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 MOTION FOR SANCTIONS

Defendant Blue Cross Blue Shield of Michigan ("BCBSM"), by its attorneys Dickinson Wright PLLC, moves this Court pursuant to FED. R. CIV. P. 37, this Court's inherent authority, as well as 28 U.S.C. § 1927, to sanction Plaintiffs and their counsel for having violated this Court's Orders and for engaging in vexatious litigation. In support of this Motion, BCBSM relies upon and incorporates by reference the facts, arguments, and legal authority set forth in the accompanying Brief in Support, as well as the pleadings on file with the Court.

Pursuant to LR 7.1, the undersigned certifies that he conferred with counsel for Plaintiffs through multiple e-mails in August 2023 and September 2023, as well as during a 45-minute phone call occurring the morning of September 6, 2023,

regarding the legal and factual basis for this Motion and the seeking of concurrence in the relief sought in this Motion. Plaintiffs did not concur in the relief sought.

BCBSM respectfully requests that this Court enter an Order sanctioning Plaintiffs and their counsel for the fees and costs that BCBSM incurred as a result of Plaintiffs' failure to obey this Court's August 2022 and July 2023 Orders, as well as for having engaged in vexatious litigation that unreasonably multiplied these proceedings, including the fees and costs that BCBSM incurred for: (i) having to respond to Plaintiffs' three motions for default; (ii) preparation of, and then attending appearances before this Court in having to defend against Plaintiffs' three motions; (iii) reviewing one-by-one the thousands of purchase orders Plaintiffs used as a vehicle to falsely accuse BCBSM; and (iv) preparing and filing this motion for sanctions.

WHEREFORE, BCBSM respectfully requests that this Court enter an Order granting this Motion, and award to BCBSM such other relief as the Court deems just and proper.

Respectfully submitted,
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Dated: February 9, 2024

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BCBSM'S BRIEF IN SUPPORT OF ITS MOTION FOR SANCTIONS

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STATEMENT OF ISSUES

Whether Plaintiffs and their counsel should be sanctioned where:

(i) Plaintiffs violated this Court's August 2022 Order requiring their "best efforts" to identify for BCBSM the tribal members relative to the Employee Plan, when Plaintiffs knowingly provided to BCBSM an incomplete list and then thereafter sought default against BCBSM three times for not producing claims data relative to the same individuals that Plaintiffs failed to identify.

(ii) Plaintiffs violated this Court's July 2023 Order requiring their "best efforts to resolve the remaining discovery disputes," when Plaintiffs consciously chose not to update their incomplete list of tribal members and instead sought default against BCBSM two more times for not producing claims data relative to the same individuals that Plaintiffs failed to identify.

(iii) Plaintiffs and their counsel displayed bad faith and unreasonably multiplied these proceedings by filing *three* repetitive, vexatious motions for default, even though Plaintiffs twice acknowledged that BCBSM cannot be faulted for not producing claims data relative to the same individuals that Plaintiffs failed to identify.

BCBSM answers: Yes.

Plaintiffs answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Dubuc v. Green Oak Twp., 2010 WL 3245324 (E.D. Mich. Aug. 16, 2010).

Jackson v. Nissan Motor Corp., 888 F.2d 1391 (6th Cir. 1989).

Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368 (6th Cir. 1996).

Szappan v. Meder, No. 18-CV-12244, 2019 WL 1402514 (E.D. Mich. Mar. 28, 2019).

Victor v. Reynolds, 649 F. Supp. 3d 499 (E.D. Mich. 2023).

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I. INTRODUCTION

"Best efforts." That is what this Court *twice* ordered Plaintiffs to undertake: (i) first, in August 2022, requiring them to identify for BCBSM the tribal members relative to the Employee Plan; and (ii) then, in July 2023, to resolve the remaining discovery disputes. Plaintiffs—with the assistance of their counsel—knowingly violated *both* Orders, choosing instead a rhetoric-filled path of vexatious litigation.

Plaintiffs' first list of tribal members relative to the Employee Plan contained 136 individuals, which Plaintiffs provided in August 2022. It then grew to 561, in September 2023. And it grew again to 1,049, in December 2023. All the while, with *each* list, Plaintiffs sought entry of default against BCBSM—three separate motions seeking to default BCBSM for not producing claims data relative to the very same individuals that Plaintiffs failed to identify. But Plaintiffs knew in August 2022 what BCBSM discovered in April 2023, and what Plaintiffs conceded to this Court in June 2023: They "missed people." So why not immediately update their list and confess their knowledge? They wanted to avoid a decision on the merits, using their own, wanton failures to infuse into this litigation a false narrative, saying BCBSM should be defaulted because it "deliberately concealed claims."

Not only did Plaintiffs and their counsel consciously violate two Orders and needlessly increase the cost of this already-expensive litigation, but they disrespected this Court in the process. Sanctions are both warranted and required.

II. FACTS

A. The Two Court Orders That Required Plaintiffs' "Best Efforts"

1. The August 2022 Order

Plaintiffs stipulated to the Order entered in August 2022 ("August 2022 Order") that required their "best efforts" to identify for BCBSM the tribal members relative to the Employee Plan: "Further, it is **ORDERED** that Plaintiffs will make *best efforts* to identify for BCBSM by August 31, 2022, the Tribal Members that participated in the Employee Plan[.]" (Aug. 2022 Order, ECF No. 222, PageID.13297 (italic emphasis added).) Once Plaintiffs identified for BCBSM those individuals, the August 2022 Order obligated BCBSM to "produce to Plaintiffs the claims data relative to those individuals." (*Id.*)

As this Court explained: "It is important to emphasize that, per the Parties' stipulation, the onus was on *the Tribe* to first identify its members that participated in the Employee Plan and provide a list of these individuals to BCBSM, to allow BCBSM to then produce the claims data for these individuals." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16954-16955 (original emphasis).) Or, as this Court separately explained: "[I]n 2022, the Tribe was ordered, *based on their own stipulation*, to 'make its best efforts to identify for BCBSM . . . the Tribal Members that participated in the Employee Plan,' so that BCBSM could then produce the relevant claims data." (*Id.* PageID.16964 (original omission and emphasis).)

As explained in this brief, Plaintiffs utterly and knowingly failed to exercise "best efforts" to identify for BCBSM the tribal members relative to the Employee Plan (and sanctions are thus warranted).

2. The July 2023 Order

When this Court denied Plaintiffs' *first* motion for default, it entered on July 19, 2023, another "best efforts" Order ("July 2023 Order"), this time requiring the parties to use their "best efforts to resolve the remaining discovery disputes while the pending motion for summary judgment is resolved." (July 2023 Order, ECF No. 283, PageID.15622.) And when this Court in December 2023 denied Plaintiffs' *second* motion for default, it reinforced that "best efforts" obligation:

> Indeed, [in denying Plaintiffs' first motion for default,] this Court held [in July 2023] that the Tribe had "enough information to assess the value of their claims" because "nearly 100,000 claims are already on the table." This Court also noted that the Tribe's allegation that BCBSM was sitting on undisclosed claims data is "unsubstantiated speculation" and that any remaining claims would "mostly concern damages, not liability." Accordingly, this Court ordered *both* Parties to "put forth their best efforts to resolve the remaining discovery disputes." [(Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16960 (original emphasis) (internal citations omitted).)]

As explained in this brief, Plaintiffs once again failed to exercise "best efforts," this time to resolve the remaining discovery disputes (and sanctions are thus warranted).

B. Plaintiffs Violated The August 2022 Order

1. Plaintiffs *knew* what the August 2022 Order required

On August 31, 2022, Plaintiffs provided to BCBSM their *first* list of tribal members relative to the Employee Plan, ostensibly using their best efforts, and in purported compliance with the August 2022 Order—the list contained 136 individuals. (List of 136, ECF No. 266-8.)

This Court held a hearing in June 2023, during which Mr. Rynders acknowledged that Plaintiffs were required to provide to BCBSM their "best list" in August 2022:

> *The Court:* [W]hat did the Tribe owe Blue Cross/Blue Shield on August 31st [in 2022]?
>
> *Mr. Rynders:* Well, we were to give the best list we could, which we did, which had 136 names on it. That's [the] tribal members that were in the employee group.
>
> *The Court:* How many was it?
>
> *Mr. Rynders:* 136.
>
> *The Court:* How did you make that determination?
>
> *Mr. Rynders:* We went to the Tribe and asked them to help us put together the best list we could of everybody that was an employee in the employee group but was also a tribal member. [(6/27/23 Hr'g Tr., ECF No. 284, PageID.15662.)]

Long before that June 2023 hearing, however, Plaintiffs and their counsel: (i) knew that their list of 136 was incomplete; but (ii) despite that knowledge, chose

instead to still seek default by accusing BCBSM of improperly withholding claims data relative to the very same individuals that Plaintiffs failed to identify. The below illustrates the extraordinary efforts undertaken by Plaintiffs to utilize their own failure as a mechanism to seek entry of default against BCBSM three separate times.

2. Plaintiffs *knew* in August 2022 that their list of 136 was incomplete, and they used that failure to seek entry of default

In February 2023, and even though their first list of 136 was woefully incomplete, Mr. Hofman sent to the undersigned a letter, telling BCBSM to "stop digging the hole" relative to "tribal member employees," saying:

> Plaintiffs have identified for BCBSM dozens of instances where tribal member employees were referred to hospitals by the Tribe's CHS program and received care at hospitals that BCBSM paid for using tribal plan assets, but for which BCBSM has failed to produce claims data and documents. Plaintiffs' investigation continues, and Plaintiffs have already identified many more instances of facility care provided to tribal member employees for which BCBSM has failed to produce any claims data or documents.
>
> We suggest BCBSM stop digging the hole it is in and instead, immediately comply with the Court's Orders. [(Hofman 2/3/23 Letter, ECF No. 266-16, PageID.14982 (emphasis omitted).)]

Following that February 2023 letter, and as this Court by now knows well, Plaintiffs used hundreds (and, eventually, thousands) of purchase orders to accuse BCBSM of withholding claims data relative to the Employee Plan. BCBSM investigated each of those purchase orders, and on April 3, 2023, explained to Plaintiffs (among other things) the following: "Several . . . purchase orders were for

the ***Employee Group*** relative to individuals ***not*** identified by Plaintiffs as required by the August 2, 2022 Order (ECF No. 222)—BCBSM is producing claims for these individuals (and their dependents) even though Plaintiffs never identified them." (*See* Hubbard 4/3/23 Letter, ECF No. 282-2, PageID.15549 (original emphasis).) That is to say, Plaintiffs were on notice by BCBSM since at least April 2023 that their first list of 136 individuals was incomplete. (*See id.*) But they did not need BCBSM's April 2023 notice—Plaintiffs *knew in August 2022* that their list was incomplete (as illustrated below). And for reasons still unexplained, neither Plaintiffs' August 2022 knowledge nor BCBSM's April 2023 notice prompted Plaintiffs to update their list of 136. Instead of remedying their own failure, they chose to persistently lodge against BCBSM knowingly false accusations.

For example, on June 16, 2023 (and more than two months after BCBSM's April 2023 notice), Plaintiffs filed a brief with this Court, seeking default against BCBSM and citing to 4,806 purchase orders, saying those purchase orders exhibited "hospital visits for which BCBSM has withheld claims data," and using the purchase orders to tell this Court that BCBSM "deliberately concealed claims." (Pls.' Suppl. Br., ECF No. 280, PageID.15474-15475.) But as this Court recognized, "[d]espite having received these orders only four days before the [June 2023] hearing, BCBSM had already analyzed the first set of 1,000." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16965.) And as the undersigned explained at the June 2023

hearing: Many were for "*individuals that they never identified for us.*" (6/27/23 Hr'g Tr., ECF No. 284, PageID.15695 (emphasis added).)

And during that same June 2023 hearing, Plaintiffs' counsel—specifically, Mr. Rynders—conceded that Plaintiffs *did know* that they "missed people," saying to this Court: "we did find out that we missed people." (*Id.* PageID.15662.) Mr. Rynders made another concession during that same June 2023 hearing: "There isn't a default motion because we didn't get these other names back in August [2022], okay." (*Id.* PageID.15672.) Indeed, even before that June 2023 hearing, Plaintiffs "conceded during the May 17, 2023 in-person status conference that . . . no fault lies with BCBSM for not producing claims data for the Employee Plan relative to individuals not previously identified by Plaintiffs." (BCBSM's Suppl. Br., ECF No. 282, PageID.15537.)

But exactly *when* did Plaintiffs know that their list of 136 "missed people"? Certainly Plaintiffs knew in June 2023 when their counsel represented to this Court that "we missed people." (6/27/23 Hr'g Tr., ECF No. 284, PageID.15662.) And certainly they knew in April 2023 when BCBSM itself placed Plaintiffs on notice (twice in the same letter). (*See* Hubbard 4/3/23 Letter, ECF No. 282-2, PageID.15549.) But the truth is that Plaintiffs knew in August 2022 when they provided that list of 136. And although BCBSM, the undersigned, and this Court

were misled in August 2022 about what Plaintiffs and their counsel knew, an exchange among counsel—in hindsight—illustrates Plaintiffs' real-time knowledge.

The August 2022 Order required the parties to "report to this Court by September 2, 2022, the status of the . . . discovery," including Plaintiffs' identification of tribal members relative to the Employee Plan. (Aug. 2022 Order, ECF No. 222, PageID.13297.) Mr. Hofman desired to prepare the first draft, which he provided the evening of September 1, 2022; as to the list of 136, he proposed the following message (note that it avoids mention of the number 136):

> Consistent with the Court's August 2, 2022 Order, Plaintiffs produced to Defendant on August 31, 2022 a list of the tribal members that participated in the Employee Plan. [Hofman 9/1/22 E-mail, **Exhibit A**.]

On the morning of September 2, 2022, the undersigned proposed the following changes, with the bolded phrases having particular import:

> On August 31, 2022, and consistent with the Court's Order, Plaintiffs produced to BCBSM **all of the names** of the Employee Tribal Members that were participants in the Employee Plan, **totaling 136.** [*Id.* (original emphasis).]

Clearly, BCBSM was attempting to receive confirmation that the list Plaintiffs provided was the entire universe, and not just "a list." But later that morning, Mr. Hofman struck the bolded phrases "all of the names" and "totaling 136," proposing:

> On August 31, 2022, and consistent with the Court's Order, Plaintiffs produced to BCBSM a list of the tribal members that participated in the Employee Plan. [*Id.*]

Attempting to reach middle ground, the undersigned then proposed to re-insert the bolded phrase "totaling 136":

> On August 31, 2022, and consistent with the Court's Order, Plaintiffs produced to BCBSM a list of the employee tribal members that participated in the Employee Plan, **totaling 136**. [*Id.* (original emphasis).]

Mr. Hofman struck it again without giving an explanation, saying "this is what we can agree to":

> On August 31, 2022, and consistent with the Court's Order, Plaintiffs produced to BCBSM a list of the employee tribal members that participated in the Employee Plan. [*Id.*]

Plaintiffs then submitted to this Court the joint report, avoiding reference to **"all of the names"** and **"totaling 136."** (*See* Joint Report, ECF No. 233-3, PageID.13944.) Put another way, Plaintiffs and their counsel would not permit the parties to report about anything other than Plaintiffs' production of "a list."

Neither BCBSM nor the undersigned knew, or even had reason to question in August 2022 *why* Plaintiffs and their counsel refused to agree to the phrases "all of the names" and "totaling 136." But it is now clear—Plaintiffs and their counsel knew in August 2022 what BCBSM and its counsel discovered in April 2023, and what Mr. Rynders disclosed to this Court in June 2023: they "missed people." And despite that knowledge, Plaintiffs made a very conscious decision not to promptly update their list (or even disclose in August 2022) that they "missed people."

Plaintiffs instead sought entry of default against BCBSM three separate times, trying to barricade their knowledge by falsely accusing BCBSM of "lying" and perpetrating a "fraud on the Court." (*See e.g.*, Pls.' Reply, ECF No. 277, PageID.15433-15434 (accusing BCBSM of "a blatant lie" and of orchestrating "a fraud on the Court").) But it was Plaintiffs and their counsel who lacked candor, and this Court properly recognized: "[T]he record suggests that the Tribe has been just as obstinate throughout discovery as they allege BCBSM has." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16967.)

BCBSM now seeks sanctions for Plaintiffs' violation of the August 2022 Order in failing to undertake "best efforts" when producing to BCBSM their first list of 136, with Plaintiffs instead using their own failure as a sword to seek default against BCBSM three separate times.

C. Plaintiffs Also Violated The July 2023 Order

On July 19, 2023, this Court entered the July 2023 Order and properly denied Plaintiffs' first default motion, referring to Plaintiffs' repeated allegations as "unsubstantiated speculation of lurking claims." (July 2023 Order, ECF No. 283, PageID.15621.) That is when this Court again ordered Plaintiffs to use their "best efforts," this time "to resolve the remaining discovery disputes while the pending motion for summary judgment is resolved." (*Id.* PageID.15622.)

On July 20, 2023, less than twenty-four hours after this Court entered the July 2023 Order, and in good faith seeking to "resolve the remaining discovery disputes," the undersigned confirmed the following to opposing counsel:

> BCBSM will continue to investigate the [4,806] purchase orders identified in Plaintiffs' supplemental brief (i.e., those received on June 23). That investigation will be undertaken consistent with how BCBSM investigated the 819 purchase orders that Plaintiffs identified before filing their supplemental brief [in June 2023], and we will advise of the investigation results. [(Hubbard 7/20/23 E-mail, ECF No. 289-2, PageID.16276.)]

Four days later (July 24, 2023), and even though Plaintiffs *knew* their list of 136 was incomplete, Mr. Hofman sent to the undersigned another letter, telling BCBSM *again* to "stop digging the hole it is in," citing *again* to purchase orders as a vehicle to say "BCBSM has failed to produce claims data to-date." Hofman 7/24/23 Letter, **Exhibit B**. Or, put differently, Plaintiffs made yet *another* conscious decision not to update their list of 136.

And more rhetoric followed, with Plaintiffs and their counsel establishing that they place little credence in, and place themselves above this Court's "best efforts" Orders:

> *Hubbard, 7/25/23*: Respectfully, the time for [digging-the-hole] hyperbole has come and gone—the Court encouraged both parties to work together, not posture.
>
> *Hubbard, 8/8/23*: Regarding the [4,806] purchase orders identified by Plaintiffs and received by us on June 23, . . . we are not seeing anything showing that BCBSM missed thousands of claims.

Hofman, 8/8/23: [T]his isn't about going through the purchase orders we've produced one-by-one . . . . That's just a delay and stalling tactic. . . . [W]e will be moving forward with preparing a renewed motion for default judgment.

Hubbard, 8/11/23: [W]e encourage Plaintiffs to continue to work cooperatively with BCBSM relative to identifying any tribal members that Plaintiffs did not previously identify, rather than threaten default.

Hofman, 8/17/23: All I have from you is empty promises, excuses that have already been rejected by the Court, and vague allegations (without any supporting evidence) about BCBSM's alleged efforts to fit the missing claims into BCBSM's made-up, artificial categories.

Hubbard, 8/18/23: Thank you for your e-mail. I will refrain from responding in kind. We are expecting to have next week finalized numbers as to the first 2,500 purchase orders. We are also expecting to provide claims data for the individuals that Plaintiffs did not identify relative to the Employee Plan. . . . [W]e 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. Otherwise, we are continuing to go through the purchase orders one-by-one—we are still not seeing anything showing that BCBSM has "massive deficiencies" in its production.

Hofman, 8/24/23: It appears your line about "identifying all of the tribal members on the Employee Plan," is BCBSM's latest twist on its prior attempts to get away with disobeying the Court's Orders . . . . There is no need for BCBSM to run any searches of individual enrollees [tribal members].

Hubbard, 8/25/23: Your repeated rhetoric is not well taken. Nor is it consistent with the spirit of Judge Ludington's Order . . . . Other than identifying the tribal members that Plaintiffs failed to identify relative to the Employee Plan,

> BCBSM's investigation has not identified any other category of relevant claims data. . . . We again urge Plaintiffs to reconsider their unwillingness to identify those tribal members.

Hofman, 9/4/23: 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. . . . As a result of BCBSM's continued refusal to turn over the claims data, . . . we have no choice but to renew Plaintiffs' Motion for Default Judgment. [(Counsel 7/25/23–9/4/23 E-mails, ECF No. 288-3, PageID.16190-16198.)]

The foregoing establishes Plaintiffs' willful and wanton violation of the July 2023 Order requiring "best efforts to resolve the remaining discovery disputes." (July 2023 Order, ECF No. 283, PageID.15622.) Indeed, 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." (Order Den. Pls.' 2d Mot., ECF No. 294, PageID.16964-16965.)

Conversely, and as the undersigned promised on July 20, 2023, BCBSM employees spent hundreds of hours in reviewing one-by-one the 5,625 purchase orders that Plaintiffs used to accuse BCBSM of withholding claims data (the first wave of 819, plus the second wave of 4,806). And in doing so, BCBSM identified 200+ different tribal members on the Employee Plan that were not identified in Plaintiffs' first list of 136. (BCBSM's Resp., ECF No. 289, PageID.16265.) That is to say, BCBSM properly followed this Court's July 2023 Order requiring "best efforts," and in doing so established that Plaintiffs woefully failed to undertake "best

efforts." Put differently, how can Plaintiffs miss so many of their *own* tribal members if they actually undertook "best efforts"?

Yes, on September 14, 2023, Plaintiffs did provide a *second* list—the list contained 561 individuals. (List of 561, ECF No. 288-4.) And Plaintiffs' rhetoric still continued when providing that list, with Mr. Hofman saying: "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.) Doing BCBSM's work for it? Remember, there are two Court Orders requiring Plaintiffs' "best efforts" to: (i) "identify *for BCBSM* . . . the Tribal Members that participated in the Employee Plan"; and (ii) "resolve the remaining discovery disputes." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16960, 16964 (original omission) (emphasis added) (citing ECF Nos. 222, 283).)

In any event, the growth of that list from 136 to 561 did not stop Plaintiffs' strategy of using the list to seek default a second time, with Plaintiffs saying in their second default motion: "BCBSM's latest excuse . . . is to argue Plaintiffs didn't identify for it all tribal members enrolled in the Employee Plan soon enough," and that BCBSM's need for the list was a "lie as an excuse for further delaying its claims data production." (Pls.' 2d Mot. for Default, ECF No. 287, PageID.16036, 16040.)

But in further compliance with the July 2023 Order requiring "best efforts," BCBSM also investigated each person on Plaintiffs' second list of 561 (provided on

September 14, 2023). And in doing so, BCBSM employees expended hundreds of hours. (Muncy Decl., ECF No. 289-7, PageID.16296, ¶ 11.) That investigation yielded claims data only for tribal members: (i) relative to the Employee Plan; and (ii) whom Plaintiffs did not identify with their first list of 136. (*See id.* ¶ 12.) And this Court properly recognized the same: "all missing claims concerned individuals not yet identified by the Tribe nor provided to BCBSM." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16966.) But if you believe Plaintiffs, all of this is BCBSM's fault.

Recall that BCBSM's investigation of the purchase orders identified 200+ different tribal members on the Employee Plan that were not identified in Plaintiffs' first list of 136. (BCBSM's Resp., ECF No. 289, PageID.16265.) Incredibly, and further evidencing Plaintiffs' failure to exercise "best efforts," of those same 200+ tribal members, 120+ were likewise not on Plaintiffs' *second list* of 561. (*Id.*) In denying Plaintiffs' second motion for default, this Court properly held: "[T]he 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*." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16966 (emphasis added).)

Even after this Court: (i) entered two Orders requiring Plaintiffs to use their "best efforts"; (ii) denied Plaintiffs' first two motions for default; and (iii) already

told Plaintiffs and their counsel what the record shows (i.e., their own "fault"), Plaintiffs were *still* undeterred. So they continued down their now-familiar path—yes, they provided to BCBSM a third list, and, yes, with that third list came a third motion seeking entry of default against BCBSM. (*See* ECF No. 295.)

On December 20, 2023, Plaintiffs provided to BCBSM that 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 nearly 800%, from 136 to 1,049. And Plaintiffs' same rhetoric continued when providing that list of 1,049, 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.) Plaintiffs' rhetoric likewise continued in their third motion, with Plaintiffs saying: "BCBSM lies with greater sophistication," and accusing BCBSM of being "prejudiced" towards Native Americans. (ECF No. 295, PageID.16987-16988.)

But as explained in BCBSM's Response Brief opposing Plaintiffs' third motion for default: "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." (ECF No. 297, PageID.17178.) Even worse, and further evidencing Plaintiffs' failure to exercise "best efforts," is that even

Plaintiffs' third list of 1,049 *still missed* 25 tribal members that BCBSM had *already identified* for Plaintiffs. (*Id.* PageID.17187-17188.)

Plaintiffs' third motion was otherwise a repeat of the tactics employed in their second motion for default, as Plaintiffs: (i) cited to the *same* purchase orders; (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 used selective quotes to mischaracterize the record, only this time Plaintiffs selectively quoted this Court and the MLR regulations instead of the undersigned. (*Id.* PageID.17179-17195.) However, this Court already rejected that "repeat" tactic when denying Plaintiffs' *second* motion for default, recognizing: "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." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16961.)

In all, then, between August 31, 2022 and January 5, 2024, Plaintiffs: (i) provided to BCBSM three lists of tribal members (growing from 136 to 561 to 1,049); and (ii) simultaneously sought (three times) to default BCBSM. And in each such motion, Plaintiffs sought to default BCBSM for not producing claims data relative to the very same individuals that Plaintiffs failed to identify in those lists. (*See, e.g.*, Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16965 (*Court*:

"Far from bad faith, BCBSM's 'sitting on undisclosed data' reflects the fact that the Tribe did not identify all its member-employees.").)

All of that notwithstanding, BCBSM repeatedly asked Plaintiffs to update their list instead of seeking default. But Plaintiffs steadfastly refused, choosing instead to employ their familiar pattern of vexatious litigation. (*Cf. id.* PageID.16962 (*Court*: "Indeed, the 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—only to then turn around and file two motions for default judgment claiming that BCBSM failed to disclose the very claims data that BCBSM told the Tribe it needed the birthdates in question to produce." (footnote omitted)).)

BCBSM now seeks sanctions for Plaintiffs' violation of the July 2023 Order in failing to undertake "best efforts" to "resolve the remaining discovery disputes while the pending motion for summary judgment is resolved." (July 2023 Order, ECF No. 283, PageID.15622.)

D. Plaintiffs Used Thousands Of Purchase Orders To Mask Their Violations

In an effort to mask their violations, Plaintiffs tried mightily to create a false narrative by citing purchase orders 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, ECF No. 266, PageID.14935 (citing

the 464); Pls.' 2d Mot. for Default, ECF No. 287, PageID.16036-16037 (citing the 4,806).) BCBSM and its counsel then undertook exhaustive efforts to review each one-by-one, establishing each time that Plaintiffs were mistaken—that process "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).) But Plaintiffs were still not deterred with their purchase-order strategy, so they filed in November 2023 another brief citing *another* 3,100 purchase orders to argue yet again that BCBSM should be defaulted. (Pls.' Reply, ECF No. 292, PageID.16773.) BCBSM then explained (again) that Plaintiffs were wrong (again). (*See* BCBSM's Resp., ECF No. 297, PageID.17188.)

So in all, Plaintiffs used 8,725 purchase orders (in groupings of 464, 85, 200, 70, 4806, and 3100) to falsely accuse BCBSM of withholding claims data. When the undersigned properly defended against those allegations, Plaintiffs' counsel audibly laughed, finding humor in their effort. (6/27/23 Hr'g Tr., ECF No. 284, PageID.15696 ("And they're laughing . . . I hear it.").) However, this Court properly dismissed Plaintiffs' purchase-order argument—not once, but twice—referring to it as "unsubstantiated speculation" (July 2023 Order, ECF No. 283, PageID.15621), and then finding that "[t]he Tribe's assertion that BCBSM has not disclosed 'thousands' of claims is unsupported" (Order Den. Pls.' 2d Mot. for Default, ECF

No. 294, PageID.16966). Meanwhile, Plaintiffs' list grew from 136 to 561 to 1,049, and with each list Plaintiffs sought entry of default against BCBSM by citing back to the purchase orders.

Sanctions are now warranted and, respectfully, required.

III. ARGUMENT

A. Legal Standard

1. FRCP 37(b)

"If a party . . . fails to obey an order to provide or permit discovery, . . . the court where the action is pending may issue further just orders." FED. R. CIV. P. 37(b)(2)(A). "Instead of or in addition to" those orders specified under Rule 37(b)(2)(A), "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Rule 37(b)(2)(C).

"The purpose of imposing sanctions is to assure both future compliance with the discovery rules and to punish past discovery failures, as well as to compensate a party for expenses incurred due to another party's failure to properly allow discovery." *Jackson v. Nissan Motor Corp.*, 888 F.2d 1391 (6th Cir. 1989). And, respectfully, the monetary sanctions are mandatory. *Tech. Recycling Corp. v. City of Taylor*, 186 F. App'x 624, 638 (2006) ("Pursuant to Rule 37(b)(2), the district court was *required* to award defendants the fees they incurred as a result of plaintiffs'

failure to obey discovery orders, unless one of the stated exceptions applied." (emphasis added)).

2. This Court's inherent authority

A district court "may [also] award sanctions pursuant to its inherent powers." *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 375 (6th Cir. 1996) (citation omitted). Bad faith is the touchstone for sanctions under the Court's inherent authority, with conduct that is "tantamount" to bad faith meeting the requirement. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 519 (6th Cir. 2002).

3. 28 U.S.C. § 1927

Separately, any "person admitted to conduct cases . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be" sanctioned. 28 U.S.C. § 1927. A person may be sanctioned under §1927 when "he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006).

Put differently, "when an attorney knows or reasonably should know . . . his or her litigation tactics will needlessly obstruct the litigation . . . , a trial court does not err by assessing fees attributable to such actions against the attorney." *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986); *accord Red Carpet*, 465 F.3d at

646 ("Section 1927 sanctions are warranted when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'") (quoting *Ruben v. Warren City Sch.*, 825 F.2d 977, 984 (6th Cir. 1987)).

B. Plaintiffs And Their Counsel Should Be Sanctioned For Violating The August 2022 And July 2023 Orders, And For Engaging In Their Corresponding, Vexatious Litigation

Plaintiffs conceded *twice* that BCBSM cannot be faulted—let alone *de*faulted—if Plaintiffs' lists were incomplete. That concession came first during this Court's in-person status conference on May 17, 2023. (BCBSM's Suppl. Br., ECF No. 282, PageID.15537.) It came again during the June 2023 hearing. (6/27/23 Hr'g Tr., ECF No. 284, PageID.15671-15672.) But Plaintiffs *still* proceeded with trying to default BCBSM for allegedly failing to produce claims data for the very same individuals that they failed to identify. And not just one default motion. But three separate motions, with those motions being substantially repetitive. (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16961-16962 ("Most of the Tribe's Renewed [second] Motion raises the same arguments already raised in its first motion, and already rejected by this Court[.]").) *That* is vexatious. Certainly it is not "best efforts," particularly when Plaintiffs and their counsel knew in August 2022 that their list of 136 was incomplete, but chose not to disclose that fact (leaving BCBSM to discover it in April 2023). *See supra* pp. 5–10.

Consistent with Rule 37, Plaintiffs and/or their counsel must now be sanctioned for the fees and costs that BCBSM incurred as a result of Plaintiffs' failure to obey the August 2022 and July 2023 Orders, including the fees and costs that BCBSM incurred for: (i) having to respond to Plaintiffs' three motions for default; (ii) preparation of, and then attending appearances before this Court in having to defend against Plaintiffs' three motions; (iii) reviewing one-by-one the thousands of purchase orders Plaintiffs used as a vehicle to falsely accuse BCBSM; and (iv) preparing and filing this motion for sanctions. *See Szappan v. Meder*, No. 18-CV-12244, 2019 WL 1402514, at *2 (E.D. Mich. Mar. 28, 2019) (Ludington, J.) (granting defendants' request for attorney's fees under Rule 37(b) because "Plaintiff's disregard of the Defendant, its counsel, and the Court's order is not justified"); *Victor v. Reynolds*, 649 F. Supp. 3d 499, 508 (E.D. Mich. 2023) (Ludington, J.) ("Defendants will be directed to pay reasonable expenses and attorney's fees caused by their failure to comply with Judge Morris's order compelling discovery."), *reconsideration denied*, --- F.Supp.3d ----, 2023 WL 4157616 (E.D. Mich. June 23, 2023) (Ludington, J.); *Burn Hookah Bar, Inc. v. City of Southfield*, No. 2:19-cv-11413, 2023 WL 3898752, at *3 (E.D. Mich. June 8, 2023) (Murphy, J.) (sanctioning plaintiffs under Rule 37 where they "provided no satisfactory reason for why they failed to produce the documents . . . by the stipulated

deadline," "[a]t a minimum . . . knew that the documents existed and could have had them produced," and "failed to justify the dilatory disclosures.")

Sanctions are likewise consistent with this Court's inherent authority and 28 U.S.C. § 1927. There can be no debating that Plaintiffs' three default motions exhibit conduct that "so multiplies the proceedings . . . unreasonably and vexatiously." 28 U.S.C. § 1927. As BCBSM explained in its response brief opposing Plaintiffs' *third* motion for default: "Research did not locate a case where a party represented by counsel sought entry of default three times (and Plaintiffs cite no such case)." (BCBSM's Resp., ECF No. 297, PageID.17200.) After BCBSM made that point known—and knowing it to be true—Plaintiffs and their counsel filed a reply brief that blamed on this Court their vexatious filings, feigning:

> Plaintiffs' counsel indicated [at the December 4, 2023 status conference] they would preserve their argument that BCBSM has not produced the claims data and would prove that at trial. *The Court then invited Plaintiffs to instead file a motion regarding the claims data by January 5. Plaintiffs' third default judgment motion follows that directive.* [(Pls.' Reply, ECF No. 298, PageID.17279 (emphasis added).)]

That is not what happened at the December 4, 2023 status conference, and Plaintiffs and their counsel know it. Not once did this Court "invite" or "direct" Plaintiffs to file a third motion. Mr. Hofman instead *insisted* that he *would be* filing a third motion. And when Mr. Hofman asked about whether he could file a reply brief, this Honorable Court quickly told him "no." He filed one anyway. (ECF No. 298.)

The foregoing establishes that sanctions are here warranted under both this Court's inherent authority and 28 U.S.C. § 1927. *Accord Dubuc v. Green Oak Twp.*, 2010 WL 3245324, at *1, *10 (E.D. Mich. Aug. 16, 2010) (Cleland, J.) (sanctioning "the individual Plaintiffs under the court's inherent powers and . . . Plaintiffs' counsel under § 1927" upon "determin[ing] that there is evidence of bad faith on the part of Plaintiffs and their counsel.").

IV. CONCLUSION

Plaintiffs repeatedly violated this Court's August 2022 and July 2023 Orders, failing entirely to use their "best efforts" as required by those Orders. Instead of using "best efforts," Plaintiffs and their counsel advanced a knowingly false narrative, citing to thousands of purchase orders to say that BCBSM "deliberately concealed claims." (Pls.' Suppl. Br., ECF No. 280, PageID.15474.) But in reality, "all missing claims concerned individuals not yet identified by the Tribe nor provided to BCBSM." (Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16966.) Respectfully, sanctions are both warranted and required.

Respectfully submitted,
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Dated: February 9, 2024

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 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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