

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN AND ITS
WELFARE BENEFIT PLAN,

Plaintiffs,

Case No. 16-cv-10317

Honorable Thomas L. Ludington

Magistrate Judge Patricia T. Morris

v.

BLUE CROSS BLUE SHIELD OF
MICHIGAN,

Defendant.

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO BCBSM'S
MOTION FOR SANCTIONS (ECF NO. 299)

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs violated the Court's August 2, 2022 Order directing Plaintiffs to "make best efforts to identify for BCBSM by August 31, 2022, the Tribal Members that participated in the Employee Plan" where:
 - (a) With the information they had at that time, Plaintiffs and their counsel used their best efforts to compile and produce to BCBSM on August 31, 2022, a list of 136 tribal member participants enrolled in the Employee Plan;
 - (b) When Plaintiffs' counsel first learned about the BCBSM enrollee list BCBSM had produced in 2017, Plaintiffs' counsel updated and produced to BCBSM a new list of the tribal members participants and dependents enrolled in the Employee Plan;
 - (c) When Plaintiffs' experts compiled a list of all individuals identified on the Tribe's purchase orders, Plaintiffs' counsel updated and produced to BCBSM a new list of tribal member participants and dependents enrolled in the Employee Plan;
 - (d) Plaintiffs' counsel repeatedly identified for BCBSM all tribal members, tribal employees, and dependents with missing claims data on February 23, March 23, June 16, July 24, October 9, and November 27, 2023; and
 - (e) BCBSM has not identified any tribal member identification it still needs.

2. Whether Plaintiffs violated the Court's July 2023 Order requiring the parties to use their "best efforts to resolve the remaining discovery disputes" when Plaintiffs:
 - (a) identified for BCBSM all tribal members and employees in 2017 and 2019;
 - (b) identified for BCBSM all tribal member employees enrolled in the Employee Plan that Plaintiffs could locate in August 2022;
 - (c) updated Plaintiffs' list of tribal member employees enrolled in the Employee Plan in September and December 2023 with information BCBSM always had but ignored;

- (d) identified for BCBSM numerous tribal members and employees with missing claims data on February 23, March 23, June 16, July 24, October 9, and November 27, 2023 using information BCBSM always had but ignored;
 - (e) followed up with BCBSM over twenty times on its claims data deficiencies;
 - (f) filed six motions to compel BCBSM's compliance with six Court Orders;
 - (g) spent hundreds of hours reviewing BCBSM's nineteen productions for completeness (they were all incomplete); and
 - (h) the remaining discovery disputes that exist are entirely of BCBSM's own making.
3. Whether Plaintiffs' three default motions were filed in bad faith and unreasonably multiplied the proceedings when:
- (a) each default motion was filed upon the Court's invitation and with its permission;
 - (b) each default motion sought to default BCBSM for not producing claims data relative to the individuals Plaintiffs had specifically identified for BCBSM months before each motion was filed; and
 - (c) each default motion was successful, in that it forced BCBSM to surrender claims data for thousands of claims it had previously withheld.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

For denying Defendant's Motion for Sanctions, Plaintiffs rely on 28 U.S.C. § 1927, Fed. R. Civ. P. 37, this Court's August 2, 2022 Order (ECF No. 222, PageID.13297); this Court's November 14, 2022 Order (ECF No. 232, PageID.13901); Magistrate Judge Morris's February 1, 2023 Sanctions Order (ECF No. 255, PageID.14659-85); this Court's February 9, 2023 Order (ECF No. 258, PageID.14691); this Court's March 2, 2023 Order (ECF No. 271, PageID.15083); this Court's July 19, 2023 Order (ECF No. 283, PageID.15622), and the law, arguments, and authorities set forth in this Brief.

I. INTRODUCTION

BCBSM—guilty of violating six discovery Orders over the past eighteen months—is asking the Court to reward its violations by sanctioning *Plaintiffs* for pursuing *Court-ordered discovery*, and for filing motions the Court *gave leave to file*. After BCBSM initially produced *zero* Employee Plan claims, Plaintiffs filed motion after motion, *each* resulting in BCBSM surrendering more claims data. After BCBSM's latest *January 25, 2024*, production spurred by Plaintiffs' *third* default motion, Plaintiffs now have *20,000+* Employee Plan claims they would not have had. But BCBSM is still withholding *3,100 more claims*, likely *many* more, and it seeks retribution for Plaintiffs demanding BCBSM do what it was ordered to do.

Plaintiffs and their counsel used "best efforts" to get claims data from BCBSM, including: (1) identifying for BCBSM all tribal members and employees in 2017 and 2019; (2) identifying for BCBSM all tribal member employees enrolled in the Employee Plan that Plaintiffs could locate in August 2022; (3) updating Plaintiffs' list of tribal member employees enrolled in the Employee Plan in September and December 2023 with information BCBSM always had but ignored; (4) identifying for BCBSM numerous tribal members and employees with missing claims data on February 23, March 23, June 16, July 24, October 9, and November 27, 2023; (5) following up with BCBSM over *twenty* times on its claims data deficiencies; (6) filing *six* motions to compel BCBSM's compliance with six Court

Orders; and (7) spending *hundreds* of hours reviewing BCBSM's *nineteen* productions for completeness (they were all incomplete). As this Court found in *awarding Plaintiffs their fees* for these efforts from September 1, 2022 - January 30, 2023: "*Plaintiffs' counsel, billing slightly above the 25th percentile, have earned their due. Their work throughout the discovery process—clear and cogent briefings, patient pursuits of discovery disputes, and averaging less than 1.6 hours of work per day on uniquely complex issues—has demonstrated efficiency, diligence, and competence such that \$382.21 per hour is well deserved.*" 7/19/2023 Order at 10-11, (PageID.15617-18) (emphasis added). Importantly, BCBSM has not identified anything it still needs from Plaintiffs. Its present motion is its effort to deflect attention away from its discovery abuses.

One deflection tactic BCBSM uses is grossly misrepresenting the record. For example, Plaintiffs did not seek to default BCBSM "for not producing claims data relative to the very same individuals that Plaintiffs failed to identify." (ECF No. 299, PageID.17291, 17307); *Plaintiffs sought to default BCBSM for not producing claims data relative to the individuals Plaintiffs had specifically identified months before each motion was filed.* When BCBSM contends Plaintiffs "falsely accuse[d] BCBSM of withholding claims data" (ECF No. 299, PageID.17309), BCBSM is dead wrong; *after each motion Plaintiffs filed, BCBSM produced more withheld claims* (although it continued withholding others). BCBSM is also wrong when it

says Plaintiffs' counsel "knew that their list of 136 was incomplete" in August 2022 (ECF No. 299, PageID.172945). As the Court has noted, that was "the Tribe's best efforts at the time." 12/1/2023 Order, at 22 (ECF No. 294, PageID.16964). Plaintiffs and their counsel had no reason to hide anything; Plaintiffs wanted more claims data, not less. Only later did Plaintiffs discover additional BCBSM enrollee information, which they quickly used to update the lists. By contrast, BCBSM always turned over fewer claims data than it was required to.

Plaintiffs have vigorously pursued the claims data. Even so, they only filed default motions with the Court's leave. And each motion yielded more claims data. BCBSM's frivolous motion should be denied.

II. FACTUAL BACKGROUND

BCBSM ignores most of the parties' discovery disputes and grossly misrepresents certain cherry-picked events. What follows is the correct chronology.

A. PLAINTIFFS' BEST EFFORTS TO IDENTIFY THE TRIBAL MEMBERS.

In June 2022, upon remand from the Sixth Circuit, Plaintiffs' counsel reached out to BCBSM's counsel to obtain claims data. **Exhibit 1**, 6/2022 Emails. BCBSM's counsel agreed to produce Employee Plan claims data but asked for identification of tribal member participants in the Employee Plan. Plaintiffs' counsel noted those tribal members were identified in 2019, (ECF No. 288-2, PageID.16176), but agreed to use best efforts as a cooperative gesture. Those efforts included the following:

- **July 28, 2022**: Plaintiffs' counsel emailed the Tribe's General Counsel to schedule a call on identifying the tribal member participants enrolled in the Employee Plan. **Exhibit 2**, Hofman Decl., at ¶ 7.
- **August 1**: Over e-mail and video, Plaintiffs and their counsel discussed identifying the tribal members enrolled in the Employee Plan. *Id.* at ¶ 8.
- **August 2**: The Court entered the Stipulated Order directing best efforts for: (1) BCBSM to produce the claims data and (2) Plaintiffs to identify the tribal member participants in the Employee Plan.
- **August 11-17**: The Tribe's General Counsel informed Plaintiffs' counsel that the Tribe's benefit manager Connie Sprague had retired and that the Tribe's new benefits manager, Craig Graveratte, was out of office until August 23. Ms. Sprague nevertheless returned and worked on the list. *Id.* at ¶¶ 9-10.
- **August 19**: Plaintiffs' counsel and his wife have their fourth child. *Id.* at ¶ 11.
- **August 23**: Mr. Graveratte compiled and sent Plaintiffs' counsel an initial list of tribal members in the Employee Plan. *Id.* at ¶ 12.
- **August 24**: Plaintiffs' counsel followed up with questions about the initial list, which Mr. Graveratte answered the next day. *Id.* at ¶ 13.
- **August 26**: Plaintiffs' counsel and Mr. Graveratte had a phone call to go through the list again and confirm certain items. *Id.* at ¶ 14.
- **August 24-29**: Plaintiffs' counsel compiled information regarding the Tribe's members and employees and sent Mr. Graveratte this information to assist Mr. Graveratte in putting together an updated list. *Id.* at ¶¶ 15-16.
- **August 30**: Using this information, Mr. Graveratte compiled and sent Plaintiffs' counsel an updated list, with all 136 tribal member participants in the Employee Plan he could identify, and Plaintiffs' counsel and Mr. Graveratte discussed that list over a call. **Exhibit 3**, Graveratte Decl., at ¶¶ 6-15.
- **August 31**: Plaintiffs' counsel produced a list of the same 136 tribal member-participants to BCBSM in compliance with the Court's Order. **Ex. 2**, Hofman Decl., at ¶¶ 17-19.

As this Court previously noted, those were "the Tribe's best efforts at the time." 12/1/2023 Order, at 22 (ECF No. 294, PageID.16964). Notwithstanding BCBSM's speculation, Plaintiffs and their counsel were then unaware of any tribal member participants in the Employee Plan other than the 136.¹ **Ex. 2**, Hofman Decl., at ¶¶ 20-22; **Ex. 2**, Graveratte Decl., at ¶¶ 13-15. Further, there was no possible reason to omit any names; Plaintiffs wanted *all* the claims data. *See id.*

B. BCBSM VIOLATES THE ORDER TO PRODUCE CLAIMS DATA.

BCBSM, in contrast, violated the Court's August 2 Order. Its timeline starts on August 31 because—as Magistrate Judge Morris noted in her Sanctions Order—it never identified *any* pre-August 31 efforts to meet the Court's deadline. *See* 2/1/2023 Sanctions Order, at 11-12 (ECF No. 255, Page-ID.14669-70).

- **August 31-September 9**: BCBSM missed the Court's August 31 deadline. After Plaintiffs' counsel followed up on September 2, BCBSM promised it would send "updated claims data by next week." 9/2/2022 E-mail (ECF No. 233-2, PageID.13941); 9/9/2022 E-mail (ECF No. 233-3, PageID.13943-44).
- **September 16**: BCBSM admitted it failed to produce the complete set of claims data the next week. *See* 9/16/2022 E-mail (ECF No. 233-4, PageID.13947-49).
- **September 22**: On September 22, BCBSM produced what it misrepresented was "the completed claims data." 9/22/2022 E-mail (ECF No. 233-5, PageID.13951-52). It was not "complete," as Plaintiffs' counsel noted at that time. *See id.*

¹ Contrary to BCBSM's argument, the disagreement among counsel about whether the 136 were "all of the names" was not because Plaintiffs' counsel knew of more names. **Ex. 2**, Hofman Decl., at ¶¶ 23-26. It was because the August 2 Order only required "best efforts to identify" the names, not "identify all of the names." *Id.*

- **September 22-28**: BCBSM's counsel promised to produce claims data the next week but did not, forcing Plaintiffs to follow up again. 9/28/2022 E-mail (ECF No. 233-6, PageID.13954). BCBSM then promised "revised claims data yet this week or early next." 9/28/2022 E-mail (ECF No. 233-7, PageID.13956-57).
- **September 28-October 13**: Over the next two weeks, BCBSM did not produce more claims data, despite Plaintiffs' follow-ups. 10/11/2022 E-mail (ECF No. 233-7, PageID.13956); 10/13/2022 E-mail (ECF No. 233-8, PageID.13959-60).
- **October 14-19**: After BCBSM produced another incomplete set of Member Plan claims data and no Employee Plan claims data, Plaintiffs' counsel followed up for the *fifth* time. See 10/19/2022 E-mail (ECF No. 233-9, PageID.13962-63).
- **October 19-November 4**: Plaintiffs' counsel followed up a *sixth time*, identifying missing Member Plan claims data fields and, "[o]n the Employee Plan data," requesting "an ETA as it has now been months since BCBSM promised to provide this data." See 11/4/2022 E-mail (ECF No. 233-10, PageID.13967).
- **November 18**: BCBSM's counsel finally responded, but again failed to produce any claims data. See 11/18/2022 E-mail (ECF No. 233-11, PageID.13970-72).
- **November 14**: The Court again ordered BCBSM to produce "all claims data relative to the Member Plan going back to July 2007" and for "the Tribal Members that participated in the Employee Plan, . . . the claims data relative to those individuals" 11/14/2022 Order, at 3 (ECF No. 232, PageID.13902).
- **November 18-21**: After Plaintiffs' counsel followed up yet again, BCBSM's counsel responded with more "promises." 11/18/2022 E-mail (ECF No. 233-12, PageID.13974-75); 11/21/2022 E-mail (ECF No. 233-13, PageID.13977).
- **November 23**: BCBSM produced claims data for 1,022 claims relative to only 73 of the 136 identified tribal member employees. Hofman Decl., at ¶¶ 4-12 (ECF No. 241-1, PageID.14294-95).
- **November 28**: Plaintiffs moved for sanctions against BCBSM (ECF No. 233).

C. BCBSM CONCEALS THE CLAIMS DATA IT IS WITHHOLDING.

BCBSM said the 1,022 claims were everything (ECF No. 236, PageID.14042) ("There is nothing left for BCBSM to produce."). But about *nineteen times* that

number has been wrested from BCBSM since then (1,022 claims became 19,090 claims). Sharma Decl., at ¶¶ 6-23 (ECF No. 292-3, PageID.16786-89).

Then BCBSM misrepresented it had not produced claims data for certain member-employees because they never visited a hospital. *See* BCBSM's Position Statement, (ECF No. 252, PageID.14628-29) ("73 of the 130 actually visited a hospital while in the Employee Plan."); *see also* Transcript of 1/30/2023 Hearing, at 21:13-23 (ECF No. 266-3, PageID.14949) ("Not everyone goes to the hospital, and so that explains why, for example, some of the 130 don't actually have claims data."). Plaintiffs proved they did visit hospitals and BCBSM still withheld their claims data. *See* Reihl Decl., at ¶¶ 4-10 (ECF No. 266-4, PageID.14951); Sharma Decl., at ¶¶ 5-9 (ECF No. 266-10, PageID.14962-65).

D. BCBSM IS SANCTIONED AND WARNED ABOUT A DEFAULT JUDGMENT, BUT KEEPS DISOBEYING COURT ORDERS.

In her February 1, 2023 Sanctions Order, Magistrate Judge Morris held that "Blue Cross willfully violated" the August 2 and November 14 Orders. (ECF No. 255, PageID.14668, 14681). She "**Sanction[ed] Blue Cross by Ordering It to Pay Attorney's Fees and Costs . . . and by Warning Blue Cross that Further Noncompliance will Result in more Severe Sanctions, Potentially Including Default Judgment.**" *Id.* at PageID.14679 (emphasis in original).

On February 3, Plaintiffs reminded BCBSM: (1) "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"; and (2) absent BCBSM's compliance, Plaintiffs "will seek further sanctions, including entry of a default judgment." 2/3/2023 Letter (ECF No. 266-16, PageID.14982-83). BCBSM falsely denied withholding claims data. *See* 2/6/2023 Letter (ECF No. 266-17, PageID.14985-87).

Through a stipulation dated February 9, Plaintiffs apprised the Court that, since entry of the Court's Sanctions Order, BCBSM still had not produced the claims data it was sanctioned for withholding. *See* Stipulation, at ¶ 6 (ECF No. 258, PageID.14690). In response—through a *fourth* Order—the Court "**DIRECTED** BCBSM to comply with Magistrate Judge Morris's Sanctions Order on or before March 1, 2023." 2/9/2023 Order (ECF No. 258, PageID.14691).

Then, proving Plaintiffs were right, BCBSM produced data for **4,870 new Employee Plan claims** on February 28. Sharma Decl., at ¶¶ 8-10 (ECF No. 292-3, PageID.16786). It refused to produce anything more, instead challenging the Court's Order (ECF No. 261, PageID.14816).

E. FOLLOWING THE COURT'S WARNING TO BCBSM, PLAINTIFFS MOVE FOR DEFAULT.

After the Court's warning that default was the next step to address BCBSM's noncompliance, Plaintiffs moved for default (ECF No. 266). Their motion was not about unidentified tribal members. *It was based on BCBSM's failure to produce*

claims data for the 136 tribal member employees Plaintiffs identified for BCBSM six months earlier, on August 31, 2022:

[A] default judgment should be entered against BCBSM as a sanction for its ongoing violations of this Court's Orders where . . . BCBSM falsely represented to the Court that it complied with the Court's August 2 Order by producing all claims for 130 tribal members enrolled in the Employee Plan, but it actually withheld and concealed at least 464 claims from Plaintiffs, and likely numerous more claims.

(ECF No. 266, PageID.14914, 17-41). The Court then "**ORDERED** that Defendant is **DIRECTED** to rerun and to produce the claims data to Plaintiffs **on or before April 3, 2023.**" 3/2/2023 Order, at 5 (ECF No. 271, PageID.15083).

As a result, *BCBSM produced 4,020 new Employee Plan claims, proving Plaintiffs' motion was justified.* See Sharma Decl., at ¶¶ 11-15 (ECF No. 292-3, PageID.16786-87). It falsely stated it had not produced more because it lacked enrollees' birthdates (ECF No. 276, PageID.15205). But as the Court later noted, BCBSM's "birthdates" representation was false: "Plaintiffs showed that Blue Cross had the information earlier in the case." 7/19/2023 Order, at 12 (ECF No. 283, PageID.15619). It produced birthdates in 2017 (ECF No. 280-5, PageID.15508).

F. PLAINTIFFS IDENTIFY FOR BCBSM THE TRIBAL MEMBERS AND MEMBER-EMPLOYEES WITH MISSING CLAIMS DATA.

Plaintiffs' counsel and their experts spent numerous hours analyzing BCBSM's production for completeness and found tribal members with missing claims (ECF No. 287, PageID.16045). On June 16, 2023, Plaintiffs gave BCBSM:

(1) an updated list of 1,047 tribal members, tribal member employees, and dependents with missing claims data; (2) the hospital visits for which BCBSM had not produced claims data; and (3) the source documentation (purchase orders). *See Exhibit 4*, 6/16/2023 List; *see also* (ECF No. 280-2, PageID.15491). Importantly, BCBSM always had that source documentation (ECF No. 292-8, PageID.16931).

G. THE COURT AFFIRMS \$91,672 IN MONETARY SANCTIONS AGAINST BCBSM AND LEAVES THE DEFAULT SANCTION OPEN.

Thereafter, through a *sixth* Order entered July 19, the Court affirmed Magistrate Judge Morris's Sanctions Order and rejected all BCBSM objections, finding Magistrate Judge Morris "applied the correct law and drew reasonable inferences in ordering sanctions." 7/19/2023 Order, (ECF No. 283, PageID.15615). The Court rejected BCBSM's "birthdates" excuse, finding BCBSM "had the information earlier in the case" and further "could have mined its database to discover the respective birthdates," but "didn't do so." *Id.* at PageID.15619.

The Court "denied without prejudice" Plaintiffs' default request. *Id.* at PageID.15618. The Court noted Plaintiffs' motion raised legitimate problems: "Plaintiffs sought a default judgment for Blue Cross's slow and unresponsive discovery." *Id.* Further, "[t]he parties' relevant disagreements were many, persisting through nine status conferences and two hearings." *Id.* BCBSM had been warned about possible default: "***When Blue Cross was sanctioned with an order compelling***

discovery and the payment of fees and costs, it was warned about possibly being sanctioned with a default judgment." *Id.* at PageID.15618-19 (emphasis added).

Contrary to BCBSM's position that Plaintiffs' discovery efforts were "vexatious," the Court commended Plaintiffs' counsel on their patience, efficiency, diligence, and competence in attempting to obtain the claims data from BCBSM:

Plaintiffs' counsel, billing slightly above the 25th percentile, have earned their due. *Their work throughout the discovery process—clear and cogent briefings, patient pursuits of discovery disputes, and averaging less than 1.6 hours of work per day on uniquely complex issues—has demonstrated efficiency, diligence, and competence such that \$382.21 per hour is well deserved.*

Id. at 10-11, (PageID.15617-18) (emphasis added).

The Court further noted the claims data pursuit was not over; there were "lingering discovery disputes," which "*the parties*" were to use their "best efforts" to resolve by September 18. *Id.* at 15, 19 (PageID.15620, 22) (emphasis added).

H. PLAINTIFFS' BEST EFFORTS TO RESOLVE THE DISCOVERY DISPUTES.

Plaintiffs' best efforts to resolve the discovery disputes continued:

- **July 24, 2023**: After analyzing BCBSM's claims data production again and identifying tribal members with missing claims, Plaintiffs gave BCBSM an updated list of tribal members and their 6,275 hospital visits for which BCBSM had yet to produce claims data, together with the underlying documentation BCBSM already had. **Exhibit 5**, 7/24/2023 Correspondence.
- **July 25**: BCBSM's counsel responded: "We will look into these purchase orders," without producing more claims data (ECF No. 288-3, PageID.16198).
- **August 4**: Plaintiffs' counsel followed up with BCBSM's counsel, requesting the claims data or commitment from BCBSM to provide same. *Id.* at PageID.16197.

- **August 8**: Four days later, BCBSM's counsel responded they were "continuing to work through the same" and would later have unspecified "results." *Id.*
- **August 8**: Plaintiffs' counsel followed up again, noting they were halfway through the extra time given by the Court, but Plaintiffs still had no additional claims data from BCBSM. *Id.* at PageID.16196.
- **August 11**: Three days later BCBSM responded they "have nearly completed that investigation," without producing anything. *Id.* at PageID.16194-95.
- **August 17**: Having still received no claims data a week later, Plaintiffs' counsel followed up again, for the *fourth* time. *Id.* at PageID.16194.
- **August 18**: BCBSM's counsel responded by vaguely stating he was expecting to produce more claims data the next week. *Id.* at PageID.16193.
- **August 24**: Having heard nothing the next week, Plaintiffs' counsel followed up again, the *fifth* time. *Id.* at PageID.16192.
- **August 25**: BCBSM produced claims data for 4,009 more Employee Plan claims, again confirming Plaintiffs were right about BCBSM withholding claims data. Sharma Decl., at ¶¶ 16-17 (ECF No. 292-3, PageID.16787).
- **September 4**: Plaintiffs' counsel followed up a *sixth* time, pointing out "BCBSM is still withholding thousands of claims, *which I identified for you and your client months ago.*" (ECF No. 288-3, PageID.16189-90).
- **September 5**: Plaintiffs' counsel followed up the *seventh* time, asking "How many more claims will BCBSM be producing? When will BCBSM finally complete its claims data production?" *Id.* at PageID.16187-88. Plaintiffs' counsel also requested a phone call and availability to attend a status conference with the Court about BCBSM's ongoing claims data deficiencies. *See id.*
- **September 6**: Responding, BCBSM did not produce any claims data and did not commit to provide anymore. *Id.* at PageID.16186-87. BCBSM's counsel further stated: "We do not believe any such conference is necessary." *Id.* Thereafter, on the phone call between counsel, BCBSM's counsel was "not able to identify . . . how many claims BCBSM still needs to produce"; "the date(s) on which BCBSM would be making its rolling productions"; or "the date on which BCBSM expects to complete its claims data production." *Id.* at PageID.16184-86.

- **September 6:** Plaintiffs' counsel e-mailed the Court regarding BCBSM's claims data deficiencies, stating: "*Plaintiffs would like to discuss these issues with the Court before the September 18 deadline, in order to hopefully reach a resolution of these issues short of Plaintiffs being forced to file another motion, including having to renew their motion for default judgment against BCBSM.*" **Exhibit 6**, 9/6/2023-9/13/2023 E-mails (emphasis added).
- **September 8:** Later, BCBSM did not produce any claims data and continued its refusal to provide any firm production date: "As to when BCBSM will be done going through the purchase orders one-by-one and producing the claims data . . . I do not have a date certain." (ECF No. 288-3, PageID.16183-84).
- **September 13:** The Court responded to counsel for Plaintiffs' e-mail: "Judge Ludington . . . has had a chance to review the email chain. *Judge is asking that the discovery issues be filed by way of motion on the docket then a response to the motion be filed.*" **Ex. 6**, 9/6/2013-9/13/2023 E-mails (emphasis added).
- **September 14:** Plaintiffs' counsel followed up again on the claims data. Using BCBSM enrollment data Plaintiffs' counsel recently discovered, (but BCBSM's counsel always had), Plaintiffs produced an updated list of tribal member employees, noting BCBSM already had it.² (ECF No. 288-3, PageID.16182-83).
- **October 6:** BCBSM produced claims data for 363 more claims, again confirming Plaintiffs were right about BCBSM withholding claims data. Sharma Decl., at 18-19 (ECF No. 292-3, PageID.16787-88).

I. PLAINTIFFS RENEW THEIR DEFAULT MOTION UPON THE COURT'S EXPRESS INVITATION.

On October 9, *at the Court's invitation*, see **Ex. 6**, 9/13/2023 E-mail, Plaintiffs renewed their default motion (ECF No. 287). It was not about unidentified

² The undersigned appeared in 2019, unaware that BCBSM had identified all Employee Plan enrollees in 2017. **Ex. 2**, Hofman Decl., at ¶¶ 27-29. BCBSM's counsel knew. He used that information in Court filings in 2017 (ECF No. 79-23, PageID.3635). Had the undersigned also known, he would have used it earlier to identify more tribal members. **Ex. 2**, Hofman Decl., at ¶ 30.

tribal members; it was about claims data for tribal member employees specifically identified in August 2022 and June 2023. *Id.* at PageID.16026, 36-37, 39-41. As Plaintiffs stated: "BCBSM is still withholding thousands of the 4,806 missing claims Plaintiffs specifically identified for BCBSM as missing back in June 2023." *Id.* at PageID.16036-37. And "BCBSM's latest excuse does not address its failure to produce claims data for tribal member employees Plaintiffs identified for BCBSM over a year ago, in August 2022." *Id.* at PageID.16040-41.

Plaintiffs' default motion proved justified; BCBSM produced 4,808 more Employee Plan claims—almost exactly the number Plaintiffs said were missing—less than two weeks later. See Sharma Decl., at ¶¶ 20-21 (ECF No. 292-3, PageID.16788). Plaintiffs then gave BCBSM an updated list of tribal members, employees, and dependents and their 3,100 hospital visits for which BCBSM was withholding claims data, together with the underlying documents BCBSM always had since 2020. Myrick Decl., at ¶¶ 6-12 (ECF No. 292-4, PageID.16791-16829).

J. THE COURT LEAVES THE DEFAULT SANCTION OPEN AGAIN.

On December 1, the Court "denied without prejudice" Plaintiffs' renewed default motion. 12/1/2023 Order at 3, (ECF No. 294, PageID.16954); *see also id.* at 25 (PageID.16967). It did not find the motion improper; it noted BCBSM admitted it had "incomplete disclosure" of claims data, although BCBSM blamed it "on the Tribe's failure to identify its members within the Employee Plan." *Id.* at 2-3

(PageID.16944-45). Further, the Court acknowledged discovery disputes were ongoing: "At this upcoming status conference scheduled for December 4, 2023, this Court and the Parties will confirm the number of Tribal members who participated in the Employee Plan and will inquire as to BCBSM's analysis and disclosure of these members' claims data." *Id.* at 24-25 (PageID.16966-67).

K. PLAINTIFFS' BEST EFFORTS CONTINUE

At the December 4 conference, Plaintiffs' counsel asked if BCBSM needed anything further from Plaintiffs to produce the missing claims data. **Ex. 2**, Hofman Decl., at ¶ 36. BCBSM's counsel responded they did not, and that they considered their claims data production complete. *Id.* at ¶ 37. Plaintiffs' counsel then stated they would prove at trial it was incomplete. *Id.* at ¶ 38. The Court, in turn, recommended Plaintiffs make a filing to preserve their argument. *Id.* at ¶ 39. When Plaintiffs' counsel asked what that filing should look like, the Court responded it envisioned a motion and set a January 5 deadline for it. *Id.* at ¶¶ 40-41.

The following day, BCBSM's counsel walked back his concession about "identification of tribal members," demanding a "final" list. 12/5/2023 E-mail (ECF No. 295-3, PageID.17010-11). Plaintiffs' counsel answered that BCBSM already knew all tribal members enrolled in the Employee Plan and those with missing claims had been identified on November 27, making BCBSM's proposed exercise

unnecessary. *Id.* (PageID.17009-10). Still, Plaintiffs' counsel re-identified those tribal members, using information BCBSM always had. *Id.* (PageID.170007-34).

L. PLAINTIFFS FILE A THIRD DEFAULT MOTION PURSUANT TO THE COURT'S INVITATION.

By January 4, 2024, Plaintiffs still had not received the claims data, despite having identified 3,100 specific missing claims on November 27 and having followed up with BCBSM regarding them. (ECF No. 292-4, PageID.16795-16829); *see also* **Exhibit 7**, 12/27/2023 E-mail; **Exhibit 8**, 1/4/2024 E-mail.

As a result, on January 5, *pursuant to the Court's express invitation at the December 4 conference*, Plaintiffs filed their motion (ECF No. 295). Their motion was not, as BCBSM asserts, about unidentified tribal members; *it was expressly based on BCBSM's admitted failure to produce claims data—by the Court's January 5 motion deadline—for tribal members and employees Plaintiffs had identified for BCBSM over a month earlier, on November 27.* *Id.* at PageID.16977-78, 95, 97. As Plaintiffs stated: "BCBSM continues to withhold at least 3,100 claims Plaintiffs identified as missing in November." *Id.* at PageID.16997.

Plaintiffs' default motion proved justified again, with BCBSM producing 2,848 more new Employee Plan claims three weeks later, on January 25. *See* 1/25/2024 E-mail, (ECF No. 297-5, PageID.17252). Further, as set forth in Plaintiffs' Reply Brief, BCBSM's own statistical analysis in its Response Brief proves it has *still* not produced all claims data (ECF No. 298, PageID.17280-81).

III. LAW AND ARGUMENT

A. GOVERNING LEGAL STANDARDS

A party seeking sanctions under Fed. R. Civ. P. 37 "must produce clear and convincing evidence" of a discovery Order violation. *EEOC v. Cintas Corp.*, No. 04-40132, 2015 WL 13021471, at *3 (E.D. Mich. Aug. 20, 2015). Sanctions are improper if the non-moving party "took all reasonable steps within his power to comply with the court's order." *Id.*

Section 1927 "is implicated when a party has (1) multiplied proceedings, (2) unreasonably and vexatiously, (3) in bad faith or when an attorney knows or reasonably should know that the claim or litigation tactics pursued is frivolous or will impede the litigation of proper claims, and (4) which has resulted in additional expense to the other parties." *In re Sharkey*, 563 B.R. 655, 671 (Bankr. E.D. Mich. 2017). These elements must also be proven by clear and convincing evidence. *See In re Avandia Marketing, Sales Practices and Prods. Liability Litig.*, 469 F. Supp. 3d 357, 360 (E.D. Pa. 2020).

A Court may sanction if a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *BDT Prod., Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 752 (6th Cir. 2010). There must be bad faith or conduct "tantamount to bad faith." *Id.*

B. PLAINTIFFS COMPLIED WITH THE COURT'S ORDERS.

The August 2022 Order required Plaintiffs to "make best efforts to identify for BCBSM by August 31, 2022, the Tribal Members that participated in the Employee Plan." The July 2023 Order required *both parties* to use their best efforts to resolve the discovery disputes. Plaintiffs complied with both Orders.

The Tribe's benefits manager responsible for compiling the list of tribal member participants in the Employee Plan identified every participant he could find (136) and omitted none he could find. **Ex. 3**, Graveratte Decl., at ¶¶ 6-15. Plaintiffs' counsel produced all 136 tribal member participants identified by Mr. Graveratte; none were withheld. **Ex. 2**, Hofman Decl., at ¶¶ 17-22. Those were Plaintiffs' best efforts at the time. 12/1/2023 Order, at 22 (ECF No. 294, PageID.16964). Plaintiffs and their counsel had no reason to omit anyone; they wanted more claims data, not less. **Ex. 2**, Hofman Decl., at ¶ 22; **Exhibit 9**, Rynders Decl., at ¶¶ 6-7.

Much later, when looking into BCBSM's assertion that it had no birthdates, Plaintiffs' counsel discovered BCBSM previously produced a list of all Employee Plan enrollees. **Ex. 2**, Hofman Decl., at ¶ 27. Upon realizing that, Plaintiffs cross-referenced that newly discovered list with the tribal member lists previously produced by Plaintiffs in 2019 to compile an updated list of the tribal member enrollees in the Employee Plan. *Id.* at ¶ 31. The updated list was produced to BCBSM in September 2023. *Id.* at ¶ 32. Because he only appeared in this case in

2019 and therefore did not know about BCBSM's list of Employee Plan enrollees, Plaintiffs' counsel could not have compiled that list in August 2022. *Id.* at ¶ 33. By contrast, BCBSM's counsel knew about the list of Employee Plan enrollees all along, having used it in Court filings in 2017 (ECF No. 79-23, PageID.3635).

Then, after Plaintiffs' expert ClaimInformatics analyzed the purchase orders from March-September 2023, Plaintiffs cross-referenced the list Plaintiffs' experts compiled of all individuals listed on purchase orders or enrolled in the CHS program (who were all tribal members) to BCBSM's list of Employee Plan enrollees. **Exhibit 10**, Sharma Decl., at ¶ 14. Plaintiffs then added and de-duplicated the resulting list to their list of 561. *Id.* at ¶ 15. That list was produced to BCBSM on December 20, 2023. *Id.* at ¶ 16. Plaintiffs could not have created that list before their experts completed this preliminary work on September 2023. *Id.* at ¶ 17.

Further—as detailed above—Plaintiffs' counsel used "best efforts" to resolve the claims data discovery dispute, including by: (1) identifying for BCBSM all tribal members and employees in 2017 and 2019; (2) identifying for BCBSM all tribal member employees enrolled in the Employee Plan they could locate in August 2022; (3) updating Plaintiffs' list of tribal member employees enrolled in the Employee Plan in September and December 2023 with new information BCBSM always had but omitted to mention; (4) identifying for BCBSM tribal members and employees with missing claims data on February 23, March 23, June 16, July 24, October 9,

and November 27, 2023; (5) following up with BCBSM over *twenty* times on missing claims data; (6) filing *six* motions to compel BCBSM's compliance with six Court Orders; and (7) spending *hundreds* of hours reviewing BCBSM's *nineteen* productions for completeness (they were all incomplete). *See supra* Section II.

Plaintiffs took all reasonable steps to comply with the August 2022 and July 2023 Orders. BCBSM has not identified any tribal member identification or efforts it still needs. This is because BCBSM has *always* known who the Employee Plan tribal members are, and the only open discovery issue is BCBSM's incomplete disclosure of claims data. BCBSM confirmed this at the December 4 status conference, conceding they needed nothing further from Plaintiffs' counsel. **Ex. 2**, Hofman Decl., at ¶ 37. Because "[t]he record does not show that Plaintiffs' counsel failed to comply with discovery or any other pretrial orders nor did Defendants file any motions to compel discovery from Plaintiffs," BCBSM's motion should be denied. *Riddle v. Egensperger*, 266 F.3d 542, 556 (6th Cir. 2001); *Cintas*, No. 04-40132, 2015 WL 13021471, at *4-5 (because "EEOC has now provided Cintas with a list . . . that provides a responsive answer to the interrogatory posed to it, . . . the Court finds no basis to impose sanctions").

C. PLAINTIFFS' SUCCESSFUL DEFAULT MOTIONS WERE NECESSARY, NOT VEXATIOUS.

BCBSM also argues Plaintiffs' default motions are supposedly "vexatious," (falsely) stating: (1) Plaintiffs "conceded" BCBSM cannot be defaulted; (2) the

motions related to "individuals that [Plaintiffs] failed to identify"; and (3) they were "substantially repetitive" (ECF No. 299, PageID.17312). None of that is true.

First, BCBSM misrepresents what was said at the May 17 status conference and June 2023 hearing. Plaintiffs' counsel never said BCBSM was not at fault for not producing claims data; he said Plaintiffs' first default motion was not about claims data for unidentified individuals (ECF No. 284, PageID.15672).

Second, Plaintiffs' default motions were not "vexatious" because each was filed with leave of the Court. Plaintiffs' first default motion followed Magistrate Judge Morris's warning that a default judgment was the next step to address BCBSM's noncompliance (ECF No. 255, PageID.14679). The second was filed upon the Court's express invitation on September 13: "Judge is asking that the discovery issues be filed by way of motion on the docket then a response to the motion be filed." **Ex. 6**, 9/13/2023 E-mail. And the third was filed after Plaintiffs' counsel offered to prove BCBSM's ongoing noncompliance at trial, and the Court invited Plaintiffs to file a motion instead. **Ex. 2**, Hofman Decl., at ¶¶ 38-41. Plaintiffs' motions—filed with leave of the Court and seeking Court-ordered discovery—cannot possibly be "vexatious." *See Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, 618 F. App'x 246, 260 (6th Cir. 2015) ("Moreover, the Trustees sought discovery pursuant to a magistrate judge's order . . . it is unclear how the Trustees' petition for a show-cause order, motion to compel

discovery, and opposition to a stay of discovery were unreasonable or vexatious rather than acceptable litigation tactics. The district court did not abuse its discretion in declining to award attorney fees under § 1927.").

Third, contrary to BCBSM's assertion, each default motion was premised on BCBSM's refusal to produce Court-ordered claims data relative to individuals Plaintiffs had identified for BCBSM *before* each motion was filed and that BCBSM always knew about anyways. Plaintiffs' first motion was premised on BCBSM's refusal to produce claims data for the 136 individuals Plaintiffs identified for BCBSM in August 2022 (ECF No. 266, PageID.14914, 17-41). The second, filed October 9, 2023, was premised on BCBSM's refusal to produce—after six Court Orders—the missing claims data for the individuals Plaintiffs had previously identified in August 2022 and June 2023, but that BCBSM always knew about (ECF No. 287, PageID.16026, 36-37, 39-41). And the third—filed January 5, 2024—was based on BCBSM's refusal to produce the missing claims data for the individuals Plaintiffs specifically identified in November 27, 2023, but that (again) BCBSM always knew about (ECF No. 295, PageID.16977-78, 95, 97).

Fourth, Plaintiffs' motions were not "vexatious" because they yielded further productions by BCBSM. Plaintiffs' first default motion—filed February 23, 2023—yielded **4,870** more claims from BCBSM on February 28. Sharma Decl., at ¶¶ 8-10 (ECF No. 292-3, PageID.16786). Plaintiffs' second default motion—filed October

9—led BCBSM to surrender **4,808** more claims on October 27. *Id.* at ¶¶ 20-21 (PageID.16788). And Plaintiffs' third motion—filed January 5, 2024—resulted in BCBSM releasing **2,848** new claims on January 25. 1/25/2024 E-mail, (ECF No. 297-5, PageID.17252). "A litigation strategy, perhaps obviously, is not 'unreasonable' or 'frivolous' if it is successful." *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 266 (6th Cir. 2015).

D. PLAINTIFFS—NOT BCBSM—ARE PREJUDICED.

BCBSM's motion should also be denied because it is Plaintiffs, not BCBSM, who are prejudiced. That it took three default motions for BCBSM to surrender the claims Plaintiffs now have proves BCBSM's bad faith, not any lack of "best efforts" on Plaintiffs' part. And Plaintiffs still don't have all claims data they are entitled to.

BCBSM asserts it was prejudiced by Plaintiffs' "identification of tribal members in the Employee Plan," but that is incorrect and illogical. Unlike Plaintiffs and their counsel, BCBSM and its counsel have always known who the tribal members in the Employee Plan are. *First*, BCBSM contemporaneously received information from providers indicating which claims were for CHS-eligible tribal members and which were not, thus providing BCBSM with identification of the tribal member participants in the Employee Plan. *See* 11/14/2022 Order, at 4 (ECF No. 232, PageID.13903); BCBSM Stipulation (ECF No. 271-1, PageID.15086-91). *Second*, Plaintiffs identified the tribal member-employees to BCBSM in March

2017, and in August 2019. *See* 3/10/2017 Letter (ECF No. 79-23, PageID.3637-38); 8/13/2019 Letter (ECF No. 295-2, PageID.17005). And BCBSM previously used its own enrollee lists, (ECF No. 280-5, PageID.15508), and Plaintiffs' lists to identify the tribal members enrolled in the Plans, confirming it has always known who they are. *See* BCBSM's "Analysis of Non-Employee Members in Both Groups Combined" (ECF No. 79-23, PageID.3635).

All lists Plaintiffs provided BCBSM from 2022-2024 were *not* new information to BCBSM. They were a *compilation* of information BCBSM's counsel *already had since March 2017* and that BCBSM *received in real time from 2006-2016*. *See* BCBSM Stip. (ECF No. 271-1, PageID.15086-91). That is why BCBSM previously argued *it knows better than Plaintiffs* who are tribal members enrolled in the Employee Plan. *See* BCBSM Resp., at 18 (ECF No. 289, PageID.16256); BCBSM Resp., at 10-12 (ECF No. 297, PageID.17187-89). That is also why, during the parties' December 4 status conference, when Plaintiffs' counsel asked BCBSM's counsel if they needed anything from Plaintiffs to be able to produce the claims data, BCBSM's counsel responded they did not. **Ex. 2**, Hofman Decl., at ¶¶ 36-37.

E. SANCTIONING PLAINTIFFS OR THEIR COUNSEL WOULD BE UNJUST.

For similar reasons, any award of expenses to BCBSM would be unjust. *See* Fed. R. Civ. P. 37(b)(2)(C). At bottom, the parties' discovery dispute is about claims data *BCBSM is withholding*, which it could have easily produced *years ago* by

running the Member Plan and Employee Plan numbers through its system. In fact, in its discovery responses, BCBSM *agreed to do so without preconditions*. See BCBSM's Resps. 38, 39, 44 & 45 (ECF No. 225-4, PageID.13362-66). And even if BCBSM was entitled to somehow limit claims data to tribal members only, (it was not), it *always knew who they were*. See *supra* Subsection II.

The Sixth Circuit has *twice* held Plaintiffs' claims have merit and this Court has ordered BCBSM *six times* to produce the claims data. Plaintiffs' efforts to enforce six Court Orders—with the Court's leave—is not sanctionable. See *Riddle*, 266 F.3d at 558 (declining to award sanctions to Defendants where "[t]o the extent that Plaintiffs' counsel may have been overzealous, Defendants' counsel as well appears to have been just as overbearing in this case."); *Agarwal v. Morbarck, LLC*, 585 F. Supp. 3d 1026, 1030 (E.D. Mich. 2021) (Ludington, J.) ("If attorneys were sanctioned for pursuing reasonable arguments, like those Plaintiff pursued here, attorneys would be practically useless.").

IV. CONCLUSION

For the forgoing reasons, Defendant's Motion should be denied.

VARNUM LLP
Counsel for Plaintiffs

Dated: March 7, 2024

By: /s/ Herman D. Hofman
Perrin Rynders (P38221)
Herman D. Hofman (P81297)

CERTIFICATE OF SERVICE

I certify that on March 7, 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/ Herman D. Hofman

Herman D. Hofman (P81297)

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