UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, and ITS WELFARE BENEFIT PLAN,	
Plaintiffs,	Case No. 1:16-cv-10317-TLL-PTM
v.	Honorable Thomas L. Ludington
BLUE CROSS BLUE SHIELD OF MICHIGAN,	Magistrate Judge Patricia T. Morris
Defendant.	

BCBSM'S RESPONSE BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

COUNTER-STATEMENT OF THE ISSUE

Did the Court properly determine that "MLR is only applicable for those services funded by CHS," and that because "BCBSM was not authorized nor did it pay for services using funds from CHS . . . MLR was not applicable to BCBSM's payments to medical providers"?

BCBSM answers "Yes"

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Fed. R. Civ. P. 59(e)
- 42 C.F.R. § 136.30
- 42 C.F.R. § 136.21(e)
- 42 C.F.R. § 489.29
- *Rancheria v. Hargan*, 296 F.Supp.3d 256 (D.D.C. 2017)

I. INTRODUCTION

Plaintiffs' Motion to Alter or Amend Judgment ("Motion") does not present any newly discovered evidence, nor does it establish a clear error of law. To the contrary, in falsely insinuating—but not directly stating—that CHS funds were used to pay Member Plan claims, Plaintiffs endeavor to create a question of fact about whether MLR should have applied to the Member Plan. Plaintiffs already conceded in this litigation, however, that BCBSM was not a fiduciary over the Tribe's CHS funds. That alone ends the inquiry. But moreover, Plaintiffs cite to evidence that was *always* available to Plaintiffs—namely, the 2019 deposition of Ms. Jacqueline Reger, who is a 25-year employee of the Tribe. Nothing here is "newly discovered," which Rule 59 requires. Regardless, as explained in this brief, Ms. Reger's testimony changes nothing.

Plaintiffs also call into question this Court's interpretation of the MLR legislation and corresponding regulations, but nothing raised by Plaintiffs establishes a clear error of law. Plaintiffs are simply re-arguing their case, which is impermissible. Besides that, this Court got it right when it held that MLR is only applicable when CHS funds actually are used to pay for the services.

For these reasons, as well as for the reasons further provided below, Plaintiffs' Motion should be denied in its entirety.

II. ARGUMENT

A. Rule 59(e) Standard

Under Rule 59(e), a court may alter a prior judgment based on: "(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." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (citing *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)).

Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5 (2008); *Michigan Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017) ("A motion under Rule 59(e) is not an opportunity to re-argue a case"); *Leisure Caviar, LLC*, 616 F.3d at 616 ("[a] plaintiff cannot use a Rule 59 motion . . . to raise arguments which could, and should, have been made before judgment issued") (internal quotations omitted).

B. The Court Did Not Commit A Factual Error Regarding The Member Plan And Its Funding

Critically, Plaintiffs conceded in their summary judgment papers that, regardless of the plan (Member or Employee), "BCBSM was not a fiduciary over

the Tribe's CHS funds." ECF No. 175 at 26.[1] Plaintiffs made that concession because: (a) BCBSM never had access to CHS funds; and (b) CHS funds were never used to pay for claims processed by BCBSM. Indeed, during discovery, Plaintiffs admitted "that the funds provided by IHS for the funding of SCIT's PRC/CHS program are held in an account *separate from* the account used to fund the Plans [*i.e.,* the Employee Plan and the Member Plan]." Plfs' Resp. to RFA No. 2, ECF No. 163-3, PgID.8576 (emphasis added). And like IHS funds, "the Tribal Supplement money that [also] goes to fund the CHS Department . . . is . . . not from the fringe [trust that funds the Employee Plan] or the gaming trust [that funds the Member Plan]." 2019 Reger Dep., **Ex. 1**, at 33:7-10, 24; ECF No. 112, pgs. 4-5. Once a fact is admitted, a party may not later submit contradictory testimony. *Peck v. Bridgeport Machines, Inc.,* 237 F.3d 614, 619 (6th Cir. 2001) (striking affidavit as inadmissible for purposes of creating an issue of fact at summary judgment because it contradicted earlier deposition testimony).

So that there would be no question, counsel for BCBSM secured the following testimony from the Tribe's Controller, Ms. Jacqueline Reger,[2] who made

[1] CHS funds include both IHS funds and funds provided by the Tribe itself (a/k/a Tribal Supplement dollars). 2019 Reger Dep., **Exhibit 1**, 14:5-8.

[2] Ms. Reger is a 25-plus year employee of the Tribe, having been the Tribe's Controller for 15-plus years. 2017 Reger Dep, **Exhibit 2**, at 7:15-8:17.

it clear that CHS funds had nothing to do with BCBSM and either the Employee or Member Plans:

> Q. And you say you're not a Tribal member. So the PRC program or the CHS program only applies to Tribal members, in your understanding?
>
> A. To the best of my knowledge.
>
> Q. And you said you only have knowledge as to the funding aspect because of course you -- that is your role as Tribal controller, correct?
>
> A. Correct.
>
> Q. And with respect to that funding, the funding is both through the IHS and through Tribal Supplement dollars, correct?
>
> A. Yes.
>
> Q. Is there any other funding for the CHS Department that we haven't talked about today?
>
> A. Not to my knowledge.
>
> ***
>
> Q. And, again, to your knowledge as the Tribal controller and in that context, . . . was there any intersection in terms of budgeting, funding or other financial aspects between the Tribe's *employee* healthcare benefit plan when it was through Blue Cross/Blue Shield, and the Tribe's PRC Department?
>
> A. No.

> Q. And last question on this line, but, to your knowledge, as a Tribal controller, was there, when Blue Cross administered the Tribe's *member* healthcare benefit plan, any intersection in terms of the budgeting, the funding, or any other financial aspect, between that member healthcare benefit plan and the Tribe's PRC program?
>
> A. No.
>
> Q. Would Blue Cross ever have had access to the money used to fund the PRC Department?
>
> A. No.

Ex. 1 at 32:9-33:4; 61:3-62:2 (emphasis added).

Given this inescapable reality, this Court recognized the obvious: that "Plaintiffs d[id] not dispute BCBSM's assertion that none of the claims paid by BCBSM were paid by or through the Tribe's CHS program," and that "BCBSM was not authorized nor did it pay for services using funds from CHS." ECF No. 197 at 16, 21.

Plaintiffs now seek to backpedal, claiming that CHS funds were held together with Member Plan funds, thereby insinuating that CHS funds were used to pay for Member Plan claims processed by BCBSM. As ostensible support, Plaintiffs note that the Government Trust originally funded the Member Plan (before Plaintiffs switched its funding to the Gaming Trust), and then claim that "CHS funds were also held in the Government Trust." ECF No. 199, pg. 6. Plaintiffs' insinuation is simply not true, and this Court will note that Plaintiffs

stop immediately short of actually stating that CHS funds were used to pay for Member Plan claims. That's because it never happened.

The Government Trust is indisputably comprised of multiple accounts. 2017 Reger Dep, **Ex. 2**, at 35:24-36:2 ("The Government Trust is the oversight of *all of the bank accounts* that have to do with the governmental entity.") (emphasis added). So, even if CHS funds (either IHS or Tribal Supplement) were held in an account within the Government Trust, as Plaintiffs *claim* Ms. Reger testified, that does not mean *ipso facto* that CHS funds were used to fund the Member Plan. *Accord* 2019 Reger Dep., **Ex. 1**, at 21:7-10, 23-25 ("the government trust is the actual investment *portfolio* that holds the dollars on behalf of all Tribal programming," "so there's multiple accounts that all roll into [it].") (emphasis added). Plaintiffs have certainly not provided any evidence of CHS funds actually being used to fund the Member Plan.

On the contrary, Ms. Reger confirmed that BCBSM never "would . . . have had access to the money used to fund the PRC Department." 2019 Reger Dep., **Ex. 1**, 61:25-62:2. That undisputed testimony, coupled with Plaintiffs' concession that "BCBSM was not a fiduciary over the Tribe's CHS funds" (ECF No. 175, pg. 26), shows that this Court made no mistake in concluding that "BCBSM was not

authorized nor did it pay for services using funds from CHS," and that "BCBSM did not have the authority to distribute CHS funds." ECF No. 197 at 14, 21.[3]

C. The Court Did Not Commit A Legal Error When Interpreting The MLR Regulations

Nor did the Court commit any "legal errors" in analyzing the MLR regulations. The parties argued very extensively during the summary judgment proceedings about what does and does not qualify for MLR, expending approximately 20 pages on the topic. ECF No. 173, pgs. 5, 18-23; ECF No. 175, pgs. 2-6, 19-25; ECF No. 178, pgs. 1-6. This Court then properly concluded that "only services funded by the Tribe's CHS program qualified for MLR." ECF No. 197, pg. 21.

Plaintiffs now argue that this Court committed legal error in reaching that conclusion (ECF No. 199, pgs. 7-23), but they are both wrong and improperly using their Rule 59(e) motion "to relitigate old matters, [and] to raise arguments . .

[3] Plaintiffs' Motion should also be denied because nothing raised qualifies as "newly discovered evidence" within Rule 59(e), which requires the evidence to have been previously unavailable. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Obviously the evidence ostensibly now relied upon by Plaintiffs was *always* available—Ms. Reger has been an employee of the Tribe for over two decades, and she was deposed twice in this case, in 2017 and in 2019. Nothing about her testimony is new (and her testimony does not change anything regardless). Furthermore, Plaintiffs were well aware of Ms. Reger's testimony because BCBSM cited to both of her depositions in their summary judgment briefing. ECF Nos. 173-4, 173-5. Plaintiffs nonetheless chose not to cite her testimony when they had the opportunity to do so. They did, however, have Ms. Reger sign a declaration in support of a different issue in their response brief opposing summary judgment. ECF No. 177-54.

. that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5 (2008). In any event, Plaintiffs' assertions fail for a number of reasons.

First, the Sixth Circuit did not decide whether CHS funds must be used in order for claims to be eligible for MLR. Rather, the Sixth Circuit only recognized that "[t]he Tribe bases its MLR claim on 42 C.F.R. § 136.30," and then left completely undecided whether Plaintiffs could prove their claim:

> These regulations, BCBSM contends, apply only to the expenditure of IHS funds and do not limit the payment that hospitals must accept from a third-party payor, such as BCBSM, which is not expending IHS funds. Although BCBSM asserts that the Tribe's MLR claim therefore fails as a matter of law, *BCBSM's argument is better understood as contending that the Tribe cannot show, as a factual matter, that the regulations apply to its ERISA plan*. But since the Tribe has alleged that . . . BCBSM failed to ensure that the Tribe paid no more than MLR for *MLR-eligible services*, and that all other conditions precedent to the MLR claim were met, the Tribe has sufficiently pleaded that the MLR regulations are applicable to BCBSM's administration of the Tribe's ERISA plan. ***We emphasize that we express no opinion on the ultimate merits of the Tribe's MLR claim, and we hold only that it would be premature to dismiss the Tribe's claim at this stage of the proceedings.*** [*SCIT v. BCBSM*, 748 Fed. Appx. 12, 21-22 (6th Cir. 2018) (emphasis added).]

Plaintiffs are thus wholly mistaken when they assert that "the Sixth Circuit set forth the MLR regulations' requirements" and "previously stated only one condition exists for applicability of MLR." ECF No. 199, pgs. 4, 8-9. The Sixth

Circuit did no such thing, and this Court did not in any way "create[] an additional condition found nowhere in the regulations." *Id.* at pg. 4.

Second, Plaintiffs still do not reconcile their position with the fact that the MLR regulations require coordination of benefits with third-party payers (like BCBSM), such that a CHS program's payment "will not exceed" MLR. 42 C.F.R. § 136.30(g). If Plaintiffs were indeed correct that MLR applies regardless of the source of funds, then the coordination provisions that define when a payment "will not exceed" MLR would be impermissibly superfluous. *Id.* Put another way, if a third-party payer must pay first, and at no more than MLR, then there would be no need to require coordination so that a CHS program's payment (the payer of last resort) "will not exceed" MLR because the payment by the third-party payer would already, and every time, "not exceed" MLR. These regulations "cannot be construed in a vacuum," *Davis v. Michigan Dept. of Treas.*, 489 U.S. 803, 809 (1989), or in a way that renders parts of them redundant. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007).[4]

[4] Plaintiffs also ignore the title of 42 C.F.R. § 136.30, referring to payments for "authorized Contract Health Services[,]" which the regulations define as "health services provided *at the expense of the [IHS]* from . . . hospital facilities." 42 C.F.R. § 136.21(e) (emphasis added). In the same way, Plaintiffs ignore 42 C.F.R. § 489.29, under which hospitals are only required to "accept [MLR] . . . as payment in full *for . . . [a] CHS program*." (Emphasis added). Section 489.29 not require hospitals to accept MLR from non-CHS payers like BCBSM—yet another indication that the regulations do not contemplate a wholesale application of MLR regardless of payment source.

Third, Plaintiffs' position that MLR applies to all payers is contrary to the intent of the legislation and regulations, which is to conserve CHS funds, *not the funds of third-party payers*. ECF No. 178, pg. 2. This Court thus recognized that, if Plaintiffs were correct, then "the insurance company would benefit from the MLR," not the Tribe, "because [the Tribe] would not be paying for the actual service." ECF No. 197, pg. 21. "Such a result would be contrary to the intent of the statute," *id*., and nothing in the "statutory text" says otherwise.

Fourth, as discussed in BCBSM's summary judgment brief, "the Tribe *could have* coordinated its CHS program and the [Employee/Member] Plans in order to ensure that claims possibly eligible for MLR were only paid (and paid first) by the Tribe's CHS program with CHS Funds, thereby achieving MLR for those claims." ECF No. 173, pg. 20 (emphasis in original). As this Court knows, that's exactly what the Redding Rancheria Tribe of California did, and it is something that the Tribe remains free to do today. *See Rancheria v. Hargan*, 296 F.Supp.3d 256, 261–62 (D.D.C. 2017) (emphasis added).[5]

Accordingly, this Court's decision did not "g[i]ve short shrift to the Tribe's self-governed and self-determined status," as Plaintiffs now claim. ECF No. 199, pg. 20. Nor did anything about this Court's decision "undermine[] the Tribe's

[5] In its opinion, this Court noted that Plaintiffs did "not address this portion of the *Rancheria* opinion in their response brief." ECF No. 197, pg. 20, fn. 3. Nor have Plaintiffs done so in their present Motion.

authority to design and maintain its own healthcare plan and programs." *Id.* at pg. 23. Being self-governed and self-determined does not automatically entitle a tribe to MLR. It only provides an avenue to *achieve* MLR, if done properly. *Rancheria*, 296 F.Supp.3d at 261–62. The Tribe did not do so in this case.

Fifth, BCBSM believes that the only reason this Court cited to the 2008 IHS FAQs is because Plaintiffs relied on Judge Lawson's opinion in *Little River Band of Ottawa Indians v. Blue Cross Blue Shield of Michigan*, 183 F. Supp. 3d 835 (E.D. Mich. 2016). As the Court explained, *Little River* concluded "that MLR applied . . . irrespective of the fund sources. . . ." ECF No. 197, pg. 16. But despite Plaintiffs' assertion, *Little River* did not "ancho[r] its holding . . . to the regulations' text." ECF No. 199, pg. 9.

Rather, as this Court properly recognized, *Little River* cited to *only* the FAQs. *See Little River*, 183 F. Supp. 3d at 843-44. Naturally, that caused this Court to review the FAQs. Appreciating that the FAQs actually support BCBSM's interpretation, this Court was right to find it "unclear why neither Judge Lawson nor Plaintiff[s] addressed the[] [other] passages." ECF No. 197, pg. 18. Regardless, this Court did not, as Plaintiffs argue, need to find the MLR regulations ambiguous before referring to the FAQs as providing support for its

analysis.[6] Nor is there any basis for construing the regulations in the Tribe's favor. That possibility would only arise in the case of an ambiguity, which there is not.

On the contrary, the regulations and the statutory framework in which they operate make it apparent, as the Court correctly held, that "MLR is only applicable for those services funded by CHS." ECF No. 197, pg. 21. And because "BCBSM was not authorized nor did it pay for services using funds from CHS . . . MLR was not applicable to BCBSM's payments to medical providers." *Id*.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion (ECF No. 199) must, respectfully, be denied in its entirety, and this Court's Opinion (ECF No. 197) should be left undisturbed.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: */s/ Brandon C. Hubbard*
Scott R. Knapp (P61041)
Brandon C. Hubbard (P71085)
Attorneys for Defendant BCBSM
215 S. Washington Sq., Ste. 200
Lansing, MI 48933
(517) 371-1730

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[6] The Court certainly did not rely on the FAQs in contravention of the MLR regulations' text. *Cf. Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 510 (2d Cir. 2017) ("[C]ourts will not rely on agency interpretations that are inconsistent with unambiguous statutory language.").

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 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.

By: */s/ Brandon C. Hubbard*

4838-2719-0991 v7 [19276-227]