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 IN OPPOSITION TO PLAINTIFFS' THIRD MOTION FOR DEFAULT JUDGMENT (ECF NO. 295)

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COUNTER-STATEMENT OF ISSUE

Whether a default judgment should be entered against BCBSM as a sanction where:

(i) Plaintiffs' *third* Motion for Default is essentially rehashing the same arguments they made in their *first* and *second* Motions for Default, seeking (again) a different outcome based on the same facts and the same laws.

(ii) The claims data subject to Plaintiffs' Motion pertains only to damages, not liability, and BCBSM's Motion for Summary Judgment as to liability is fully briefed and ready for adjudication.

(iii) Plaintiffs' lists of 136 and 561 tribal members relative to the Employee Plan were woefully incomplete, and any failure by BCBSM to produce claims data is due to Plaintiffs' bad faith and refusal to update their lists.

(iv) Plaintiffs' (third) list of 1,049 tribal members relative to the Employee Plan was *still* incomplete, with Plaintiffs having failed to identify at least 25 tribal members.

(v) Plaintiffs already conceded that BCBSM cannot be defaulted due to Plaintiffs having failed to identify tribal members relative to the Employee Plan.

BCBSM answers: No.

Plaintiffs answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

- Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294
- *Grand Traverse Band of Ottawa & Chippewa Indians v. BCBSM*, 619 F. Supp. 3d 773 (E.D. Mich. 2022)

Regulations

- 42 C.F.R. § 136.30

I. INTRODUCTION

Just one thing changed between Plaintiffs' second and third motions for default: Plaintiffs' list of tribal members relative to the Employee Plan nearly doubled, from 561 to 1,049. Remember when it was 136? BCBSM repeatedly asked Plaintiffs *at that time* to revisit their list, and Plaintiffs responded:

> There is no need for "identifying the tribal members on the Employee Plan" and you and BCBSM know it. So stop pretending, obstructing, and delaying.

But as this Court held, "BCBSM's requests that the Tribe identify its members within the Employee Plan reflects this Court's August 2022 Discovery Order." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964-16965.)

Otherwise, Plaintiffs' familiar patterns are on repeat in their third motion, as they: (i) rely upon the same purchase orders to accuse BCBSM of withholding claims; (ii) failed again to use "best efforts" to identify tribal members, saying again that Plaintiffs are doing "[BCBSM's] work for it"; and (iii) again use selective quotes to mischaracterize the record, only this time Plaintiffs selectively quote this Court and the MLR regulations. Meanwhile, as this Court recognized before, two other constants remain: (i) 100,000 claims are already on the table; and (ii) any additional claims would not significantly affect the math.

Plaintiffs' third motion for default is meritless. It also exhibits disrespect to this Court and its Orders. Respectfully, it should be denied—enough is enough.

II. FACTS

A. Plaintiffs' First Pattern: *Using Purchase Orders To Accuse BCBSM*

Over the last year, Plaintiffs repeatedly—and improperly—used purchase orders as a vehicle to accuse BCBSM of withholding claims data, originally citing 5,625 purchase orders in five different groupings: 464, 85, 200, 70, and 4,806. (*See, e.g.*, Pls.' 1st Mot. for Default J., ECF No. 266, PageID.14935 (citing the 464); Pls.' 2d Mot. for Default J., ECF No. 287, PageID.16036-16037 (citing the 4,806).) BCBSM reviewed each, explaining one-by-one why Plaintiffs were mistaken—a process "that took 500+ hours of work." (*See* BCBSM's Suppl. Br., ECF No. 282, PageID.15531-15541 (the 464, 85, 200, and 70); BCBSM's Resp., ECF No. 289, PageID.16266 (the 4,806); Hubbard 12/22/23 E-mail, ECF No. 295-4, PageID.17037 (the hours expended).) And even though Plaintiffs repeatedly learned throughout that their accusations were mistaken, their pattern continued and it became clear that Plaintiffs violated this Court's orders.

To illustrate, upon learning that they were wholly incorrect as to the first four groupings (comprising 819 purchase orders), Plaintiffs threw at BCBSM another 4,806 purchase orders just days before the June 2023 hearing. Plaintiffs learned again that they were fully mistaken. (*See* BCBSM's Resp., ECF No. 289, PageID.16266 (addressing all 4,806); *see also* Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16965 ("By August 11, BCBSM had analyzed the

first 2,000 [of 4,806] purchase orders and emailed the Tribe's counsel with preliminary findings.").) Not deterred, Plaintiffs then filed in November 2023 another brief relative to their second motion, this time citing *another* 3,100 purchase orders to argue yet again that BCBSM should be defaulted. (Pls.' Reply, ECF No. 292, PageID.16773.) In all, by the time Plaintiffs were done briefing their first two motions for default, they had used 8,725 purchase orders (in groupings of 464, 85, 200, 70, 4806, and now 3100), with Plaintiffs being completely mistaken each time.

This Court properly dismissed Plaintiffs' purchase-order argument—not once, but twice—referring to it as "unsubstantiated speculation" (Op. & Order Den. Pls.' 1st Mot. for Default J., ECF No. 283, PageID.15621), and then finding that "[t]he Tribe's assertion that BCBSM has not disclosed 'thousands' of claims is unsupported" (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16966). Still undeterred, Plaintiffs are doing it again.

B. Plaintiffs' First Pattern Repeats Itself

Plaintiffs' current Motion is again premised upon purchase orders, using them to say that "there are at least 3,100 instances when CHS-eligible patients were referred to hospitals for which BCBSM has not produced claims data." (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16997.) Four fundamental problems exist.

First, the "3,100 instances" are actually the same 3,100 purchase orders relied upon by Plaintiffs in November 2023, meaning this Court already ruled upon those

purchase orders when it held: "The Tribe's assertion that BCBSM has not disclosed 'thousands' of claims is unsupported[.]" (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16966.) Plaintiffs' brief does not address—let alone acknowledge—that this Court already disposed of the 3,100 purchase orders.

Second, two weeks before Plaintiffs filed their current Motion, the undersigned informed Plaintiffs' counsel (Mr. Hofman) of the following:

> As to the 3,100 purchase orders, please recall that we (BCBSM and DW) already reviewed one-by-one 5,625 other purchase orders, a process that we undertook in good faith but which you discouraged[1] us to do. . . . Notwithstanding that history, since the most recent status conference [on December 4, 2023] *we have again reviewed many (but not all) of the 3,100 purchase orders, and that review has thus far not shown anything different than the first five times you cited purchase orders (5,625 in total) to accuse BCBSM of withholding claims data*. [(Hubbard 12/22/23 E-mail, ECF No. 295-4, PageID.17037 (emphasis added).)]

Plaintiffs thus knew two weeks before they filed their Motion that the purchase orders were showing nothing different than the first 5,625. But they still carelessly say: "Over a month ago, Plaintiffs identified 3,100 hospital visits for which BCBSM

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[1] Mr. Hofman evidenced that discouragement in saying: "[T]his isn't about going through the purchase orders we've produced one by one . . . . That's just a delay and stalling tactic." (Hofman 8/8/23 E-mail, ECF No. 287-2, PageID.16065.) But far from a stalling tactic, "the only reason Plaintiffs learned that they failed to identify tribal members relative to the Employee Plan is because BCBSM did in fact go through the purchase orders one-by-one." (Hubbard 8/11/23 E-mail, ECF No. 287-2, PageID.16064; *see also* Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16966 (*Court:* "[A]lthough these purchase orders claims did reveal *some* missing Employee Plan claims, all missing claims concerned individuals not yet identified by the Tribe nor provided to BCBSM." (original emphasis)).)

has yet to turn over claims data." (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16977.)

Third, BCBSM reviewed one-by-one 342 of the 3,100 purchase orders, which is a statistically valid sample size as determined by BCBSM's expert. Crawford Decl., **Exhibit A**, ¶ 17. And BCBSM's expert randomly selected those 342 purchase orders (i.e., the 342 purchase orders were not selected by BCBSM). *Id.* ¶¶ 18-21. After the 342 purchase orders were randomly selected, BCBSM confirmed that they fell into the same categories as the first 5,625 purchase orders, just as the undersigned stated before Plaintiffs filed their Motion. Those categories are as follows: (i) 42 were for claims already produced; (ii) 242 of the purchase orders are duplicative of the first 5,625; (iii) 36 did not have a matching date of service; (iv) 14 were professional claims and are irrelevant to this matter; and (v) 8 were for different BCBSM customers. *See* **Exhibit B**. Yes, Plaintiffs are mistaken. Again.

Fourth, just as they did in November 2023, Plaintiffs cite to a declaration from Ms. Myrick, saying it is their expert's "sworn statement and accompanying documentation" that "establish[es] ***each plan participant or dependent*** was referred to a ***specific hospital*** for ***specific care*** and received that care on a ***specific date***." (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16978 (original emphasis).) But the above facts establish Ms. Myrick to be wrong—*again*. Moreover, this Court will recall that Plaintiffs *withdrew* Ms. Myrick as an expert (ECF No. 290,

PageID.16451-16452), and that Plaintiffs' "expert" Ms. Cornelis actually testified: "And when I say we reviewed [purchase orders], whether we reviewed 50 or a hundred, I can't tell you," but it was a matter of "just thumbing through the ones that we couldn't link." (Cornelis Dep., ECF No. 289-10, PageID.16402.)

All told, Plaintiffs (again) seek default, premised (again) upon that same "thumbing-through" process, relative to (again) the same 3,100 purchase orders they cited in November 2023. The truth is that Plaintiffs use the purchase orders to mask their failure to identify tribal members (addressed below). This is vexatious.

C. Plaintiffs' Second Pattern: *Failing To Use "Best Efforts" To Identify Tribal Members*

As this Court recognized: "[I]n 2022, the Tribe was ordered, *based on their own stipulation*, to 'make its best efforts to identify for BCBSM [by August 31, 2022,] the Tribal Members that participated in the Employee Plan,' so that BCBSM could then produce the relevant claims data." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964 (original emphasis).) Plaintiffs then produced on August 31, 2022, a list of 136 individuals. (List of 136, ECF No. 266-8, PageID.14956-14959.) However, since at least April 2023, BCBSM repeatedly advised Plaintiffs that they had missed individuals. (*See* Hubbard 4/3/23 Letter, ECF No. 282-2, PageID.15551.) Plaintiffs then acknowledged to this Court in June 2023 that they did in fact miss individuals, saying: "we did find out that we missed people." (6/27/23 Hr'g Tr., ECF No. 284, PageID.15662.)

BCBSM thereafter repeatedly asked Plaintiffs to revisit their list. (Hubbard 8/11/23 E-mail, ECF No. 287-2, PageID.16063-16064 (asking "Plaintiffs to . . . identify[] any tribal members [on the Employee Plan] that Plaintiffs did not previously identify."); Hubbard 8/18/23 E-mail, ECF No. 287-2, PageID.16062 ("we request that Plaintiffs revisit their failure to identify all of the tribal members on the Employee Plan and give it another shot. That would help this process."); Hubbard 8/25/23 E-mail, ECF No. 287-2, PageID.16060 ("We again urge Plaintiffs to reconsider their unwillingness to identify those tribal members.").) Plaintiffs steadfastly refused, offering the following rhetoric:

> There is no need for "identifying the tribal members on the Employee Plan" and you and BCBSM know it. So stop pretending, obstructing, and delaying. [(Hofman 9/4/23 E-mail, ECF No. 287-2, PageID.16059.)]

But as this Court properly held, "BCBSM's requests that the Tribe identify its members within the Employee Plan reflects this Court's August 2022 Discovery Order, which was based on the Tribe's own stipulation." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964-16965.)

Finally, on September 14, 2023, Plaintiffs provided their second list—it contained 561 individuals. (*See* List of 561, ECF No. 288-4, PageID.16201-16213.) And even though Plaintiffs were obligated by the August 2022 Order to provide that list, Plaintiffs' rhetoric continued: "Plaintiffs have now gone a step further in doing BCBSM's work for it." (Hofman 9/14/23 E-mail, ECF No. 288-3, PageID.16182.)

After having provided that list, Plaintiffs continued to accuse BCBSM of "bad faith" and proceeded to file their second motion for default. (*See* Pls.' 2d Mot. for Default J., ECF No. 287.) This Court properly denied that second motion, recognizing that "all missing claims concerned individuals not yet identified by the Tribe nor provided to BCBSM." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16966.) This Court continued: "Far from bad faith, BCBSM's 'sitting on undisclosed data' reflects the fact that the Tribe did not identify all its member-employees." (*Id.* PageID.16965 (footnote omitted).)

Plaintiffs are now continuing their pattern: They provided a *third* list, and they seek default because BCBSM did not yet produce claims data for individuals on that list. The number of individuals on that list? Not 136. Not 561. But 1,049.

D. Plaintiffs' Second Pattern Repeats Itself

On December 20, 2023, Plaintiffs provided to BCBSM a third list—this time containing 1,049 individuals. (*See* Hofman 12/20/23 E-mail, ECF No. 295-3.) Or, put differently, between August 31, 2022 and December 20, 2023 (nearly 16 months), Plaintiffs' list grew more than 7x, from 136 to 561 to 1,049. And yes, in a display of disrespect for this Court's August 2022 Order and this Court's first two decisions denying Plaintiffs' first two motions, Plaintiffs' rhetoric continued, saying:

> [B]ecause BCBSM insists we need to do its work for it, and because BCBSM is still withholding claims data, we . . . compile[d] for you the attached list of [1,049] tribal members and their dependents enrolled in the Employee Plan. [(*Id.* PageID.17008.)]

The Court will recall the parties' dispute about birthdates, with BCBSM repeatedly expressing to Plaintiffs the import of needing birthdates instead of "just names." (*Cf.* Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16962 (*Court:* "[T]he Tribe could have just as easily provided BCBSM with the birthdates again upon BCBSM's numerous requests for such information, instead of refusing to do so[.]" (footnote omitted)).) But why raise that bygone again? Because the Court might find ironic that Plaintiffs' new list of 1,049 individuals actually highlights—*literally, in red*—the 109 *different* individuals that have *identical* names but *different* birthdates. (ECF No. 295-3.) Recall that, in June 2023, Plaintiffs maintained that BCBSM's request for birthdates was "an excuse that has no factual basis." (6/27/23 Hr'g Tr., ECF No. 284, PageID.15673.) Plaintiffs' third list establishes otherwise.

In any event, Plaintiffs' pattern continued when Plaintiffs cited to documents produced in 2017 and 2019 to blame BCBSM for the third list, saying that those documents show that "Plaintiffs had already identified for BCBSM in this litigation all tribal members, including those enrolled in the Employee Plan, ***twice***." (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16995 (original emphasis).) As Plaintiffs would have it, the third list was "simply the work product resulting from rearranging and merging the above-described lists," which "[counsel] and BCBSM have always had" (Hofman 12/20/23 E-mail, ECF No. 295-3, PageID.17008), meaning the "lists

Plaintiffs sent BCBSM thereafter in 2022 and 2023 were ***not*** new information for BCBSM" (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16998 (original emphasis).) But that is the *same* argument Plaintiffs offered to this Court when they provided their second list of 561 and filed their second motion for default, saying:

> The lists of all the tribal members were produced to BCBSM on August 7, 2019 . . . . To figure out which tribal members were enrolled on the Employee Plan, BCBSM could have (and should have) cross-referenced these lists [to come up with the list of 561]. (Pls.' 2d Mot. for Default J., ECF No. 287, PageID.16040.)]

Plaintiffs' argument is patently hollow. It is also an argument already rejected by this Court. (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964 (rejecting the notion that, "[a]ccording to the Tribe, 'all BCBSM had to do was cross-reference those lists'" (footnote omitted)).)

Another hallmark of Plaintiffs' pattern is repeating itself. Recall BCBSM established that Plaintiffs' second list of 561 remained incomplete because it failed to identify 120+ individuals, a fact this Court recognized. (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964 ("[The] second disclosure of 561 missed at least 120." (footnote omitted)).) BCBSM only learned that fact by reviewing one-by-one the purchase orders that Plaintiffs used to accuse BCBSM, and then provided to Plaintiffs the identities of those 120+ individuals. (BCBSM's Resp. to Pls.' 2d Mot. for Default J., ECF No. 289, PageID.16265; ECF No. 289-6, PageID.16290-16291 (listing all 120+).) It is happening again: Of those same 120+

individuals, 25 remain missing from Plaintiffs' third list of 1,049. *See* **Exhibit C** (identifying those 25 individuals). And just like before, that means: (i) those 25 individuals are *also* nowhere to be found in "those lists" from 2017 and 2019; and (ii) yes, Plaintiffs missed the mark yet again. Plaintiffs *still* seek default. And while BCBSM produced additional claims on January 25, 2024, that production pertained to "individuals relative to the Employee Plan whom Plaintiffs did not previously identify, and whom BCBSM discovered through reviewing Plaintiffs' third list of 1,049." Hubbard E-mail, **Exhibit D**.

> Remember, Mr. Rynders conceded the following in June 2023:
>
> If we were talking about the fact that our list of 136 wasn't complete . . . we wouldn't be here. *There isn't a default motion because we didn't get these other names back in August [2022], okay.* [(6/27/23 Hr'g Tr., ECF No. 284, PageID.15671-15672 (emphasis added).)]

Plaintiffs do not honor their June 2023 concession, nor have they respected this Court's decisions: (i) Plaintiffs' first list of 136 was incomplete, and they still sought default—it was denied; (ii) Plaintiffs' second list of 561 was incomplete, and they still sought default—it was denied; (iii) Plaintiffs' third list of 1,049 *is* incomplete, they still seek default—it *should be* denied.[2]

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[2] In citing to BCBSM's response brief opposing Plaintiffs' second motion, Plaintiffs posit that "BCBSM recently argued it knows better than Plaintiffs who they [the Employee Plan tribal members] are." (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16977.) But the page that Plaintiffs' cite *actually* states: "BCBSM employees have now spent hundreds of hours in reviewing one-by-one the 5,625 purchase orders that Plaintiffs used to accuse BCBSM of withholding claims data

E. Plaintiffs' Third Pattern: *Using Selective Quotes To Mischaracterize*

In their first motion for default, Plaintiffs selectively quoted the undersigned, using the selective quotes to mischaracterize the record and seek default. (Resp. to Pls.' 1st Mot. for Default J., ECF No. 276, PageID.15201-15202 (illustrating same).) Plaintiffs did it again in their second motion for default, multiple times. (Resp. to Pls.' 2d Mot. for Default J., ECF No. 289, PageID.16259-16260 (illustrating same).) And this Court took exception: "But the Tribe's selected quotation cuts BCBSM's Counsels' sentence short and does not provide full context." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964.)

Not having learned, Plaintiffs do it again in their third motion—only this time they selectively quote this Court and the MLR regulations.

(the first wave of 819, plus the second wave of 4,806). In doing so, BCBSM identified 200+ different tribal members on the Employee Plan that were not identified in Plaintiffs' *first* list of 136. Of those 200+ tribal members, 120+ are likewise not on Plaintiffs' *second* list of 561." (BCBSM's Resp. to Pls.' 2d Mot. for Default J., ECF No. 289, PageID.16265 (original emphasis).) How is it that BCBSM knows better? This Court will recall that the undersigned explained during the December 4, 2023 status conference exactly how BCBSM discovered the 120+ tribal members. After providing that explanation, Plaintiffs' counsel inquired if BCBSM needed any additional information, to which the undersigned responded "no" because BCBSM considered its claims-data productions to have been completed. But during that exchange, Plaintiffs did not disclose—and the undersigned had no idea—that a third list of 1,049 tribal members would follow sixteen days later.

F. Plaintiffs' Third Pattern Repeats Itself

1. Selectively quoting this Court

The Court will recall that, on November 14, 2022, it entered an Order relative to claim forms, saying the following (and note the emphasis on *"Treatment Authorization Codes"*):

> If the Tribe referred or authorized the claimed care, then the [claim forms] would identify "the Tribe's Nimkee Contract Health Program" in Box 38 as the "Responsible Party," in Box 50 with Defendant as the "Payer," and in Box 80 as the "authorized agent"—*and the [forms] have a designated blank for "Treatment Authorization Codes."* [(Order Granting Pls.' Mot. to Compel, ECF No. 232, PageID.13903 (footnotes omitted; emphasis added).)

The Court then explained why "Treatment Authorization Codes" are meaningful: "The Treatment Authorization Codes are 'a number or other indicator that designates that the treatment covered by this bill has been authorized by the payer indicated in Box 50 on lines A, B, and C." (*Id.* n.3 (citation omitted).) Continuing, the Court recognized: This "explanation of what treatment if any was 'authorized' demonstrates 'the healthcare claims that were referred/authorized by the Tribe's Contract Health Services Program.'" (*Id.* PageID.13903.)

Today, when Plaintiffs quote the above passage from this Court, they purposefully strike this Court's reference to, and discussion of "Treatment Authorization Codes." Below is an illustration—note that: (i) Plaintiffs cite this Court's 11/14/22 Order to support their use of the phrase "authorized the care"

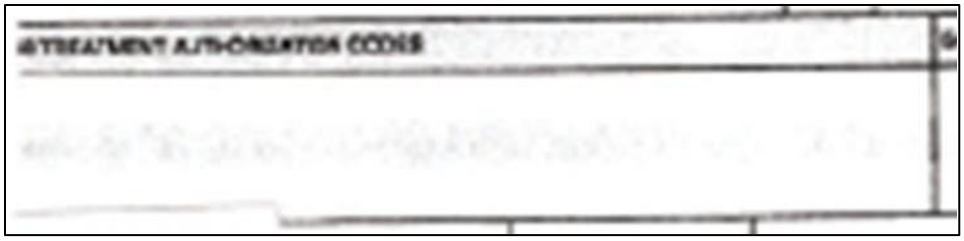
(bold/italicized); but (ii) strike the very item ("Treatment Authorization Codes") that this Court identified as being meaningful to determining "what treatment if any was 'authorized'":

> Claims data fields in these forms identified for BCBSM whether the Tribe's CHS program ***authorized the care*** for each claim. ***See* 11/14/2022 Order, at 4 (ECF No. 232, PageID.13903)**; 3/2/2023 Order (ECF No. 271, PageID.15082). Specifically, "if the Tribe referred or authorized the claimed care, then the [forms] would identify 'the Tribe's Nimkee Contract Health Program' in Box 38 as the 'Responsible Party,' in Box 50 with Defendant as the 'Payer,' and in Box 80 as the 'authorized agent'~~ **and the [forms] have a designated blank for "Treatment Authorization Codes."** ~~**"** 11/14/2022 Order, at 4 (ECF No. 232, PageID.13903). [(Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16983-16984 (emphasis added).)]

In the very next sentence, Plaintiffs seize upon the absence (i.e., their striking) of "Treatment Authorization Codes" as a springboard to mischaracterize the parties' stipulation about those same claim forms, with Plaintiffs misrepresenting that BCBSM stipulated to "exemplar claims forms" that evidence "CHS authorization":

> BCBSM stipulated to exemplar claims forms it received for the claims at issue ***evidencing this CHS authorization*** (ECF No. 271-1, PageID.15086-91) (PHI redacted). [(*Id.* PageID.16984 (emphasis added).)]

But contrary to Plaintiffs' misrepresentation, the Court will notice that each of the "exemplar claims forms" contains a Box 63—that is the Box reserved for "Treatment Authorization Codes." (*See* ECF No. 271-1.) And on each "exemplar claim form" the Box 63 is blank (empty), meaning *nothing* in those "exemplar claims forms" evidences "CHS Authorization":



(*See* Claim Forms Stipulation, ECF No. 271-1.) Indeed, the parties' stipulation does not even reference "Treatment Authorization Codes" (other than blank boxes) or "CHS authorization." And *that* is why Plaintiffs mislead by striking this Court's language about "Treatment Authorization Codes"—it is not a slip of the pen.

The one thing that *does* evidence "CHS Authorization" is a "purchase order," a fact Plaintiffs conceded more than three years ago in their summary judgment briefing, saying:

> [A] "purchase order" ***must*** be issued by the Tribe's CHS program ***evidencing*** that the Tribe's CHS program has determined that . . . the patient is ***authorized*** to receive the specific services described ***in the purchase order***. [(Pls.' Resp. to BCBSM's Mot. for Summ. J., ECF No. 175, PageID.9465 (emphasis added).)]

Absolutely nothing within the "exemplar claims forms" to which Plaintiffs repeatedly cite serves as a substitute for—or "evidences"—a "purchase order," let alone "CHS Authorization." And this Court already correctly held that "BCBSM was not aware of which employees would be eligible for MLR *because Plaintiffs did*

not inform BCBSM which of its employees were enrolled in the CHS program." (Op. Granting Summ. J., ECF No. 197, PageID.12649 (emphasis added).)[3]

So, when Plaintiffs use the parties' stipulation to argue that BCBSM should be defaulted because BCBSM already "had all information . . . regarding which claims were for CHS-authorized care and, thus, eligible for payment at MLR or lower," telling this Court that "[t]he[] providers [hospitals] forwarded the purchase order information on to BCBSM" (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16983-16984, n.5), the *truth* is that Plaintiffs' "selected quotation cuts [this Court's] sentence short and does not provide full context." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16964.) That is intentional.

2. Selectively quoting the MLR regulations

Plaintiffs erroneously say that an "exception" within the MLR regulations applies to BCBSM, positing:

[3] There is another reason why Plaintiffs selectively-quote this Court: BCBSM established, and Plaintiffs could not dispute that "there is not a defined field/data element in [a claim form] to support identifying whether a claim . . . is eligible for a tribe's contract health services program, including whether a tribe issued a purchase order pursuant to the Medicare-like rate federal regulation." (Monarch Decl., ECF No. 238-12, PageID.14225-14226, ¶ 6.) That is to say, Plaintiffs altogether seek to avoid discussion of "purchase orders" and Magistrate Morris's finding that BCBSM "established . . . that the mere fact that a claim form names the CHS Program does not necessarily mean that there was an underlying purchase order." (Magistrate Morris Op., ECF No. 255, PageID.14684.) And Plaintiffs' mischaracterization of Mr. Kinnane's testimony (ECF No. 295, PageID.16985-16986) is the same mischaracterization they offered to Magistrate Morris. For an accurate recitation of his testimony, see ECF No. 238, PageID.14141-14142.

> An "exception" to this "payment calculation" applies where, as here, "an amount has been negotiated with the hospital or its agent," 42 C.F.R. 136.30(f), in which case the Tribe "will pay the lesser of: The amount determined under paragraph (e) of this section [MLR] or the amount negotiated with the hospital or its agent." [(Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16981.)]

But that "exception" applies only if *the Tribe*—not BCBSM—negotiated with the hospital, meaning it does not govern BCBSM. The following illustration once again exhibits Plaintiffs' selective quoting:

> [I]f an amount has been negotiated with the hospital or its agent ~~**by the I/T/U,**~~ the I/T/U [Tribe] will pay the lesser of: The amount determined under paragraph (e) of this section [i.e., MLR] or the amount negotiated with the hospital or its agent . . . . [42 C.F.R. § 136.30(f).]

Critically, "I/T/U" is defined by the regulation as a "Tribe . . . carrying out a CHS program," *id.* § 136.30(b), and Plaintiffs admit that the Tribe—*not BCBSM*—is (and was) the I/T/U. (Pls.' Resp., ECF No. 18, PageID.230 ("In essence, the Tribe stands in the shoes of IHS in administering Contract Health Services for Tribal members.").) The "exception" is thus facially inapplicable to BCBSM.

Counsel for Plaintiffs tried this very same selective quoting in the *Grand Traverse Band* litigation relative to a claim under Michigan's Health Care False Claims Act (a claim having allegations that are word-for-word identical to Plaintiffs' claim in this case), and Judge Levy properly rejected it:

> TPAs [like BCBSM] are never referenced in the entirety of § 136.30. There is no language in § 136.30 that indicates that textual references to I/T/U in the MLR regulations are extended to include TPAs like Defendant BCBSM (such that this creates a binding requirement on

> TPAs to ensure the appropriate payment is made on behalf of I/T/Us). . . . Such clear language must thus be the ending point for analysis of the regulatory meaning. [*Grand Traverse Band of Ottawa & Chippewa Indians v. BCBSM*, 619 F. Supp. 3d 773, 786–87 (E.D. Mich. 2022).]

G. Plaintiffs Develop A Fourth Pattern: *Accusing BCBSM Of Withholding Claims With A "Greater Difference"*

In their second motion, Plaintiffs erroneously accused BCBSM of withholding claims with the greatest difference relative to MLR, saying: "Demonstrating its bad faith, BCBSM is also withholding the most significant claims, namely those with greater difference between its usual rates and Medicare rates." (Pls.' 2d Mot. for Default J., ECF No. 287, PageID.16039.) This Court properly denied Plaintiffs' argument, saying: "But how these claims are being withheld, the Tribe does not say and the record does not show." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16965.) Indeed, BCBSM established: "When searching for and producing the claims data for facility claims, BCBSM produced claims data regardless of the 'type' of facility claim, and the existence or non-existence of certain types of facility claims did not at all influence BCBSM's production of claims data." (Muncy Decl., ECF No. 289-7, PageID.16294, ¶ 7.)

Today, Plaintiffs make the same argument, saying: "Indicative of its bad faith, BCBSM is withholding data for the largest claims, . . . which it paid at many multiples of MLR." (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16978.)

And Plaintiffs cite to the same "evidence" they used in their second motion. (*Compare* Pls.' 2d Mot. for Default J., ECF No. 287, PageID.16039-16040, *with* Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16978.) Or, as this Court stated in near-identical circumstances: "Most of the Tribe's Renewed [second] Motion raises the same arguments already raised in its first motion, and already rejected by this Court as failing to show bad faith on BCBSM's behalf." (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16961.)

Plaintiffs' position once again has zero merit.

H. Plaintiffs Re-Argue Summary Judgment Under The Guise Of Seeking Default

Plaintiffs used 40 pages when responding to BCBSM's Motion for Summary Judgment. (*See* ECF No. 175, PageID.9460-9500.) Once again signaling the weakness of their case, Plaintiffs try to make additional arguments relative to summary judgment—arguments otherwise having nothing to do with "claims data" and "default." The arguments are non-starters.

1. Plaintiffs' knowledge

Plaintiffs' newest endeavor is to try to distance themselves from the dispositive fact that they *knew all along* that BCBSM never applied MLR, pointing to so-called "misrepresentations." For example, Plaintiffs say that BCBSM "misrepresented that BCBSM ***did*** coordinate MLR discounted pricing for its tribal business," but "secretly decided ***not*** to comply with the MLR regulations." (Pls.' 3d

Mot. for Default J., ECF No. 295, PageID.16987 (original emphasis).) But on page 18 of their response brief opposing summary judgment, Plaintiffs conceded their knowledge, saying:

> There is no question that SCIT understood within the first year after the MLR regulations went into effect that BCBSM did not have a system in place to determine the MLR price for a hospital claim. [(*See* ECF No. 175, PageID.9477.)]

That concession notwithstanding, Plaintiffs' 199-page current (third) Motion attaches eight never-before-used e-mails, accusing BCBSM of misrepresentations. (*See* ECF No. 295, Exhibits D–G, I–L.) Not one of those e-mails contains a communication between BCBSM and Plaintiffs, let alone a statement by BCBSM that it is providing to Plaintiffs MLR. (*See id.*) In fact, many of those e-mails are the same e-mails that Plaintiffs' counsel tried using in the *Grand Traverse Band* case, with Judge Levy saying: "What matters to me is what they said to you." *GTB* 9/20/21 Hr'g. Tr., ECF No. 189, PageID.5779, **Exhibit E**.

Perfectly consistent with page 18 of Plaintiffs' response brief opposing summary judgment, Plaintiffs' witness Ms. Connie Sprague, the "Compensation and Benefits Manager" who "overs[aw] the healthcare benefits available to the Tribe's employees and members," testified that it "was [her] understanding that the claims were priced by BCBSM based on their network prices negotiated with providers," and that she "came to understand that BCBSM did not have a system in place to price claims at MLR." (Sprague Decl., ECF No. 177-50, PageID.11786-11787.)

Entirely absent is any suggestion—let alone accusation—that BCBSM made any of the so-called "misrepresentations" that Plaintiffs now suggest. It never happened, and Plaintiffs' knowledge (*id.*) triggers ERISA's three-year, actual-knowledge limitations period. *See GTB v. BCBSM*, No. 14-CV-11349, 2017 WL 6594220, at *2 (E.D. Mich. Dec. 26, 2017) (ERISA's "actual knowledge" limitations period triggered because "plaintiffs were aware that BCBSM was not obtaining MLR.")

2. BCBSM's standard operating procedures

Even though they filed *this case* in 2016, Plaintiffs cite to a 2012 deposition from a different case (a case having nothing to do with MLR) and say that the 2012 deposition establishes "BCBSM has no 'standard operating procedures.'" (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16980 (citing Mitchell Deposition).) Once again, not true. The witness *actually* testified about "standard operating procedures relative to access fees" (ECF No. 285-5, PageID.15932), an issue having nothing to do with MLR.

The unrebutted record evidence in *this case* is that "BCBSM's 'standard operating procedure' is to process and pay customers' healthcare claims at the discounted 'network rates,' including for the Tribe," which "has been true without interruption since at least 2007." (Harvey Decl., ECF No. 173-2, PageID.8936, ¶ 6.) Nothing Plaintiffs now say, or attempt to stuff into the record changes that, meaning BCBSM properly followed the parties' contract. (*See* ASC, ECF No. 79-3,

PageID.3163, Article II.A ("BCBSM *shall* administer . . . Coverage(s) in accordance with BCBSM's *standard operating procedures*." (emphasis added))); *Calhoun Cty. v. BCBSM*, 297 Mich. App. 1, 20–21 (2012) (because "[BCBSM] was authorized by the contract . . . , plaintiff cannot maintain its breach-of-fiduciary-duty claim").

I. Plaintiffs Disparage BCBSM

Signaling again the weakness of their claims, Plaintiffs stoop to asserting that BCBSM was "motivated" by a "prejudice," and otherwise chose to discriminate against Native Americans. (Pls.' 3d Mot. for Default J., ECF No. 295, PageID.16987.) Untrue and improper. Plaintiffs' "discrimination" evidence is an innocuous, internal e-mail where BCBSM discusses the possibility of expanding its business with Tribal Nations by developing an MLR product. (*Id.* PageID.16987-16988 (citing ECF No. 295-12, PageID.17111).) Nothing more, nothing less, with Plaintiffs unable (and not even trying) to articulate how this e-mail establishes BCBSM being "motivated" by a "prejudice" or "discrimination." (*Id.*)

Left with meritless claims, Plaintiffs sought *three times* to default BCBSM, and they now disparage BCBSM. Litigation privilege has bounds, and that unseemly tactic should not be tolerated. *Accord Braswell v. McCamman*, 256 F. Supp. 3d 719, 731 (W.D. Mich. 2017) ("As a threshold matter, the Court must admonish Plaintiff's counsel. Plaintiff's response brief makes repeated exaggerated or even erroneous assertions that distort the record—even in the light most favorable to Plaintiff.").

III. ARGUMENT

A. Legal Standard

BCBSM agrees with the standard this Court applied in denying Plaintiffs' first two motions for default. (Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16960-16961.) For brevity, BCBSM does not repeat it a third time.

B. Plaintiffs Raise Nothing New

In denying Plaintiffs' second motion for default, this Court recognized its repetitive nature, saying:

> Most of the Tribe's Renewed [second] Motion raises the same arguments already raised in its first motion, and already rejected by this Court as failing to show bad faith on BCBSM's behalf. [(Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16961.)]

Plaintiffs are doing it again, citing to the *same* purchase orders and making the *same* arguments that this Court already rejected. *Supra*, pp. 2-11, 17-18.

Research did not locate a case where a party represented by counsel sought entry of default three times (and Plaintiffs cite no such case). But some *pro se* litigants have tried, with courts not tolerating it. *See, e.g.*, *Redd v. Vails*, No. 14-14340, 2016 WL 9738111, at *1 (E.D. Mich. Jan. 31, 2016) (*pro se* plaintiff) ("Enough is enough," and plaintiff "cannot keep straining this Court's resources by filing the same thing over and over"), *report and recommendation adopted*, No. 14-14340, 2016 WL 9738110 (E.D. Mich. Mar. 9, 2016) (Battani, J.).

As this Court already held two times:

> Ultimately, two facts were true when this Court denied the Tribe's first motion for default judgment—and both remain true today: (1) "Plaintiffs have enough information to assess the value of their remaining claims" as "nearly 100,000 claims are already on the table;" and (2) any additional claims, at this point, "would not significantly affect the math" and would pertain only to the Tribe's potential damages, not BCBSM's liability as to the outstanding MLR issues. [(Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16966.)]

Plaintiffs' third Motion should be denied on this basis alone.

C. Default Remains Unwarranted

1. Any failure by BCBSM is due to *Plaintiffs'* willfulness, bad faith, and fault

Any failure by BCBSM to produce claims data is not in any way due to BCBSM's willfulness, bad faith, or fault. *Supra*, pp. 2-11. Plaintiffs egregiously missed the mark when providing to BCBSM their court-ordered first list of 136. *Id.* That list then grew to 561, and now 1,049. As before:

> The Tribe's assertion that BCBSM has not disclosed 'thousands' of claims is unsupported and the Tribe has not shown that BCBSM's failure to provide the full claims data for the outstanding member-employees is willful or attributable to bad faith or fault. Indeed, the record suggests that the Tribe is also at fault. [(Op. & Order Den. Pls.' 2d Mot. for Default J., ECF No. 294, PageID.16966.)]

2. Plaintiffs are not prejudiced

Again, there are now more than "100,000 claims . . . already on the table," and "Plaintiffs have enough information to assess the value of their claims." (Op. & Order Den. Pls.' 1st Mot. for Default J., ECF No. 283, PageID.15621.) And the Court will recall that Plaintiffs produced to BCBSM their expert report on September

16, 2023. (Expert Report, ECF No. 289-11.) Plaintiffs are not in any way prejudiced.[4]

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion (ECF No. 295) should, respectfully, be denied in its entirety.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: */s/ Brandon C. Hubbard*
Scott R. Knapp (P61041)
Brandon C. Hubbard (P71085)
Attorneys for Defendant BCBSM
123 W. Allegan Street, Suite 900
Lansing, MI 48933
(517) 371-1730

Dated: January 26, 2024

[4] Though BCBSM was warned by Magistrate Morris about possibly being sanctioned, that warning did not account for the bad faith of Plaintiffs and their counsel. The other factor—whether milder sanctions should be first considered—likewise weighs against sanctioning BCBSM. Only Plaintiffs are deserving of a sanction, as they repeatedly used purchase orders to mask their failure to comply with, and exhibit a lack of respect for this Court's Orders.

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2024, 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.

/s/ Brandon C. Hubbard

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