,* 107 F.3d 625, 628 (8th Cir.1997) (citing *Varity Corp. v. Howe,* 516 U.S. 489, 506, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)), *cert. denied,* 522 U.S. 914, 118 S.Ct. 297, 139 L.Ed.2d 229 (1997). Accordingly, a fiduciary may " 'not affirmatively miscommunicate or mislead plan participants about material matters regarding their ERISA plan' " when discussing a plan. *In re Xcel Energy, Inc.,* 312 F.Supp.2d 1165, 1176 (D.Minn.2004) (quoting *In re Enron Corp.,* 284 F.Supp.2d 511, 555 (S.D.Tex.2003)); *see* *Varity,* 516 U.S. at 506, 116 S.Ct. 1065 (observing that " '[l]ying is inconsistent with the duty of loyalty' " (citation omitted)); *Anderson v. Resolution Trust Corp.,* 66 F.3d 956, 960 (8th Cir.1995). A statement is materially misleading if there is "a substantial likelihood that it would mislead a reasonable employee in the process of making an adequately informed decision regarding ... benefits to which she might be entitled." *Krohn v. Huron Mem'l Hosp.,* 173 F.3d 542, 551 (6th Cir.1999). Additionally, a fiduciary has a duty to inform when it knows that silence may be harmful, *Shea,* 107 F.3d at 629 (quotations and citations omitted), and cannot remain silent if it knows or should know that the beneficiary is laboring under a material misunderstanding of plan benefits, *Griggs v. E.I. Dupont de Nemours & Co.,* 237 F.3d 371, 381 (4th Cir.2001). The duty of loyalty requires a fiduciary to disclose any material information that could adversely affect a participant's interests. *Shea,* 107 F.3d at 628; *see* *Eddy v. Colonial Life Ins. Co. of Am.,* 919 F.2d 747, 750 (D.C.Cir.1990) ("The duty to disclose material information is the core of a fiduciary's responsibility....").

[8] Before proceeding with the merits of any breach-of-fiduciary-duty claim, we must address the threshold issue of whether the defendants were acting in a fiduciary or an employer capacity when the acts in question took place. *Pegram v. Herdrich,* 530 U.S. 211, 226, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). Under ERISA, a person is a fiduciary with respect to a plan:

> *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (emphasis added). This statute requires that an employer-fiduciary "wear the fiduciary hat when making fiduciary decisions." *Pegram,* 530 U.S. at 225, 120 S.Ct. 2143 (citing *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 443-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *Varity,* 516 U.S. at 497, 116 S.Ct. 1065).

***4** The plaintiffs argue that an employer-administrator acts as a fiduciary as defined by ERISA if the employer makes statements relating to a business decision that also relate to the administration of an ERISA plan. In support of their conclusion, the

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plaintiffs cite *Varity,* where the employer-fiduciary held a meeting to persuade employees to transfer to a subsidiary and assured them that their benefits would be secure if they did so, even though it knew that the subsidiary was insolvent. 516 U.S. at 493-94, 116 S.Ct. 1065. The *Varity* Court concluded that the employer's intentional statements about the likelihood of future plan benefits in that context amounted to an act of plan administration and thus the employer was acting as a fiduciary. *Id.* at 505, 116 S.Ct. 1065; *accord Anderson,* 66 F.3d at 960. Here, we will assume for the purposes of the misrepresentation claim that CPC was acting as an administrator-fiduciary when it made statements concerning the possibility of future funding of either plan. *See Varity,* 516 U.S. at 502, 116 S.Ct. 1065.

Viewing the statements in the light most favorable to the plaintiffs, CPC's statements were not misrepresentations. The statements about funding either plan when CPC became financially stable constituted no more than a future hope or goal, and these statements were too vague to qualify as "unequivocal promise [s]." That the statements were qualified by the words "if" and "potentially" further illustrate that the statements were speculative and that the employees could not reasonably rely on them when making decisions about their benefits. Indeed, in describing her understanding of the statements, one plaintiff stated, "I *assumed* when things were refinanced ... the plan would be taken care of." J.A. at 234 (emphasis added). Furthermore, the facts do not indicate, as the plaintiffs contend, that CPC knew that re-funding of the plans was certain *not* to occur upon the merger, as re-funding was considered in the letter of intent to merge. This case is distinguishable from *Varity,* where the defendants affirmatively told employees that if they changed jobs, their pensions would be guaranteed, even though the defendants knew their statements were false. 516 U.S. at 494, 116 S.Ct. 1065. Here, CPC did not promise that it would re-fund either plan upon the occurrence a merger or any other event. Moreover, CPC had no reason to know whether the plaintiffs were laboring under a misunderstanding that would have triggered the duty to inform, since several plaintiffs testified that they "assumed" CPC's statements were promises to re-fund the plans. J.A. at 226, 228, 234. For these reasons, the plaintiffs' misrepresentation claim fails.

III.

[9][10] The plaintiffs also allege that CPC breached its fiduciary duties in the course of negotiating and ultimately merging with SVC because it failed to adequately consider the Avera proposal. [FN3] The plaintiffs argue that CPC breached its duty of loyalty by considering only its own interests and not those of the participants when merging with SVC.

***5** [11][12] While a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants," 29 U.S.C. § 1104(a)(1), "the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits," *Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1471 (11th Cir.1986) (cited with approval in *Hickman v. Tosco Corp.,* 840 F.2d 564, 566 (8th Cir.1988)), *cert. denied,* 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987). Thus, normal business decisions with potential collateral effects on prospective, contingent benefits need not be made in the interest of plan participants. *Hickman,* 840 F.2d at 566. In other words, "ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan." *Phillips,* 799 F.2d at 1471. This dual-capacity standard may distinguish transactions that are subject to ERISA's fiduciary provisions from those transactions that are not. *Martin v. Feilen,* 965 F.2d 660, 666 (8th Cir.1992), *cert. denied,* 506 U.S. 1054, 113 S.Ct. 979, 122 L.Ed.2d 133 (1993); *see Pegram,* 530 U.S. at 225-26, 120 S.Ct. 2143.

We held in *Hickman* that the defendant-administrators' refusal to allow the plaintiffs to remain on the payroll to become eligible for retirement benefits did not implicate ERISA's fiduciary duties because that decision was a "day-to-day corporate business transaction." 840 F.2d at 566 (quotations and citations omitted); *accord Adams v. LTV Steel Mining Co.,* 936 F.2d 368, 370 (8th Cir.1991), *cert. denied,* 502 U.S. 1073, 112 S.Ct. 968, 117 L.Ed.2d 134 (1992). In this case, negotiating the merger with SVC and ultimately declining to pursue an agreement with Avera were

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business decisions made by CPC that did not trigger ERISA's fiduciary provisions. Accordingly, CPC's decision to merge with SVC rather than Avera did not itself breach a fiduciary duty owed by CPC to the plaintiffs.

Even if CPC in its capacity as administrator was required to carefully and impartially evaluate the merger's effect on the plan participants, *see Schaefer v. Ark. Med. Soc'y,* 853 F.2d 1487, 1492 (8th Cir.1988); *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.), *cert. denied,* 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982), we are convinced that CPC carefully assessed the impact of the merger on the plan participants, especially considering CPC's side-by-side comparison of the competing proposals. Moreover, contrary to the plaintiffs' assertions, the record indicates that CPC did in fact retain a consulting firm to evaluate the proposals. Therefore, the plaintiffs' claims that CPC breached its fiduciary duties during its consideration of Avera's proposal fail.

IV.

[13] The plaintiffs next contend that the defendants breached their duty to properly manage plan assets. *See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 572, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985). Specifically, the plaintiffs argue that in exchange for positions at SVC, the CPC officers bargained away MPPP and PSP contributions in the form of the balance sheets that tracked the amounts that would have been paid to either plan absent the zero-funding amendment. To support such a claim, "plan assets" within the meaning of ERISA must be involved. *See* 29 U.S.C. § 1002(21)(A); *NYSA-ILA Med. & Clinical Servs. Fund v. Catucci,* 60 F.Supp.2d 194, 200 (S.D.N.Y.1999). The District Court held that CPC's balance sheets were not "plan assets" because there was no vesting language in any of the plan documents and any obligation to fund the plans was contingent upon an improvement in CPC's financial condition. The plaintiffs alternatively argue that "plan assets" are involved because: (1) the plaintiffs were promised these unpaid contributions in lieu of wages; (2) the balance sheets constituted a beneficial interest under ordinary notions of property law; or (3) the required vesting language was expressed in the plan documents.

***6** ERISA does not exhaustively define the term "plan assets," although the regulations define the term to include amounts that participants pay to an employer or have withheld from their wages for contribution to a plan. 29 C.F.R. § 2510.3-102(a). The Secretary of Labor has repeatedly defined "plan assets" consistently with "ordinary notions of property rights," including in the definition any funds in which a plan has obtained a "beneficial interest." *See, e.g.,* 2005-08A Op. Dep't of Labor at *6-7 (May 11, 2005); 2003-05A Op. Dep't of Labor at *5 (April 10, 2003); 2001-02A Op. Dep't of Labor at *5 n. 2 (Feb. 15, 2001); 94-31A Op. Dep't of Labor at *3-4, 7 (Sept. 9, 1994); 93-14A Op. Dep't of Labor at *10-11 (May 5, 1993); 92-22A Op. Dep't of Labor at *8-10 (Oct. 27, 1992). Whether a plan has acquired a beneficial interest in particular funds depends on "whether the plan sponsor expresses an intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets." 94-31A Op. Dep't. of Labor at *7 (Sept. 9, 1994).

[14][15] Agency interpretations in opinion letters are "entitled to respect" to the extent that they have the "power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). Whether a letter has the "power to persuade" is based on factors such as the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161. We find the Secretary's reasoning in its rulings regarding "plan assets" thorough, valid, and particularly consistent. *Cf. In Re Luna,* 406 F.3d 1192, 1199-1200 (10th Cir.2005) (applying the Secretary's approach).

The record does not support the plaintiffs' assertion that the unpaid contributions were promised in lieu of wages; therefore, the unpaid contributions do not qualify as plan assets under the regulations. Nor do we agree with the plaintiffs that CPC expressed an in-

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tent to grant either plan a beneficial interest in the balance sheets or that CPC made representations sufficient to lead reasonable participants to believe that the balance sheets secured any promised benefits or were otherwise "plan assets." The plaintiffs argue that CPC's use of the term "accrued expenses" on the balance sheets indicated an intent to grant the plans an interest in the unpaid contributions. J.A. at 216-17. This argument is undermined, however, by CPC's statements describing the *potential* for *future* funding of the plans as a *possibility* or a *hope*. The unpaid contributions were simply recorded as ledger entries with the possibility of future repayment. It would be unreasonable to conclude from these balance sheets that the plans had acquired a beneficial interest in the unpaid contributions under ordinary notions of property rights.

***7** Moreover, the term "accrued" as used in the balance sheets cannot reasonably be interpreted synonymously with the ERISA definition of an "accrued benefit." In the case of a defined-benefit plan such as the MPPP, an "accrued benefit" is created by the plan itself. 29 U.S.C. § 1002(23)(A). Under the MPPP, participants were eligible for *available* benefits if they completed 1000 hours of service and were employed on the last day of the plan year (i.e., December 31). Since the MPPP was zero-funded beginning with the December 1998 plan year, no benefits were available or accrued between 1998 and 2001. The label "accrued expenses" on the balance sheets did not convert the unpaid contributions into "plan assets" under the Secretary's approach.

This conclusion is consistent with cases cited by the District Court holding that unpaid contributions were "plan assets" where *the language of the plan documents* agreed to by the parties described the amounts at issue as "accrued to" or "due and owing." *Laborers Combined Funds of W. Pa. v. Cioppa,* 346 F.Supp.2d 765, 771 (W.D.Pa.2004); *Galgay v. Gangloff,* 677 F.Supp. 295, 301- 02 (M.D.Pa.1987); *cf. ITPE Pension Fund v. Hall,* 334 F.3d 1011, 1013-16 (11th Cir.2003). Here, no plan document contains vesting language that *obligated* CPC to make payments to either plan, *see, e.g., Luna,* 406 F.3d at 1199-1200; therefore, no beneficial interest was created. Because the plaintiffs cannot establish that the amounts tracked in CPC's balance sheets were "plan assets," their asset-mismanagement claim fails.

V.

[16] The plaintiffs also argue that CPC is liable under 29 U.S.C. § 1132(a)(1)(B) for failing to retroactively fund either the PSP or MPPP as allegedly promised. Since the PSP was funded at CPC's discretion and the MPPP was validly zero-funded in December 1998, the plaintiffs' claim requires a finding that one of the plans was amended as a result of CPC's alleged promises to retroactively fund either or both of the plans.

To the extent that the plaintiffs are claiming an amendment to either plan based on CPC's oral representations, we reject these claims because ERISA generally prohibits the oral amendment of plan terms. *Palmisano v. Allina Health Sys., Inc.,* 190 F.3d 881, 888 (8th Cir.1999). To the extent that the plaintiffs are claiming an amendment based on CPC's balance sheets, we also reject these claims because CPC's balance sheets did not purport to amend the plans. *Cf. Borst v. Chevron Corp.,* 36 F.3d 1308, 1323 (5th Cir.1994) (holding that CEO's written statements about plans that did not purport to be formal plan amendments were not amendments under the same reasoning that supports the prohibition against oral amendments), *cert. denied,* 514 U.S. 1066, 115 S.Ct. 1699, 131 L.Ed.2d 561 (1995). Accordingly, we reject the plaintiffs' breach-of-plan claim.

VI.

[17][18] The plaintiffs' final claims allege that CPC breached a fiduciary duty by amending the MPPP to add the zero-funding provision. "In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties...." *Hughes,* 525 U.S. at 444, 119 S.Ct. 755; *see Varity,* 516 U.S. at 505, 116 S.Ct. 1065; *Anderson,* 66 F.3d at 960. The District Court granted the defendants' motion to dismiss the plaintiffs' breach-of-fiduciary-duty claim and the plaintiffs did not appeal this order. The plaintiffs agree that the amendment itself is not actionable but attempt to restyle this claim as part of their misrepresentation argument. We find no merit in the plaintiffs' argument. The District

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Court disposed of this claim, and the plaintiffs did not appeal that decision. We therefore do not further consider it.

***8** [19] The plaintiffs also claim that the zero-funding amendment deprived them of accrued benefits, *see* 29 U.S.C. § 1054(g), and that CPC failed to comply with ERISA's notice-of-amendment procedure, *see id.* § 1054(h). These claims are not properly preserved for appeal because they were first raised in the plaintiffs' motion for reconsideration, and the District Court correctly refused to consider them in its denial of the motion for reconsideration. *See Capitol Indem. Corp. v. Russellville Steel Co.,* 367 F.3d 831, 834 (8th Cir.2004).

VII.

For the foregoing reasons, we affirm the judgment of the District Court.

FN1. The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

FN2. Dr. Dahl resigned and Ms. McFarlane retired on December 31, 2000. Dr. Hylland resigned on February 28, 2001. CPC discontinued psychological services effective March 31, 2001, which terminated the services of Drs. Whitten, Pilkington, and Kunde. Dr. Kalda resigned on April 1, 2001. CPC shareholders approved the merger on April 17, 2001, after the plaintiffs' employment with CPC ended.

FN3. The plaintiffs also attempt to raise, for the first time, several other alleged breaches, including CPC's failure to verify the eligibility of plan participants, enforce shareholders' rights, and collect and gather trust assets. We do not address claims that have been raised for the first time on appeal. *See Norwest Bank of N.D., N.A. v. Doth,* 159 F.3d 328, 334 (8th Cir.1998). The plaintiffs also argue that SVC is liable as a nonfiduciary, but the plaintiffs fail to identify any evidence in the record to support this claim.

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This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

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United States Court of Appeals,
Sixth Circuit.
PIPEFITTERS LOCAL 636, Trustees of Pipefitters Local 636 Insurance Fund; John R. Green; Charles Inman; John O'Neil; Greg Sievert; E. Thomas Devlin; Gerald Hoover, Plaintiffs-Appellants,
v.
BLUE CROSS & BLUE SHIELD OF MICHIGAN, Defendant-Appellee.
No. 05-2580.

Jan. 17, 2007.

Background: Multiemployer trust fund sued administrator for breach of fiduciary duties under Employee Retirement Income Security Act (ERISA) for imposing and failing to disclose cost transfer subsidy fee and for refusing to provide claims-related information, as well as state law claims for breach of contract, negligence, and misrepresentation. The United States District Court for the Eastern District of Michigan granted administrator's motion to dismiss, and fund appealed.

Holdings: The Court of Appeals, Restani, J., sitting by designation, held that:
(1) fund's complaint set forth sufficient allegations that administrator acted as a fiduciary under ERISA in assessing and failing to disclose subsidy fees, but
(2) fund's ERISA claim with respect to requested claims-related information was not sufficiently set forth by allegations.
Affirmed in part, reversed in part, and remanded.

[1] Labor and Employment 🔑**0**
231Hk0 k.
Multiemployer trust fund sufficiently alleged that administrator acted as an ERISA fiduciary with regard to the imposition of and failure to disclose cost transfer subsidy fee; fund alleged in its complaint and attached documents that it entrusted administrator with the authority to control and disburse fund assets, that administrator exercised such authority by allocating a portion of the money to itself in the form of subsidy fee and by failing to disclose this allotment to fund, and that administrator's unilateral decision to discontinue imposing fee further demonstrated its control and authority over the assets' disposition. Employee Retirement Income Security Act of 1974, §§ 3(21)(A), 409(a), 29 U.S.C.A. §§ 1002(21)(A), 1109(a).

[2] Labor and Employment 🔑**0**
231Hk0 k.
Allegations of multiemployer trust fund that administrator was in possession of claims records and that it "refused to provide access" to these records when requested outside of the agreed-upon audit procedure were insufficient to establish that administrator was acting as a fiduciary under ERISA when it decided not to release such information. Employee Retirement Income Security Act of 1974, § 3(21)(A)(i), 29 U.S.C.A. § 1002(21)(A)(i).
On Appeal from the United States District Court for the Eastern District of Michigan.

Ronald S. Lederman, Sharon S. Almonrode, Sullivan, Ward, Asher & Patton, Southfield, MI, for Plaintiffs-Appellants.

Francis R. Ortiz, Dickinson, Wright, PLLC, Joseph W. Murray, Blue Cross & Blue Shield of Michigan, Detroit, MI, for Defendant-Appellee.

Before DAUGHTREY and COLE, Circuit Judges, and RESTANI, [FN*] Judge.

RESTANI, Judge.

***1** Plaintiffs-Appellants Pipefitters Local 636 Insurance Fund, et al. ("Fund") appeal from a judgment of the United States District Court for the Eastern Dis-

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trict of Michigan. The district court granted a motion to dismiss in favor of Defendant-Appellee Blue Cross & Blue Shield of Michigan ("BCBSM") on federal claims of breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, et al., and related claims under Michigan law. The motion to dismiss was granted on the grounds that the complaint did not state adequate claims that BCBSM acted as a fiduciary under ERISA with regard to the actions in question.

On appeal, the Fund argues that BCBSM acted as an ERISA fiduciary with respect to its use of fund assets to pay for an "Other Than Group" ("OTG") subsidy and its refusal to provide claims-related records as requested by the Fund. The district court granted BCBSM's motion to dismiss, holding that the dispute concerns contractual duties under state law rather than fiduciary duties under ERISA.

For the reasons that follow, we conclude that the Fund's complaint sets forth sufficient allegations that BCBSM was acting as a fiduciary in control of fund assets when it assessed and failed to disclose the OTG subsidy fees. As to BCBSM's refusal to release requested claims-related information, however, we conclude that the Fund's complaint does not set forth sufficient allegations to establish a separate basis for fiduciary liability under ERISA. Accordingly, we reverse in part and remand to the district court to further consider BCBSM's status as a fiduciary with respect to the OTG subsidy fee. We affirm the district court's dismissal of the Fund's claims arising from BCBSM's refusal to release the requested claims-related information.

FACTUAL AND PROCEDURAL BACKGROUND

The Appellant is a multiemployer trust fund [FN1] administered pursuant to ERISA [FN2] and the Labor Management Relations Act, 29 U .S.C. § 186, for the purpose of providing health and welfare benefits to its participants and beneficiaries. For several years, the Fund was an insured group customer of BCBSM, purchasing insurance coverage by paying premiums. The Fund converted in June 2002 to a self-funded plan, providing benefits by using fund assets. At that time, the Fund entered into an Administrative Services Contract ("ASC") with BCBSM for services including: claims processing; financial management and reporting; negotiation of participating provider agreements; cost containment initiatives; maintenance of all necessary records; and provision of information through established audit procedures. *See* J.A. at 171-73 (ASC at 3-5).

Under the terms of the ASC, the Fund agreed to pay claims and administrative charges, including amounts billed during the year, hospital prepayments, actual administrative charges and group conversion fee, any late payment charges, statutory and/or contractual interest, and "[a]ny other amounts which are the Fund's responsibility pursuant to this Contract." *Id.* at 178 (ASC at 10). The ASC also states that "[t]he Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to [Michigan law] will be reflected in the hospital claims cost contained in Amounts Billed." *Id.*

***2** From June 2002 to January 2004, BCBSM collected from the Fund an OTG fee [FN3] to subsidize coverage for non-group clients. The OTG subsidy was regularly collected from BCBSM's group clients. Self-insured clients, however, were not always required to pay the fee, and the parties dispute whether Michigan law authorized the imposition of OTG subsidy fees on such clients. [FN4] In January 2004, BCBSM unilaterally eliminated the OTG subsidy charge to the Fund.

The Fund alleges that BCBSM breached its fiduciary duties under ERISA by imposing the OTG subsidy from June 2002 to January 2004, and by failing to disclose the fee in its quarterly statements. The Fund also alleges that BCBSM improperly refused to provide claims-related information for evaluation at the Fund's request. In district court, the Fund brought claims against BCBSM for: 1) breach of fiduciary duties under ERISA for imposing and failing to disclose the OTG subsidy fee; 2) breach of fiduciary duties under ERISA for refusing to provide claims-related information; and 3) breach of contract, negligence and misrepresentation under state law.

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BCBSM moved for dismissal pursuant to Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. BCBSM argued that it was not acting as a fiduciary under ERISA when it took the actions in question. The district court granted the motion to dismiss, [FN5] and the Fund appeals. This court has jurisdiction over a final decision of the district court pursuant to 28 U.S.C. § 1291, and review of a district court's decision on a motion to dismiss is generally *de novo. See Simon v. Pfizer Inc.,* 398 F.3d 765, 772 (6th Cir.2005).

DISCUSSION

I. Evaluating ERISA Fiduciary Status

Under ERISA, a third-party administrator such as BCBSM is deemed a fiduciary [FN6] to the extent that it exercises "discretionary authority or discretionary control respecting management of [a] plan or ... any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). A fiduciary under ERISA is required to perform its actions with the utmost "care, skill, prudence, and diligence ... [and] in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(B)-(D).

ERISA defines "fiduciary" in functional terms with regard to each action in question. *See Hamilton v. Carell,* 243 F.3d 992, 998 (6th Cir.2001). An ERISA fiduciary is permitted to make business decisions in its own interest, so long as it is not acting as a fiduciary at that time. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 443-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). When acting as a fiduciary, however, "ERISA does require ... that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich,* 530 U.S. 211, 225, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). ERISA "does not describe fiduciaries simply as administrators of the plan," but evaluates the fiduciary role "to the extent that [an administrator] acts in such a capacity in relation to the plan." *Id.* (quotation marks and citation omitted).

***3** In order to determine whether ERISA applies to the instant case, the threshold inquiry is whether, when taking each action in question, BCBSM exercised: 1) any authority or control over plan assets, or 2) discretionary authority over plan management. *See Briscoe v. Fine,* 444 F.3d 478, 490-91 (6th Cir.2006).

II. The Fund Sufficiently Alleges that BCBSM Acted as an ERISA Fiduciary With Regard to the Imposition of and Failure to Disclose the OTG Subsidy Fee

[1] The Fund seeks relief on the claim that BCBSM breached a fiduciary duty under ERISA by using fund assets to pay the OTG subsidy fee, and by failing to disclose the fee on its quarterly statements. ERISA §§ 1132(a)(2) and 1109(a) provide a cause of action against a fiduciary "who breaches any of the responsibilities, obligations, or duties imposed ... [for] any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). In reviewing the motion to dismiss, the question is not whether BCBSM actually breached a fiduciary duty under ERISA, but whether the plaintiff has set forth sufficient allegations that such a duty existed and that it was breached. We therefore turn to the issue of whether the Fund has sufficiently alleged that BCBSM acted as a fiduciary with respect to the OTG subsidy fee.

Under ERISA, fiduciary duties arise where an administrator exerts "any authority or control respecting management or disposition of [a fund's] assets." *Id.* § 1002(21)(A). An administrator is deemed a fiduciary when it exercises " 'practical control over an ERISA plan's money.' " *Briscoe,* 444 F.3d at 494 (quoting *IT Corp. v. Gen. Am. Life Ins. Co.,* 107 F.3d 1415, 1421 (9th Cir.1997)). The administrator's "disposition of funds held in an account over which it exerted control makes it a fiduciary to the extent that it exercised such control." *Id.* at 490. Discretion in the disposition of plan assets is not required; it is "irrelevant whether [the administrator] exercised 'discretion' .... '[A]ny authority or control' is enough." *Chao v. Day,* 436 F.3d 234, 236 (D.C.Cir.2006).

A fiduciary relationship does not exist, however, where an administrator "performs purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits." *Baxter v. C.A. Muer Corp.,* 941

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F.2d 451, 455 (6th Cir.1991). Fiduciary authority must amount to more than "mere possession, or custody over the plan ['s] assets." *Briscoe,* 444 F.3d at 494 (quotations omitted). In addition, fiduciary status under ERISA does not apply where "parties enter into a contract term at arm's length and where the term confers on one party the ... right to retain funds as compensation for services rendered with respect to an ERISA plan." *Seaway Food Town, Inc. v. Med. Mut. of Ohio,* 347 F.3d 610, 619 (6th Cir.2003). Fiduciary status does not extend to an administrator that exercised authority solely over funds that "belonged to [itself] and not to the plan." *Id.* at 618.

***4** Therefore, in order to overcome BCBSM's motion to dismiss, the Fund must set forth sufficient allegations that BCBSM exercised any authority or control over plan assets, and that it performed more than a mere ministerial or contractually compelled function in assessing the OTG subsidy fee. *See* *Briscoe,* 444 F.3d at 494.

The Fund's complaint sets forth allegations that BCBSM's role in assessing the OTG subsidy fee was an exercise of authority and control over the fund assets, and was not merely ministerial or contractual in nature. The complaint alleges that the monetary assets at issue were "entrusted" to BCBSM, which administered them within its authority as "a fiduciary under ERISA." J.A. at 153-54 (Pl.'s First Am. Compl. ¶ 32, ¶ 44). The complaint further states that BCBSM "improperly imposed an OTG subsidy on these funds," Pl.'s First Am. Compl. at ¶ 63, and that it "imposed the fee ... claiming it was a mandatory fee." *Id.* at ¶ 42. The complaint alleges that "[t]he ASC contracts prohibit the OTG subsidy .... [and] BCBSM was not legally required to assess this OTG fee." *Id.* at ¶ 37, ¶ 41. According to the complaint, BCBSM "selectively elected to assess [the] OTG fee," *id.* at ¶ 33, and "in its discretion indicated it would unilaterally stop charging the OTG subsidy [on January 1, 2004]." *Id.* at ¶ 39.

In addition, the ASC attached to the complaint states that BCBSM acquired control over Fund assets by an initial transfer of funds to cover the first two quarters of projected claims and expenses, followed by monthly prepayments in accordance with BCBSM-issued quarterly statements. J.A. at 180 (ASC at 12); *see also id.* at Sched. A. The ASC authorizes BCBSM to allocate and dispose of the transferred funds while the assets are within BCBSM's control. *See id.* at 9-14. In addition, under the terms of the contract, the Fund would be unable to access the transferred funds for a period even beyond the termination of the agreement. *Id.* at 14. Both parties also acknowledge that the OTG subsidy fee was "part of the allocation of the fund's money," J.A. at 280 (Mot. to Dismiss First Am. Compl. Hr'g Tr. 15:17, Sept. 26, 2005), and that BCBSM collected the fee "by keeping a portion of the hospital discount." J.A. at 220 (Letter from Ernie Kafcas, Account Manager, BCBSM, to John M. Shoemaker, Plan Manager, JMS Administrators, Inc. (Jan. 6, 2004)).

In sum, the Fund has alleged in its complaint and attached documents that it entrusted BCBSM with the authority to control and disburse fund assets, and that BCBSM exercised such authority by allocating a portion of the money to itself in the form of the OTG subsidy fee and by failing to disclose this allotment to the Fund. The Fund's complaint also alleges that BCBSM's unilateral decision to discontinue imposing the fee further demonstrates BCBSM's control and authority over the assets' disposition. Therefore, the Fund has set forth sufficient allegations that BCBSM owed a fiduciary duty under ERISA with regard to its disposal of these assets, and that BCBSM breached its duty by imposing and failing to disclose the fee. As in *Briscoe,* whether BCBSM actually breached any resulting "duty that it owed [under ERISA] is a question that the parties may address on remand." *Briscoe,* 444 F.3d at 495.

***5** Although BCBSM asserts that this dispute is merely contractual in nature, we find that the Fund's allegations place its OTG fee claims within the scope of ERISA. BCBSM argues that the dispute arises solely from the ASC, and that the meaning of the provision in question should be construed in state court. BCBSM argues specifically that the Fund must have known that the OTG subsidy fees would be assessed because the Fund asked for a waiver of the provision allowing a "Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner." J.A. at 178 (ASC

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at 10). The Fund responds that the subsidy fee could not have been included in the above provision because there is no evidence that the fee was ordered by the State Commissioner, or even that it was permitted under Michigan law. The Fund's knowledge of the fee, however, would not necessarily negate the exercise of control or authority by BCBSM in its imposition because such knowledge would not alter BCBSM's control over the funds. *See* Briscoe, 444 F.3d at 492 ("The terms of the Agreement may have limited [the administrator's] discretion over the remaining funds, but did not affect its control over those funds.... [T]he Agreement does not alter the fact that [the administrator] acted as a signatory and unilaterally disposed of the remaining funds." (emphasis omitted)). While this contractual term is relevant to the trial court's determination of the extent of BCBSM's duties under the agreement, there is nothing at this early stage that negates the Fund's assertions set forth in the complaint. The Fund has set forth sufficient allegations that BCBSM acted as a fiduciary under ERISA with respect to the OTG fee.

III. The Fund Fails to Set Forth Sufficient Allegations that BCBSM Acted as an ERISA Fiduciary With Regard to its Refusal to Provide Claims-Related Information

[2] The Fund also asserts a claim against BCBSM on the ground that BCBSM acted as a fiduciary under ERISA by refusing to provide claims information unrelated to the OTG fee and requested outside of contractually agreed-upon audit procedures. J.A. at 156 (Pl.'s First Am. Compl. ¶¶ 50-52). When a third-party administrator exercises authority over non-monetary elements of a plan, ERISA confers fiduciary status only where the administrator exercises "discretionary authority or discretionary control." 29 U.S.C. § 1002(21)(A)(i).

As indicated previously, discretionary authority under ERISA requires more than a showing of "any authority or control" and requires the exercise of authority to make administrative decisions beyond stringent contractual or policy limitations. *See Briscoe,* 444 F.3 d at 490-91. Such discretion is typically found where an administrator has the authority to make benefits determinations or construe the terms of a plan. *See* *Voyk v. Bhd. of Locomotive Eng'rs,* 198 F.3d 599, 604 (6th Cir.1999); *see also* *Tregoning v. Am. Cmty. Mut. Ins. Co.,* 12 F.3d 79, 83 (6th Cir.1993). Discretionary authority does not exist where a party merely decides to adhere to an existing contract term, *see* Seaway, 347 F.3d at 619, or makes business decisions on its own behalf, outside of its role as plan administrator. *See* Hughes, 525 U.S. at 443-44.

***6** In the instant case, the Fund's complaint states only that BCBSM was "in possession of the [requested] Claims Records," J.A. at 155 (Pl.'s First Am. Compl. at ¶ 48), and that it "refused to provide access" to these records when requested. *Id.* at ¶ 51. The complaint does not specify how BCBSM was exercising discretionary authority in deciding not to release the records, and offers only the conclusion that "BCBSM is a fiduciary under ERISA." *Id.* at ¶ 47. Although the complaint clearly indicates the types of records sought, *id.* at ¶ 49, it does not allege facts to establish that BCBSM was acting as a fiduciary when it decided not to release such information.

Contrary to its own assertions regarding BCBSM's fiduciary status, the Fund's complaint acknowledges that BCBSM refused to provide the requested information in order to "retain its competitive advantage by limiting the ability of the Fund[ ] to compare its costs with alternate service providers." *Id.* at ¶ 52. BCBSM confirmed this reasoning in correspondence to the Fund, stating that "[w]e do not share provider specific charge and payment information with anyone even ... for purposes of claim and benefit analysis. We are not required to and choose not to for legitimate business reasons and we will not do so for the particular purpose of comparing or shopping the price." J.A. at 227 (Email from Jeffrey Rumley, BCBSM, to Jacqueline Kelly (Apr. 30, 2003, 08:05:00 AM)). These statements are consistent with BCBSM's position that it was acting in a business capacity, rather than as an ERISA fiduciary, when it decided not to release the information.

In addition, the ASC provides for an established audit procedure for the disclosure and monitoring of relevant claims-related information. The ASC states that "[t]he Fund, at its own expense, shall have the right

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to audit Enrollee claims ... however, audits will not occur more frequently than once every twelve (12) months and will not include claims from previously audited periods." J.A. at 174 (ASC at 6). The agreement requires that the Fund provide sixty to ninety days notice of its intent to pursue an audit, and that "[p]rior to any audit, the Fund and BCBSM must mutually agree upon any independent third party auditor ... to perform the audit." ASC at 7. The case relied upon by the Fund to show a fiduciary obligation to release accounting information on demand is distinguishable from the current dispute, as in that case the applicable agreement was "silent on the right to an audit." *Libbey-Owens-Ford Co. v. Blue Cross and Blue Shield Mut. of Ohio,* 982 F.2d 1031, 1035 (6th Cir.1993). It is not clear why the Fund sought the claims information at issue outside of the agreed-upon audit procedure; the complaint states only that the Fund "need[s] access to the Claims Records to ... properly monitor costs." J.A. at 156 (Pl.'s First Am. Compl. at ¶ 50). As mentioned previously, discretionary authority does not arise where a party was simply adhering to a bargained-for contractual provision; in such a case, a claim for breach of fiduciary duty under ERISA would not lie. *See* Seaway, 347 F.3d 619.

***7** In this case, the Fund's complaint and supporting documents indicate that BCBSM was simply adhering to the contractually agreed-upon audit procedures in refusing to release the information, and that it decided not to release the requested documents in its own business capacity rather than as a fiduciary under ERISA. Therefore, the complaint does not sufficiently allege a claim for relief under ERISA with regard to BCBSM's decision not to release the specified claims-related information in the manner requested.

CONCLUSION

For the foregoing reasons, we find that the Fund's complaint sets forth sufficient allegations that BCBSM acted as a fiduciary under ERISA in assessing and failing to disclose the OTG subsidy fees. The Fund's ERISA claim with respect to the requested claims-related information, however, is not sufficiently set forth by the allegations of the complaint and does not provide a separate basis for federal subject matter jurisdiction. Accordingly, the district court's dismissal of the Fund's claims arising from BCBSM's refusal to release claims-related information is affirmed. We reverse the district court's dismissal of the Fund's claims arising from BCBSM's imposition of the OTG subsidy fee and remand for further proceedings consistent herewith, including consideration of the status of related state law claims. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FN* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

FN1. The complaint states that the Fund intends to pursue class status on behalf of other similarly situated funds. The district court properly considered a motion to dismiss prior to considering class certification. *See* *Heckler v. Ringer,* 466 U.S. 602, 610 n. 5, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984).

FN2. ERISA defines applicable employee welfare benefits plans to include "any plan, fund, or program which ... [is] maintained by an employer or by an employee organization ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise ... medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). ERISA also covers employee pension benefit plans. *Id.* § 1002(2)(A).

FN3. The parties appear to agree that the OTG subsidy is a type of "cost transfer subsidy."

FN4. The Fund argues that "M.C.L. 550.1221 forbids entities such as [BCBSM] from imposing a cost transfer subsidy/OTG against administrative services clients such as the Plaintiff Fund." Appellant's Br. 8-9. BCBSM asserts that the OTG subsidy "is a charge required by the State Insurance Commissioner to help fund Medigap coverage for senior citizens." Appellee's Br. 5. Neither of these positions has been clearly

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established.

FN5. The district court did not specify whether it granted the motion to dismiss under Rule 12(b)(1), Rule 12(b)(6), or both.

FN6. ERISA defines "person" and "fiduciary" to include a corporation. *See* 29 U.S.C. § 1002(9).

Slip Copy, 2007 WL 128773 (6th Cir.(Mich.)), 39 Employee Benefits Cas. 2643, 2007 Fed.App. 0043N

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