UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SAGINAW CHIPPEWA INDIAN TRIBE AND ITS EMPLOYEE WELFARE PLAN,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Case No. 16-cv-10317

Honorable Thomas L. Ludington

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

Plaintiffs move to alter or amend this Court's August 7, 2020 Opinion and Order Granting Summary Judgment (ECF No. 197) and its Final Judgment (ECF No. 198) pursuant to Fed. R. Civ. P. 59(e). In support of this Motion, Plaintiffs submit and incorporate by reference the accompanying brief.

Plaintiffs have sought concurrence for the relief sought in this Motion from Defendant on August 31, 2020. Defendant refused to concur.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order granting the Motion to Alter or Amend Judgment, along with all other relief this Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: September 1, 2020

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT

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STATEMENT OF ISSUES PRESENTED

1. Whether this Court erroneously dismissed Plaintiffs' claims under Fed. R. Civ. P. 56 based on its opinion that the Medicare-Like Rate ("MLR") regulations only apply to services exclusively funded by the Tribe's CHS program when that decision was based on a factual misunderstanding about how the Tribal Member Plan was funded?

Plaintiffs' Answer:	Yes
Defendant's Answer:	No
This Court should answer:	Yes

2. Whether this Court erroneously dismissed Plaintiffs' claims under Fed. R. Civ. P. 56 based on its opinion that the MLR regulations only apply to services exclusively funded by the Tribe's CHS program when this Court's decision (1) failed to apply the plain language of the MLR regulations, instead creating an additional condition to MLR eligibility by improperly deferring to select passages on a page linked to the IHS website; and (2) declined to enforce statutory and regulatory mandates to increase health services available to tribes, instead imposing an unduly restrictive interpretation of the MLR regulations inconsistent with the Tribe's self-determined status?

Plaintiffs' Answer:	Yes
Defendant's Answer:	No
This Court should answer:	Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

In support of its Motion to Alter or Amend Judgment, Plaintiffs rely on Fed. R. Civ. P. 59(e), and the law, arguments, and authorities set forth in this Brief.

I. INTRODUCTION

This Court looked beyond the plain language of the MLR regulations, and then compounded its error by eschewing well-established rules of interpretation, to let BCBSM escape its fiduciary duties and squander tens of millions of dollars in plan assets. It wrongly tethered its decision on a debatable interpretation of "FAQs" plucked from a page linked to the IHS website. In so doing, this Court created a new condition for MLR eligibility not found in the authorizing statute or implementing regulations. The plain text of the law only requires that claims to Medicare-participating hospitals be authorized by the Tribe; eligibility does not depend on funding sources, much less the use of CHS funds only.

The regulatory text's plain meaning is what matters. And that plain meaning is concordant with (1) the purpose of the MLR regulations; (2) the federal government's trust responsibility to the Tribe; (3) applicable case law; and (4) the positions BCBSM, the Blue Cross Blue Shield Association, and other Blue Cross entities espoused prior to this litigation.

Unfortunately, this Court's ruling undermines the Indian Self-Determination and Education Act ("ISDEAA") by ignoring the Tribe's self-determined status. As a self-determined sovereign nation, the Tribe is entitled to flexibility in how it administers its federally supported healthcare program. The Tribe's decision to provide healthcare benefits to tribal members differently than the tribe in

Rancheria does not negate the Tribe's entitlement to MLR for hospital services authorized by its CHS program. This Court's decision deprives the Tribe of millions of dollars in discounts the MLR regulations expressly provide, when the purpose behind those regulations was to reverse the long history of inadequate funding for Native Americans' healthcare. By forcing an inflexible approach to eligibility for MLR discounts, this Court contravenes the Tribe's self-determined status and worsens the Native American healthcare crisis.

Finally, this Court's Opinion was based on a factual error. The Employee Plan and Tribal Member Plan were funded differently. Contrary to what this Court believed, the Tribal Member Plan and CHS program were both funded from the Government Trust, which included federal dollars from IHS and tribal funds. Thus, even under this Court's erroneous "source of funding" analysis, the claims related to the Tribal Member Plan should be reinstated.

For these reasons, this Court should reverse its prior entry of summary judgment and deny BCBSM's motion.

II. BACKGROUND

Reversing this Court's earlier dismissal of Plaintiffs' MLR claim, the Sixth Circuit held that claim was actionable under ERISA. *SCIT v. BCBSM*, 748 F. App'x 12 (6th Cir. 2018). The Sixth Circuit identified Section 136.30 of the MLR regulations as the authority underlying Plaintiffs' MLR claim. *Id.* at 22 ("The

Tribe bases its MLR claim on 42 C.F.R. § 136.30."). It then gave the text its plain meaning as requiring "Medicare-participating hospitals to accept payment for services at a rate that is no more than what those services would cost under Medicare[.]" *Id.* The Sixth Circuit identified only one condition to applicability of the aforementioned MLR regulations: "that the services are authorized by a Tribe that is carrying out a Contract Health Service ('CHS') program on behalf of the Indian Health Service ('IHS')." *Id.* (citing 42 C.F.R. 136.30(a), (b)).

Upon reinstatement of Plaintiffs' MLR claims on remand, this Court denied BCBSM's Motion to Dismiss and directed the parties to conduct discovery. *See* April 26, 2019 Opinion (ECF No. 146). This Court emphasized the importance "factual development" would have on "the merits of the Tribe's MLR claim[s]." *Id.* at PageID.7802. The parties conducted extensive discovery over ten months.

After discovery, BCBSM moved for summary judgment (ECF No. 173). Among other so-called "defenses," BCBSM asserted Plaintiffs' claims were barred for failing to meet what it argued were MLR prerequisites. *See id.* at PageID.8910-11. BCBSM argued hospitals are only required to accept MLR rates when services are "purchased by a CHS program," but it did not tie that argument to the plain language of the MLR regulations. *Id.* at PageID.8897.

Plaintiffs' response quoted and analyzed the MLR regulations (ECF No. 177, PageID.10829-31, 10845), noting how they unambiguously contained only one

condition to eligibility: authorization of the hospital services by the Tribe's CHS program.[1] *Id.* at PageID.10830-31, 10845. The plain language of the regulations includes no requirement that payment be made with IHS funds. *See id.*

Without oral argument, this Court granted BCBSM's motion and entered judgment in its favor on Plaintiffs' claims (ECF Nos. 197, 198). Although this Court had emphasized the importance factual development, its summary judgment decision dismissed the entire case "on the purely legal question of the applicability of MLR[.]" (ECF No. 197, PageID.12656). And although the Sixth Circuit previously stated only one condition exists for applicability of MLR, this Court created an additional condition found nowhere in the regulations: exclusive CHS funding. *Id.* at PageID.12655.

This Court's opinion was based on two grounds: (1) an interpretation of a few passages of an "FAQ" page BCBSM unearthed from a link on an IHS website; and (2) certain facts (not holdings) in an out-of-circuit case concerning how another self-determined tribe structured its CHS program. *Id.* at PageID.12651-12655. This Court's decision is based on clear errors of law and fact; therefore, it should be altered or amended.

[1] BCBSM does not challenge the fact that the claims were authorized by the Tribe's CHS program.

III. LAW AND ARGUMENT

A. LEGAL STANDARDS

"A court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005) (citing *GenCorp, Inc. v. Am. In'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). "The purpose of Rule 59(e) is 'to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings.'" *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (citation omitted).

B. THIS COURT'S DECISION WAS BASED ON A FACTUAL ERROR REGARDING THE FUNDING OF THE TRIBAL MEMBER PLAN.

This Court assumed, incorrectly, that the Tribal Member Plan is funded in the same manner as the Employee Plan. Thus, it only analyzed the funding of the Employee Plan and ignored the Member Plan's funding source, which is different than the Employee Plan's funding source (ECF No. 197, PageID.12649).[2]

This Court previously found – *twice* – that the Employee Plan and Tribal Member Plan are funded from different sources. *See* July 14, 2017 Opinion (Doc

[2] Previously, this Court ruled that "the Member Plan and the Employer Plan should be analyzed separately . . . ." July 14, 2017 Opinion, (Doc # 112, PgID.6214). Moreover, "the fact that the Tribe created an . . . Employee Plan does not convert the Member Plan into [the Employee Plan]." *Id.* at PgID.6213.

#112, PgID.6203) ("The two groups are also funded from different sources."); April 19, 2016 Opinion (ECF No. 146, PageID.7787) (same). This Court's most recent opinion incorrectly assumed the funding of the two plans was the same.

During the relevant time period, the Employee Plan funds were held in the Fringe Internal Service Fund; in contrast, the Tribal Member Plan's assets were held in the Government Trust (subsequently the Gaming Trust). July 14, 2017 Opinion, (Doc # 112, PgID.6203) ("The Member Plan was originally funded by the Tribe's Government Trust and is currently funded by the Gaming Trust."); April 19, 2016 Opinion (ECF No. 146, PgID.7787) (same). CHS funds were also held in the Government Trust during the relevant time period. Reger Dep., **Exhibit 1**, at 21-24 (tribal and IHS monies funding CHS program kept in Government Trust of Wells Fargo bank account). CHS funds and Tribal Member Plan funds were held in the same trust and same bank account:

> Q . . . . Is there any difference in terms of where the funds are actually stored in terms of an account for CHS dollars as opposed to other Tribal Supplement dollars?
>
> A No.
>
> Q Those Tribal Supplement dollars used to fund the Nimkee Clinic and the Behavioral Health. Those are not from the gaming trust or the fringe trust that we have previously talked about today though, correct?
>
> A Correct.

Id. at 23:14-24:02.

If funding sources matter for MLR eligibility, the judgment must be altered or amended. The Tribe's claims against BCBSM are primarily for funds BCBSM squandered from the Tribal Member Plan's assets.[3] Rule 56 requires all facts to be construed in the light most favorable to Plaintiffs as the nonmoving party. *Richko v. Wayne County*, 819 F.3d 907, 914 (6th Cir. 2016) (a court must "review all facts and draw[] all reasonable inferences in favor of the nonmoving party"). This clear error requires reinstatement of the claims related to the Tribal Member Plan to prevent manifest injustice.

C. THIS COURT'S DECISION CONTAINS CLEAR ERRORS OF LAW

This Court also made clear legal errors requiring reinstatement of Plaintiffs' claims. Those clear legal errors fall into two categories: (1) this Court ignored the plain language of the MLR regulations, instead creating a new condition to MLR eligibility based on select passages on an "FAQ" page linked to the IHS website; and (2) by taking an unduly restrictive reading of the MLR regulations in contravention of the Tribe's self-determined status, this Court failed to enforce statutory and regulatory mandates designed to increase health services available to tribes.

[3] This Court earlier noted "[t]he vast majority of participants in the Member Plan are not Tribe employees." July 14, 2017 Opinion, (Doc # 112, PgID 6224).

1. This Court's Decision Ignored the Plain Language of the MLR Regulations and Created a New Condition to MLR Eligibility Based on "FAQs" of Dubious Reliability.

a. The plain language of the MLR regulations requires an interpretation in favor or Plaintiffs, not BCBSM.

"The starting point in interpreting a statute [or regulation] is its language." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). This Court did not follow the plain language of the MLR regulations, 42 C.F.R. § 136.1, *et seq*.

The MLR regulations are unambiguous: MLR payment methodology "applies to all levels of care furnished by a Medicare-participating hospital . . . authorized by a Tribe or Tribal organization carrying out a CHS program of the IHS under the Indian Self-Determination and Education Assistance Act . . . ." 42 C.F.R. § 136.30(b). Accordingly, the only requirements for MLR to apply to healthcare services are: (1) authorization by a Tribe or Tribal organization carrying out a CHS program; and (2) the healthcare provider's participation in Medicare. *See id.* Because the MLR regulation's language is clear and unambiguous, the plain and ordinary meaning of that language "should also be the ending point" of the inquiry. *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011) (citation and internal quotation marks omitted).

This is how the Sixth Circuit set forth the MLR regulations' requirements: "42 C.F.R. § 136.30 . . . requires Medicare-participating hospitals to accept payment for services at a rate that is no more than what those services would cost

under Medicare, provided that the services are authorized by a Tribe that is carrying out a Contract Health Service ('CHS') program on behalf of the Indian Health Service ('IHS')." *SCIT v. BCBSM*, 748 F. App'x 12, 20 (6th Cir. 2018) (emphasis added). The Sixth Circuit did not add to the plain language of the MLR regulations and require "CHS funding for the entire amount of the services."

This Court's decision conflicts with the Eastern District of Michigan's prior published decision in *Little River Band v. BCBSM*, 183 F. Supp. 3d 835 (2016), where the court rejected BCBSM's identical position. In *Little River Band*, the court analyzed the plain language of the "governing [MLR] regulations" and anchored its holding (rejecting BCBSM's argument) to the regulations' text. *Id.* at 842-44. The court in *Little River Band* interpreted the MLR regulations' text to "plainly require that payments be capped at 'Medicare-Like Rates' for *all* qualifying services, regardless of the source of funds, as long as the services were authorized by the rules of the federally-funded Indian Health Services 'Direct Care' or 'Contract Health Services' programs." *Id.*

This Court adopted BCBSM's suggestion that an additional condition be recognized, one that requires healthcare services to be funded entirely by CHS dollars. August 7, 2020 Opinion, (ECF No. 197, PageID.12655). No such requirement exists in the regulations. *See generally* 42 C.F.R. § 136.1, *et seq.* Inventing a new requirement is clear error. *See Douglas*, 634 F.3d at 858; *see also*

Watkins v. Brown, 173 F. Supp. 2d 409, 414 (D. Md. 2001) ("[W]here the language is clear and unambiguous, a court may not add or delete words to make a statute reflect an intent not evidenced in that language.").[4]

b. This Court failed to follow recognized tools of statutory and regulatory construction.

Unambiguous language requires no interpretation. To go beyond the plain text of the MLR regulations, this Court first should have identified an ambiguity. *See Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1106 (6th Cir. 2010) ("In matters of statutory interpretation, we look first to the text and, if the meaning of the language is plain, then 'the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)). This Court found no ambiguity. *See generally* August 7, 2020 Opinion (ECF No. 197). But

[4] BCBSM tried to anchor its arguments to fragments of statutory and regulatory text, albeit not until its Reply Brief (ECF No. 178, PageID.12131-12132). However, the provisions BCBSM cited do not impose a CHS-only funding requirement. For example, 42 U.S.C. § 1395cc(a)(1)(U)(i) merely speaks to the requirement that a healthcare facility be a participating provider "under the contract health services program funded by [IHS] . . . ." That regulation says nothing about CHS program payment, much less imposes a CHS-only payment regimen. *See id.* BCBSM also discussed provisions in 42 C.F.R. § 136 referencing "I/T/Us" (ECF No. 178, PageID.2132). "I/T/U" stands for IHS, an Indian Tribe, or an urban Indian organization, not a CHS program as BCBSM apparently believes. *See* 42 C.F.R. 136.30(b). Accordingly, to the extent those provisions require authorization or payment by an I/T/U, they support Plaintiffs' position because all services were paid out of the Tribe's assets, funded (in part) by IHS funds.

even if it had, this Court should have employed established tools of textual construction to resolve any such ambiguity. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction.").

Of particular applicability in this case, any ambiguity involving statutory or regulatory text affecting Indian affairs must be resolved in favor of protecting tribal interests. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). In other words, "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Id.* Thus, any statutory or regulatory ambiguity should have been resolved in Plaintiffs' favor and for its benefit; *adding* conditions for MLR eligibility not found in the regulations did just the opposite.[5] *See Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (the canon of construction in favor of Indians is a "directive to favor tribes"). This Court's creation of a new eligibility condition that diminished the Tribe's legal rights was a clear error of law. *See Bay Mills Indian Cmty. v. Whitmer*, 794 F. App'x 485, 488 (6th Cir. 2019) (reversing district court's summary judgment grant in part because "the district court should [have] consider[ed] the proper interpretation of [the statute] as a whole and in context.").

[5] The canon of construction favoring American Indian tribes "controls over more general rules of deference to an agency's interpretation of an ambiguous statute." *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011).

c. This Court's decision improperly deferred to snippets of FAQs plucked from a page linked to IHS's website.

This Court's Opinion relies heavily on "FAQs" found on a page linked to the IHS's website (ECF No. 197, PageID.12652). Where statutory or regulatory language is clear and unambiguous as a "threshold matter," this Court must apply the plain language and end its inquiry. *See Tennessee Hosp. Assoc. v. Azar*, 908 F.3d 1029, 1044 (6th Cir. 2018) ("If the regulation is not ambiguous, the court must forego deference and apply the plain language of the regulation as written."). No FAQs can be considered (much less deferred to) in such a case. *See id.* (deference to agency guidance "unwarranted" where the regulation was unambiguous).[6]

Along those lines, the United States Supreme Court recently emphasized there is "no plausible reason for deference" to agency statements where the regulation's language is clear; instead, the "the court must give [the regulation] effect." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (emphasis added). "A court has no business deferring to any other reading" where the regulation's plain language is clear. *Id.* Doing otherwise permits the opposing party or agency

[6] Previously in this litigation, this Court applied this principle in refusing to defer to the Department of Labor's position concerning interpretation of ERISA on the grounds that it was "at odds with the clear language" of the statutory section at issue there, namely 29 U.S.C. § 1002(1). *See* July 14, 2017 Opinion, (ECF No. 112, PageID.6224).

"under the guise of interpreting a regulation, to create de facto a new regulation." *Id.* Yet that is exactly what this Court did. It created a *de facto* new regulation by requiring an "exclusive CHS funding" condition for MLR eligibility. *See* August 7, 2020 Opinion (ECF No. 197, PageID.12655) ("MLR is only applicable to those services funded by CHS.").

The Sixth Circuit, in a unanimous *en banc* ruling reversing a prior panel decision, recently reaffirmed this fundamental principle that agency commentary cannot expand statutory or regulatory provisions. *See United States v. Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc) (per curiam) ("The Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference. The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses."). Notably, the Sixth Circuit's ruling in *Havis* involved the United States Sentencing Commission's authoritative Guidelines, not mere FAQs linked to an agency's web page.

This Court compounded its error by deferring to BCBSM's interpretation of the FAQs.[7] Interpretations in informal agency materials such as FAQs are entitled to deference "only to the extent that [they] have the power to persuade."

[7] As noted above, BCBSM analyzed the FAQs for the first time in its Reply Brief (ECF No. 178, PageID.12134). Because this Court did not hold oral argument, Plaintiffs lacked an opportunity to rebut BCBSM's faulty analysis before this submission.

Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000). To be assigned any weight, there must be "thoroughness evident in [the agency's] consideration" and its reasoning must be valid. *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006). BCBSM's interpretation of the FAQs reflects the opposite of reasoned consideration because it flies in the face of Congress' intentions.

But that is not all. No evidence suggests the FAQs at issue are IHS's words, much less its formal position (ECF No. 173-27, PageID.9274-9285). The FAQs' title contains an acknowledgement to the California Rural Indian Health Board for "developing this document," which suggests IHS did not write the passages. *Id.* at PageID.9274. There is no indication IHS agrees with or endorses BCBSM's interpretation (ECF No. 197, PageID.12651), making reliance upon them error. *See OfficeMax, Inc. v. U.S.*, 428 F.3d 583, 598 (6th Cir. 2005) ("*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted.")

The Sixth Circuit previously declined to defer to informal agency guidance even when the agency filed an amicus brief proffering its position. *See Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 928-29 (6th Cir. 2014) (disregarding agency interpretation of ERISA expressed in amicus brief).

Furthermore, the ISDEAA expressly exempts tribal contractors (like the Tribe) from being bound by IHS guidance unless they specifically agree to it. *See*

25 U.S.C. § 5329(c) (Title I model agreement, at Sec. 1(b)(11)) ("Except as specifically provided in the [ISDEAA] (25 U.S.C. § 450 *et seq.*) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law."); 25 U.S.C. § 458aaa-16e (Title V). Here the Tribe does not agree with this Court's formulation of IHS's so-called "policy."

Consistent with the foregoing, BCBSM's reading of the FAQs clashes with the plain language of the MLR regulations. That reading also undermines the policies and purpose of the ISDEAA, IHCIA, and the American Indian provisions of the ACA.

Ironically, BCBSM's reading of the FAQs contradicts its own prior position. The sincerity of BCBSM's interpretation of passages from a document apparently drafted by the California Rural Indian Health Board is belied by the fact that the Association to which it belongs promulgated policies that say otherwise. The Blue Cross Blue Shield Association's policy for member companies (including BCBSM) says authorization (not payment) by a tribe's CHS program is the only condition for application of MLR pricing to claims for services rendered by a Medicare-participating facility to a Native American member (ECF No. 177, PageID.10832-33; ECF No. 177-9, PageID.11210-11219; ECF No. 117-10, PageID.11220-11227). Moreover, BCBSM repeatedly admitted that MLR pricing methodology

applies to the Tribe's claims at issue in this lawsuit (ECF No. 177, PageID.10835-10843); see also ECF No. 176-31, PageID.11699) ("[T]he non-employed tribal groups (CHS – Contract Health Services) are unquestionably entitled to Medicare-like rates and act as the tribes insurer of last resort . . . .") (emphasis added). And BCBS of Minnesota, BCBSM's partner in researching the MLR question, interpreted the regulations to mean "ALL members are entitled to MLR whether they have other coverage or not." (ECF No. 176-29, PageID.11695) (emphasis added). This Court ignored these facts related to the MLR regulations' meaning. See August 7, 2020 Opinion (ECF No. 197).

The facts outlined in the previous paragraph were uncovered because this Court directed the parties to conduct discovery when it denied BCBSM's prior motion to dismiss. *See* April 26, 2019 Opinion, (ECF No. 146, PageID.7802). This Court previously acknowledged that "further factual development of the merits of the Tribe's MLR claim[s] must occur" before ruling on the issues, yet it ignored the important facts unearthed during the discovery period.

2. <u>This Court's decision undermines the purpose of increasing healthcare services available to tribal members and subverts the Tribe's self-determined status.</u>

This Court's new condition for MLR eligibility is inconsistent with Congress' intent to expand tribal access to federal resources, programs, and

benefits; and it subverts the Tribe's self-determined status, expressly conferred on the Tribe by the federal government pursuant to the ISDEAA.

a. This Court's decision contradicts the purpose of the authorizing statutes and implementing regulations.

This Court rationalized its decision by adopting BCBSM's theory that the statutory framework was designed to "conserve IHS funds." August 7, 2020 Opinion, (ECF No. 197, PageID.12655). That is wrong. The statutory text plainly says the opposite. *See Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 338 (6th Cir. 2014) ("A court must discern the purpose of a law chiefly from its words" (citation and quotation marks omitted)).

The statutes authorizing the MLR regulations are the Snyder Act, 25 U.S.C. § 13, and the Transfer Act of 1954, 42 U.S.C. § 2001 (ECF No. 197, PageID.12645-12646). The Snyder Act actually expressed the purpose of spending federal funds for Indian healthcare needs: the administering agency "shall . . . expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes: . . . . For relief of distress and conservation of health . . . ." 25 U.S.C. § 13 (emphasis added); *see also Navajo Nation v. Dep't of Health & Human Servs., Sec'y*, 325 F.3d 1133, 1138 (9th Cir. 2003) ("[T]he Snyder Act is directed solely to Indian welfare."). The Transfer Act transferred these responsibilities to the federal government. *See* 42 U.S.C. § 2001(b) (transferring "the maintenance

and operation of hospital and health facilities for Indians . . . to . . . the United States Public Health Service.").

Several related statutory provisions also contradict this Court's view of legislative "purpose." In the American Indian provisions of the Affordable Care Act, Congress specifically authorized tribes to provide health coverage to their members using federal funds, including CHS funds, through self-insured plans. *See* 25 U.S.C. § 1642. This Court's interpretation of the MLR regulations disqualifies from MLR eligibility hospital services provided to an individual covered under a self-insured plan funded in part by CHS dollars. August 7, 2020 Opinion, (ECF No. 197, PageID.12655). Congress wanted to encourage tribes to leverage federal program dollars, not disqualify them from assistance by including some of their own resources to enhance healthcare benefits. *See* 25 U.S.C. § 1642.

This Court's decision also undermines the IHCIA, which governs reimbursements from third-party payors such as Medicare, Medicaid, and private insurance (among other things). *See* 25 U.S.C. § 1602. The IHCIA was enacted to "implement the Federal responsibility for the care and education of the Indian people by improving the services and facilities of Federal Indian health programs and encouraging the maximum participation of Indians in such programs, and for other purposes." Pub. L. No. 94-437 pmbl, as amended and reauthorized by § 10221, Pub. L. No. 111-148 (March 23, 2010) (emphasis added). Among other

things, it was designed to address "insufficient services in such areas as laboratory, hospital inpatient and outpatient, eye care and mental health services, and services available through contracts with private physicians, clinics, and agencies." 25 U.S.C. § 1601(f). The IHCIA's mandate to encourage maximum participation of tribes in healthcare programs renders untenable the notion that MLR eligibility requires a funding scheme found nowhere in the statute and regulations.

b. This Court's decision subverts the Tribe's self-governed and self-determined status.

This Court failed to properly consider the statutory and regulatory text concerning the Tribe's self-determination and self-government rights. There is a "federal policy of Native American self-determination." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997). "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in th[e] area [of Indian affairs] cautions that [courts] tread lightly in the absence of clear indications of legislative intent." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

Although this Court noted the Tribe's CHS program and IHS funding originate from the ISDEAA, it failed to note that "Congress' stated purpose in enacting the ISDEAA was to increase Indian tribal autonomy in running federally administered programs." *Solomon v. Interior Reg'l Hous. Auth.*, 313 F.3d 1194, 1199 (9th Cir. 2002) (emphasis added). The ISDEAA authorizes self-determined tribes to not only “administer,” but also “redesign” services taken over from IHS

administration and "rebudget" funds to target their communities' specific healthcare needs. 25 U.S.C. §§ 5321(a)(1); 5324(j); 5325(o) (providing tribes with right to contract for funds and responsibilities for programs, redesign programs, and reallocate funds awarded in a contract).

This Court's decision gave short shrift to the Tribe's self-governed and self-determined status, in contrast to its previous recognition that the Tribe's Member Plan was created "in the Tribe's capacity as a sovereign." July 14, 2017 Opinion, (Doc # 112, Pg ID 6222). The Tribe's sovereign and self-determined status is critical to interpreting the statutory and regulatory frameworks at issue.[8] *See Merrion*, 455 U.S. at 149 (requiring courts to interpret statutes with a "proper respect" for "tribal sovereignty"). "As a statutory initiative, self-governance (1) expands the types of programs and responsibilities that participating tribes can take over; (2) places greater emphasis on minimizing oversight by federal agencies; and (3) maximizes flexibility for tribes to redesign programs and reallocate resources in their agreements." Strommer & Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. IND. L. REV. 1, 31 (2014).

[8] Not all tribes have self-determination rights under the ISDEAA, and some that do have such rights nevertheless choose not to administer a CHS program for their members.

c. The *Rancheria* opinion is premised on tribal self-determination and fully supports Plaintiffs' position.

This Court's opinion relied heavily on BCBSM's misreading of facts (not holdings) from a single, out-of-circuit case: *Rancheria v. Hargan*, 296 F. Supp. 3d 256 (D.D.C. 2017). *See* August 7, 2020 Opinion, (ECF No. 197, PageID.12652-12655). But *Rancheria*'s facts and holdings actually support Plaintiffs' position.

Like the Tribe's attempt to hold BCBSM accountable for squandering the Tribe's self-insured plan assets, *Rancheria* addressed "the Redding Tribe's attempt to create a tribally-funded self-insurance program and coordinate its benefits with those available from the Indian Health Service to make efficient use of all available services." *Rancheria*, 296 F. Supp. 3d at 260. While BCBSM bilked the Tribe out of MLR, the IHS in *Rancheria* repeatedly refused to grant that tribe's reimbursement requests. *Id.*

Both BCBSM here and IHS in *Rancheria* disputed "the legitimacy of the Tribe's coordination of federal benefits with its self-insurance program" under federal IHS regulations. *Id.* at 260. Almost identical to BCBSM's position on MLR discounts here, "IHS took the position that the CHEF applications could not be processed because CHEF cannot reimburse payments to a tribal self-insurance plan, but can only reimburse valid CHS payments." *Id.* at 262; *see also id.* at 263, 268 ("IHS contends that the definitions inevitably rob a tribe's self-insurance program of similar status [under the statute] as self insurance is neither funded nor

administered by IHS.") (emphasis added). The *Rancheria* tribe's position, like the Tribe here, was that no "statutory or regulatory requirement" supported the defendant's position. *Id.*

The *Rancheria* court's holding sided with the tribe. *Id.* at 274. That court "first determine[d] whether Congress ha[d] specifically spoken to the question at issue, in other words, whether the statutory text is plain and unambiguous." *Id.* at 265. It then rejected IHS's interpretation of various statutory and regulatory provisions (including CHS regulations) as "inconsistent with a plain reading of the statue and congressional intent." *Id.* at 260, 268, 272. The *Rancheria* court adopted an interpretation "favoring the Tribe" under "the canon that statutes are to be construed liberally in favor of the Indians." *Id.* at 266 (emphasis added) (citation and quotation marks omitted). The court based its holding on "principles of statutory interpretation" and "statutory text and purpose," *id.* at 272, not the nature of the tribe's "insurance policy" as this Court apparently believed. *See* August 7, 2020 Opinion, (ECF No. 197, PageID.12654-12655) ("[t]he tribe's insurance policy in *Rancheria* is not legal authority but . . . supports a finding that the use of CHS funds are necessary to obtain MLR.").

Self-determined status (as granted by the ISDEAA) gives tribes flexibility to spend appropriated funds on pressing local health concerns and needs. *See* S. Rep. No. 100-274, at 1 (1987) *reprinted in* 1988 U.S.C.C.A.N. 2620, 2620-21 (noting

Congress's policy of allowing tribes to assume control over service delivery of federally funded programs); *see also* Declaration of Jacqueline Reger (ECF No. 97-7, PageID.5830) (Tribe has complete discretion on how to spend funds). This Court's view that the authorizing statutes and MLR regulations prescribe one exact way to administer a healthcare plan to qualify for MLR discounts (the *Rancheria* tribe model) flies in the face of the Supreme Court's admonition that "courts [should] not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). This Court should not have endorsed BCBSM's interpretation of the MLR regulations, which undermines the Tribe's authority to design and maintain its own healthcare plan and programs. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978) (declining to add statutory language to Indian Civil Rights Act because it would "undermine the authority" of tribal self-government and "impose serious financial burdens on already financially disadvantaged tribes." (citation and quotation marks omitted)).

Far from supporting this Court's decision, the *Rancheria* decision actually undermines BCBSM's position and supports reversal of this Court's ruling.

IV. CONCLUSION

This Court's August 7, 2020 Opinion and Order should be amended or altered, and BCBSM's Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted,

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Dated: September 1, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2020 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

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