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 REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION FOR SANCTIONS

> *"The attempted presentation of cases . . . with want of fairness and candor discredits the bar and obstructs the administration of justice."*
>
> *~ United States Supreme Court, 1929*

SANCTIONS ARE WARRANTED

The MLR regulations "went into effect on July 5, 2007," and BCBSM began administering the Employee Plan many years before that. (*See* Order Den. Pls.' 2d Mot. for Default, ECF No. 294, PageID.16949-16950 ("As of 2004, both the Employee and the Member Plan were self-funded or self-insured—the Tribe directly paid for the cost of health care benefits and paid BCBSM an administrative fee.").) But in 2017, "the Tribe transitioned away from BCBSM to Meritain." (Graveratte Decl., ECF No. 302-4, PageID.17410, ¶ 9.) Meritain (a different insurer) had "a January 1, 2017 start date," meaning BCBSM was no longer involved. (*Id*. ¶ 10.b.)

The relevant time period of the parties' dispute thus spans a decade, from 2007 (the commencement of the MLR regulations) through 2016 (BCBSM's last year administering the Employee Plan). And during that decade, the Tribe employed *thousands* of individuals (hundreds of them being tribal members), with the Tribe explaining to this Court their enrollment in the Employee Plan:

> The Tribe owns and operates a casino, hotel and waterpark, marina, retail store, pharmacy, and gas station. It has more than 3,400 employees, including more than 2,500 full-time employees, [to whom it offered] "comprehensive health care benefits." [(Pls.' Resp. to Def.'s Mot. for Partial Summ. J., ECF No. 92, PageID.5506 (citations omitted).)]

Why is all of this important? Because when Plaintiffs and their counsel provided to BCBSM the Tribe's first list of 136, they did not use that decade's worth of enrollment data encompassing the parties' dispute (2007–2016). They instead used Meritain's 2017 enrollment—a snapshot in time *after* "the Tribe transitioned away from BCBSM to Meritain." (Graveratte Decl., ECF No. 302-4, PageID.17410, ¶¶ 9–10.) Their justification? Plaintiffs no longer had access to "BCBSM's online portal," so they instead used "Meritain's portal," positing that anyone enrolled in 2017 (with Meritain) must have been previously enrolled with BCBSM. (*Id.*)

That 2024 "explanation" immediately falters. Plaintiffs' counsel already explained to this Court in June 2023 the obvious: Enrollment is *not* the same year-to-year. (6/27/23 Hr'g Tr., ECF No. 284, PageID.15660.) Indeed, Ms. Sprague testified that the Employee Plan is "optional" with an "annual open enrollment" period. Sprague Dep., **Exhibit A**, at 32:18-22. Because Plaintiffs and their counsel knew in August 2022 that enrollment changed each year, they also knew that enrollment in 2017 (with Meritain) does not equal enrollment in 2016 (with BCBSM), *let alone 2007–2015*.

By using only 2017 data, Plaintiffs and their counsel *absolutely knew* in August 2022 that they "missed people." That is, Plaintiffs cannot with a straight face suggest that—by excluding a decade's worth of enrollment—they somehow thought they were actually providing a complete list. *Still*, instead of admitting that

they knew in August 2022 that they "missed people," Plaintiffs and their counsel try *again* to barricade their knowledge, saying no sanction should issue because they did not "omit any names." (Pls.' Resp. to Mot. for Sanctions, ECF No. 302, PageID.17372.) But Plaintiffs and their counsel desire to avoid truth. They argue that they didn't intentionally "omit" names; but the list was incomplete (Plaintiffs now reveal) because they never actually reviewed the relevant data from 2007 through 2016. Is that better? Moreover, and respectfully, this Court should find telling that *none* of this is actually mentioned, let alone explained in Plaintiffs' Response (ECF No. 302); a reader must instead sift through nearly 200 pages of exhibits and find Mr. Graveratte's declaration (ECF No. 302-4) to piece it together.

Make no mistake about it—the August 2022 Order required best efforts to identify *all* tribal members during *the relevant time period* (i.e., 2007–2016), not *some* tribal members during an *irrelevant time period* (2017). Just days before entry of the August 2022 Order, Mr. Rynders confirmed that exact understanding:

> Relative to the employee group, Plaintiffs will seek to identify for Blue Cross ***all*** tribal members enrolled in that group ***during the relevant time period***. [Rynders 7/19/22 Letter, **Exhibit B**, at 1 (emphasis added).]

Mr. Rynders then repeated to this Court that same "all-tribal-members" understanding in June 2023, nearly a year after entry of the August 2022 Order:

> And so we were to use our best efforts to give the names of ***all*** the members of that employee group who were ***also tribal members***. [(6/27/23 Hr'g Tr., ECF No. 284, PageID.15659 (emphasis added).)]

Surely Mr. Rynders did not believe that the August 2022 Order required identification of "all the . . . tribal members" in 2017, a point in time after "the Tribe transitioned away from BCBSM to Meritain." (Graveratte Decl., ECF No. 302-4, PageID.17410, ¶ 9.) But that is what Plaintiffs and their counsel knowingly provided to BCBSM. It is also what they concealed, making the very strategic decision not to disclose it in 2022; in 2023; or even in the first two months of 2024. They instead purposefully withheld that fact—from BCBSM and this Court—using that withheld fact as an advantage when endeavoring *three different times* to default BCBSM for not producing claims data relative to the very same people that were not identified on Plaintiffs' knowingly incomplete list.

With that fact now revealed in March 2024, Plaintiffs and their counsel today say that BCBSM is employing a "deflection tactic" by "grossly misrepresenting the record," claiming in the next sentence that "Plaintiffs did not seek to default BCBSM 'for not producing claims data relative to the very same individuals that Plaintiffs failed to identify.'" (Pls.' Resp., ECF No. 302, PageID.17369 (quoting ECF No. 299).) But that is *exactly* what happened. In this Court's words when denying Plaintiffs' *second* default motion: "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.) How is BCBSM "grossly misrepresenting the record?" Plaintiffs then filed a *third* default motion doing *precisely* the same

thing, with BCBSM explaining: "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.)

As Plaintiffs and their counsel would have it, this is just a matter of "zealous" advocacy. (ECF No. 302, PageID.17392 (citing cases suggesting same).) But "a lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy." *U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 925 (4th Cir. 1995). The duty of candor did not here prevail. It was instead purposefully suppressed for litigation gain, yielding to three default motions having a purposefully concealed fact as their foundation.

Plaintiffs and their counsel then characterize that "litigation strategy" as neither "unreasonable" nor "frivolous," but rather "successful," reasoning that those three default motions "yielded further productions by BCBSM." (Pls.' Resp., ECF No. 302, PageID.17389-17390.) But it was not the three default motions that yielded "further productions." An updated list of tribal member employees would have done just fine, which the undersigned requested of Mr. Hofman:

> [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. [(Hubbard 8/18/23 E-mail, ECF No. 287-2, PageID.16062.)]

Yes, Plaintiffs did provide three different lists, eventually updating their first list of 136 two different times (first from 136 to 561, and then to 1049). But as this Court

knows, with each list came one of those default motions, which Plaintiffs and their counsel now call a "successful litigation strategy."

The truth is that when the undersigned discovered, and promptly informed Plaintiffs and their counsel in April 2023 that they "missed people," it came to them as no surprise—they already knew it. (Hubbard 4/3/23 Letter, ECF No. 282-2, PageID.15549.) So they deflect again, saying they did not know in August 2022 that using "a list of all Employee Plan enrollees" produced by BCBSM in 2017 would have helped to compile their list, something Mr. Hofman says he realized "in late April or early May 2023." (Pls.' Resp., ECF No. 302, PageID.17385; Hofman Decl., ECF No. 302-3, PageID.17403, ¶ 27.) According to Mr. Hofman: "Upon learning about this list," he and his colleague worked to "compile an updated list of the tribal member participants and dependents in the Employee Plan." (Hofman Decl., ECF No. 302-3, PageID.17404, ¶ 31.) Those are damning facts.

If Plaintiffs and their counsel: (i) learned of this in "late April or early May 2023;" and (ii) "upon learning about this" they worked to create an "updated list," why did they not share all of this (*including* their prior but undisclosed use of Meritain's 2017 enrollment data) before, or even during the default hearing taking place more than a month later on June 27, 2023? Per Mr. Rynders *at that hearing*:

> If we were talking about the fact that our list of 136 wasn't complete, and through everyone's best efforts we identified, you know, several dozen more and then several dozen more and then we just went back and got those claims, 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.)]

Plaintiffs and their counsel knew at that moment in June 2023 that they had *already* identified several *hundred* more, not just "several dozen." And they likewise knew that despite being ordered to use "best efforts," their identification of employees to BCBSM could not possibly have been anything close to accurate or complete. But there they were in June 2023, seeking default with their lack of candor as the foundation. Two more default motions then followed, with a new "list" being produced on the eve of each motion. And only today are we (the undersigned and this Court) learning that the original list of 136 was comprised of Meritain's 2017 enrollment, a point in time *after* "the Tribe transitioned away from BCBSM."

Sanctions are now required to: (i) hold Plaintiffs and their counsel accountable for having violated this Court's Orders, needlessly multiplying these proceedings; and (ii) maintain public confidence in the profession and, consequently, "the administration of justice." *N.Y. Cent. R.R. Co. v. Johnson*, 49 S. Ct. 417, 417 (1929).

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: March 14, 2024

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 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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