

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

BLUE CROSS AND BLUE SHIELD )  
OF KANSAS CITY, )  
 )  
Plaintiff, )  
 ) Case No. 21-cv-00525-FJG  
v. )  
 )  
GS LABS LLC, )  
 )  
Defendant. )

**MOTION FOR LEAVE TO FILE FIRST AMENDED COUNTERCLAIMS**

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Defendant GS Labs LLC (“GS Labs”) respectfully requests leave to amend its counterclaims against Blue Cross and Blue Shield of Kansas City (“Blue KC”). As described in more detail below, GS Labs seeks to add six additional counterclaims:<sup>1</sup> a claim for conspiracy to restrain trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; a claim for monopolization in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2; a claim for attempt to monopolize in violation of Section 2 of the Sherman Antitrust Act; a claim for conspiracy attempt to monopolize in violation of Section 2 of the Sherman Antitrust Act; a claim for defamation; and a claim for tortious interference with business expectancy.

Each of these new claims is supported, at least in part, by critical new evidence obtained during discovery in this case that was unknown to GS Labs when it filed its original counterclaims. Before conducting discovery in this case, GS Labs could never have known that Blue KC was

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<sup>1</sup> GS Labs is also dropping one count from its initial counterclaims for breach of covenant of good faith and fair dealing.

*directly colluding with other insurers* to restrict the supply and quality of COVID-19 testing and to solidify Blue KC’s monopoly power in the Kansas City area. Before conducting discovery in this case, GS Labs could never have known that *Blue KC’s records* demonstrate that it made knowingly false material statements about GS Labs to at least nine government regulators. Before conducting discovery in this case, GS Labs could not have known that Blue KC had abused its position of trust to cause third-party plans it administers to unlawfully deny reimbursement claims to advance Blue KC’s self-serving campaign against GS Labs. Because each of GS Labs’ proposed additional counterclaims rests on facts that it could not have known without discovery in this case, and because this request to amend the pleadings is timely under the Court’s scheduling order, GS Labs respectfully requests leave to file its amended counterclaims. Pursuant to Local Rule 15.1, a copy of GS Labs’ proposed First Amended Counterclaims is attached as Exhibit 1 hereto.

### **ARGUMENT**

Rule 15(a)(2) directs that courts “should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). “Resolution of claims on their merits is favored under [Rule] 15(a)(2) . . . .” *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 962-63 (8th Cir. 2015). For this reason, “[u]nless there is a good reason for denial, . . . leave to amend should be granted.” *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 840 (8th Cir. 2004). For the reasons stated below, the Court should grant GS Labs leave to file its amended counterclaims.

#### **I. GS Labs’ Motion for Leave to Amend Is Timely Under the Court’s Scheduling Order.**

Under the Court’s current scheduling order, the deadline for motions to amend the pleadings is January 18, 2022. *See* ECF No. 57, at 3.<sup>2</sup> GS Labs has filed this motion for leave to

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<sup>2</sup> The text of the Scheduling Order set January 15, 2022 as the deadline. ECF No. 57, at 3. However, because January 15 is a Saturday and January 17 is a national holiday, by operation of

amend by the deadline specified by the scheduling order. Courts generally hold that where “a party files a motion for leave to amend by the court-ordered deadline, there is a presumption of timeliness.” *Smallwood v. Bank of Am.*, No. 3:11-cv-1283, 2011 WL 4941044, at \*1 (N.D. Tex. Oct. 17, 2011) (quotation omitted); *see also, e.g., Ernest Bock, LLC v. Steelman*, No. 2:19-cv-1065, 2021 WL 1550332, at \*4 (D. Nev. April 20, 2021) (“Generally, a motion to amend that is made within the time established by the pretrial scheduling order is presumed timely.”). Because GS Labs has sought to amend its counterclaims within the time prescribed by the Court’s scheduling order, the Court should grant GS Labs leave to add its additional counterclaims. *See Robinson v. Midwest Division-RMC, LLC*, No. 4:19-cv-934-SRB, 2020 WL 2151880, at \*2 (W.D. Mo. May 5, 2020) (granting leave to amend where the “motion to amend [was] timely pursuant to the Scheduling Order deadlines in place”).

**II. Each of GS Labs’ Proposed Additional Counterclaims Depends, at Least in Part, on Evidence That Did Not Become Available to GS Labs Until Discovery in This Case.**

When GS Labs filed its original counterclaims, the parties had not yet commenced discovery. At the time, GS Labs was not privy to Blue KC’s internal documents and communications. GS Labs certainly knew of Blue KC’s bad-faith refusal to pay for millions of dollars’ worth of COVID testing, in direct violation of the CARES Act. But the breadth and depth of Blue KC’s misconduct were greater than GS Labs could have known from the parties’ direct dealings. Only with the benefit of discovery did GS Labs learn of certain unlawful conduct by Blue KC that forms the bases of the proposed additional counterclaims.

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Federal Rule of Civil Procedure 6, the deadline is extended to January 18, 2022. *See Fed. R. Civ. P. 6(a); Modaressi v. Vedadi*, 441 F. Supp. 2d 51, 54 n.2 (D.D.C. 2006).

First, GS Labs' new antitrust counterclaims involve important evidence of direct collusion between Blue KC and other Blue Cross/Blue Shield insurers in their negotiations with GS Labs, including on issues of price. For example, as with most unlawful conspiracies, Blue KC and its accomplices did not broadcast their collusion, and GS Labs only learned of their concerted action through discovery. Coordination is an essential element of a claim under Section 1 of the Sherman Act, *Willman v. Heartland Hosp. E.*, 34 F.3d 605, 610 (8th Cir. 1994), and interfirm communications such as these often provide the evidence necessary to prove the existence of a conspiracy to restrain trade in violation of that statute, *see, e.g., Iowa Public Employees' Retirement Sys. v. Merrill Lynch*, 340 F. Supp. 3d 285, 321-22 (S.D.N.Y. 2018). The extensive communications GS Labs has uncovered between Blue KC and other insurers regarding their collective strategies vis-à-vis GS Labs thus provides important evidence supporting the existence of a conspiracy to restrain trade, to which GS Labs had no access before discovery. Discovery similarly alerted GS Labs to Blue KC's efforts to leverage its power in the Kansas City insurance market to steer subscribers toward Blue KC's own competing COVID testing provider, including by misrepresenting the out-of-pocket costs subscribers would face if they chose to test with GS Labs instead. That evidence is relevant to the anticompetitive conduct element of GS Labs' claims under Section 2 of the Sherman Act, *see, e.g., Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801, 804 (8th Cir. 1987), and none of it was available at the time GS Labs filed its original counterclaims.

Second, GS Labs could not have brought its defamation claim without access to documents produced in discovery. The defamation claim is premised on the fact that Blue KC made material false statements about GS Labs to government regulators, and that Blue KC *knew* those statements to be false when it made them. Before discovery, GS Labs certainly knew that Blue KC was

making false statements about it to regulators. But defamation requires more than a false statement by a defendant; the defendant must make the false statement with the requisite mental state. *Overcast v. Billings Mutual Ins. Co.*, 11 S.W.3d 62, 70 (Mo. banc 2000). Before conducting discovery in this case, GS Labs could only speculate about whether Blue KC knew that its representations to government regulators were false. But internal Blue KC documents obtained in discovery reveal that Blue KC knew that GS Labs collected its cash price from patients paying out of pocket *before* Blue KC falsely represented the opposite to at least nine distinct government regulators that GS Labs. Only with the benefit of these internal Blue KC documents revealed in discovery could GS Labs plead that Blue KC had satisfied the mental-state requirement of defamation. Thus, GS Labs should be permitted to add its defamation claim.

Third, GS Labs lacked important information relevant to its tortious-interference claim before conducting discovery in this case. GS Labs' tortious-interference count involves situations in which a self-insuring employer or labor union retains Blue KC to administer its health plan. Such health plans are often referred to as "administrative services only plans" or "ASO plans." In the context of ASO plans, Blue KC acts as an administrative-services provider rather than as a health insurer. To establish a tortious-interference claim, a plaintiff must show that the defendant induced or caused a third party to without a reasonable business expectancy from the plaintiff. *See, e.g., Rail Switching Services, Inc. v. Marquis-Missouri Terminal, LLC*, 533 S.W.3d 245, 257 (Mo. Ct. App. 2017). Before discovery in this litigation, GS Labs had minimal visibility into Blue KC's control over the ASO plans to which GS Labs had submitted claims for reimbursement. However, in discovery, GS Labs has obtained key documents—such as Blue KC's Administrative Services Agreements with ASO plan sponsors—that make clear that Blue KC exercises complete control over whether the plans pay claims. These documents indicated that Blue KC unilaterally

caused the ASO plans to deny GS Labs' reimbursement claims, which caused those plans to violate their payment obligations under the CARES Act and depriving GS Labs of its reasonable expectancy of receiving funds owed to it under the CARES Act.

Because each of GS Labs' new counterclaims relies, at least in part, on critical new evidence obtained only through discovery, GS Labs respectfully requests that the Court permit it to add these new counterclaims.

Respectfully submitted,  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2022, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record.

/s/Matthew P. Diehr

Matthew Diehr

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
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BLUE CROSS AND BLUE SHIELD )  
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GS LABS LLC, )  
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Defendant. )

**DEFENDANT GS LABS LLC’S FIRST AMENDED COUNTERCLAIMS**

COMES NOW Defendant, GS Labs LLC (“GS Labs”), by and through undersigned counsel, and for its First Amended Counterclaims states as follows:

**I. Introduction**

1. On July 20, 2021, Blue KC filed the instant lawsuit against GS Labs seeking to escape its obligation to pay for COVID-19 testing for Missouri and Kansas citizens at the required rates. Simply put, this is the very specter envisioned by Congress, and Congress passed the CARES Act to avoid just this scenario. As one of Missouri’s own Senators stated in this regard:

Then we need to do things in this bill that will support healthcare workers and healthcare providers. This bill will make sure, I think, to do that in any form it is taking at this moment. Certainly, in the healthcare part that I have worked on as the chairman of the subcommittee, **testing for the coronavirus is going to be paid for. It is going to be paid for by Medicare. It is going to be paid for by Medicaid. It is going to be paid for by private insurance.** Hospitals will get relief in terms of the payments they are supposed to make. It will be the regulatory relief they need to have as they are trying to adapt to a new situation.

166 Cong. Rec. S1976-03, 166 Cong. Rec. S1976-03, S1996 (Sen. Blunt, R-Mo).

2. In other words, in the midst of a resurgence of the COVID-19 virus in the State of Missouri, Blue KC filed a baseless lawsuit asking this Court to approve of Blue KC's refusal to pay for critical, accurate and efficient COVID-19 testing for its members.

3. In direct contravention of laws enacted explicitly in response to the pandemic, Blue KC is boldly attempting to use the legal system to bully a COVID-19 testing company, refusing to compensate GS Labs for the clinical services provided to Missouri and Kansas residents, and making it harder for consumers to get fast and accurate COVID-19 tests.

4. Such conduct is unconscionable, especially at such a critical time, when COVID cases continue to skyrocket and, each day, thousands of individuals rely on GS Labs to keep themselves and their community safe.

5. Blue KC's entire Complaint rests on one fundamental flaw: with no legal authority, the insurer suggests it can refuse to pay GS Labs for COVID-19 testing at the required rates simply because Blue KC deems the published prices too high. Never mind that thousands of Blue KC's insureds benefitted from those services, or that Congress intended to incentivize providers to pivot their businesses to supply this crucial testing in an attempt to curb the virus's spread.

6. Blue KC's position has no support in law and directly contradicts the language of the CARES Act, which requires insurers like Blue KC to pay out-of-network providers like GS Labs the cash prices published on the providers' websites.

7. GS Labs asks this Court to deny the relief sought by Blue KC and grant GS Labs relief under the Counts discussed further herein.

## **II. The Current State of the COVID-19 Pandemic**

8. While the COVID-19 virus raged through the State of Missouri, rather than partnering with providers like GS Labs to stop the spread, Blue KC instead chose to abruptly



discontinue negotiations and file a baseless lawsuit asking this Court to condone its reckless disregard for the law.

9. On the exact same day as this lawsuit was filed, the Kansas City Star reported “Missouri is experiencing a rise in COVID-19 cases and hospitalizations due in part to the spread of the delta variant” and that Missouri is the second in the nation, behind only Arkansas, in the most newly confirmed COVID cases per capita on a weekly basis.<sup>1</sup>

10. In addition, on that same day, it was reported that “St. Louis County has had a 28.6% increase in cases in the past seven days compared to the previous week” and the City of St. Louis “has seen a 40.8% increase in cases in the past seven days.”<sup>2</sup>

11. Since then, COVID conditions have only worsened. Due to the Omicron variant, in January 2022, almost every state across the U.S., including Missouri, experienced record-breaking numbers of daily cases, as well as a shortage of available testing among escalating demand.

12. As of the date of this filing, there have been 1.19 million confirmed COVID-19 cases in Missouri and 16,822 deaths.

13. Throughout each new variant and resulting surge, GS Labs continues to provide consistent and accessible daily testing to residents and is oftentimes the only provider in the area that offers same-day or next-day appointments. Despite having to expend significant time and resources defending this litigation, all while receiving little to no reimbursement for thousands of tests already provided, GS Labs has not wavered in its provision of efficient and accurate testing to its community.

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<sup>1</sup> Here’s what we know about COVID-19 surge in Missouri: St. Louis crisis, masks and more, July 20, 2021 (available at: <https://www.kansascity.com/news/coronavirus/article252903873.html>).

<sup>2</sup> *Id.*

14. The importance of COVID-19 testing during a worldwide pandemic cannot be overlooked and continues to be a significant mitigation mechanism to identify and curtail the spread of the COVID-19 virus.

**III. GS Labs Rapidly Shifted Its Business Model, Made Significant Investments, and Took on Risk to Ensure Safe, Effective, and Accurate COVID-19 Testing.**

15. GS Labs was formed in January 2020, with the aim of providing various clinical testing services from a clinical lab based in Omaha, Nebraska.

16. In the months that followed, as businesses closed and scientists around the world scrambled to understand COVID-19, GS Labs responded to the public health emergency by investing in groundbreaking innovation relating to COVID-19 testing, including the development of a custom technology platform to support secure and high-volume scheduling, convenient intake process, and rapid delivery of results to patients.

17. GS Labs shifted its entire business model by launching twenty-seven COVID-19 testing sites across the nation. Unlike most facilities that offer COVID-19 testing (e.g., hospitals, clinics), GS Labs had to develop the infrastructure for delivering its testing services from the ground up, which required an enormous investment.

18. Recognizing the urgent need for expanding COVID-19 testing capacity as quickly as possible to slow the spread of the pandemic, GS Labs' founders decided to utilize their experience as successful businesspeople to rapidly mobilize the resources necessary to open convenient and accessible testing labs.

19. With a serious and highly communicable disease such as COVID-19, the timing of testing is critical, and as such, GS Labs' focus was on available appointments, accessible testing (allowing patients to visit a laboratory site but safely remain in their vehicles at testing locations),

with same-day results. Additionally, to maximize testing capacity, GS Labs committed to ensuring that its sites would remain open as long as 8 am – 8pm each day, 7 days per week.

20. To meet these high service standards, GS Labs committed to investing substantial resources toward the development of a technology platform built to support secure scheduling and intake of patient information, and a very quick delivery of results to patients. Furthermore, to better support a seamless operation and a better patient experience in all locations, GS Labs invested in hiring its own in-house staffing, billing, accounting, financial employees, and on-site registered nurses to administer tests during all operating hours.

21. Ultimately, its investment has given GS Labs the ability to service up to 1,000 patients per day, at each site. These patients have the unique ability to book within 15 minutes of their proposed appointment and are provided with timely and rapid results in as little as 20 minutes.

22. The following is an image showing the demand for GS Labs' services at Lee's Summit, Missouri. These sites provided testing for as many as 500 patients per day during COVID surges. Tens of thousands of patients were tested at these two locations.



23. The costs for the provision of this critical testing are certainly more than the mere cost of the supplies for the testing, as alleged by Blue KC. In order to provide timely and quality testing, GS Labs pays approximately 30 percent higher wages than the industry average for registered nurses in this area to properly swab patients.

24. In addition to registered nurses, GS Labs employs runners, administration staff and laboratory technicians, and GS Labs pays almost 40 percent higher than similar positions in the area to ensure proper and appropriate staffing.

25. The reason for the steep pay rates is because the nature of the job is “essential” and at-risk. GS Labs’ workers have a demanding job to support a busy test operation, requiring PPE and extensive precautions potentially putting themselves at greater risk by working at a COVID-19 test site. On top of pay rates being an extraordinary cost – GS Labs offers incentives to ensure that it can provide testing after hours and on holidays.

26. GS Labs has offered three different types of COVID-19 tests: (1) a “Rapid Antigen” (“Antigen”) test; (2) a “Polymerase Chain Reaction” (“PCR”) test; and (3) a “Rapid Antibody” (“Antibody”) test. Each test has a unique set of inherent tradeoffs, so the three tests are complementary and often performed in conjunction with one another.

27. The Antigen test requires a nasal swab, and it detects protein fragments that are specific to COVID-19—if found, these protein fragments indicate that the patient is currently infected with COVID-19. All GS Labs Antigen testing products fall under the FDA’s Emergency Use Authorization, and Antigen testing is specifically contemplated in the CARES Act. Results can take as little as 20 minutes, depending on the volume of tests being processed. These results are relatively quick, but the tradeoff is that the protein fragments can take many days to develop, so a patient infected with COVID-19 may nevertheless test negative if the Antigen test is performed within a week (or more) after exposure. There is approximately a 15 percent false negative rate for Antigen testing, which partly serves to explain the need for complementary or confirmatory tests.

28. The PCR test requires a nasal or oral swab and detects genetic material that is specific to COVID-19—if found, this genetic material indicates that the patient is currently infected with COVID-19. All GS Labs PCR testing products fall under the FDA’s Emergency Use Authorization, and PCR testing is specifically contemplated in the CARES Act. Results can take between 2-5 days, or longer, depending on the volume of tests being processed. These results are relatively slow, but the tradeoff is that the genetic material is produced relatively quickly, so the PCR test is significantly less prone to “false negatives” than the Antigen test and can more reliably indicate whether a patient is currently infected with COVID-19.

29. The Antibody test requires a blood sample (via finger prick) and detects antibodies that often develop in someone after they have been infected with COVID-19. All GS Labs Antibody testing products fall under the FDA's Emergency Use Authorization, and Antibody testing is specifically contemplated in the CARES Act. Results can take as little as 20 minutes, depending on the volume of tests being processed. Unlike the Antigen test and PCR test, the Antibody test does not indicate that the patient is currently infected with COVID-19. The extent to which antibodies can protect a person from becoming re-infected with COVID-19 remains unclear, but the Antibody test *can* confirm that the patient has been infected with COVID-19 at some point in the past.

30. Unlike most facilities that offer COVID-19 tests (e.g., hospitals, clinics), GS Labs was built from the ground up *during* the pandemic, and without the luxury of relying on an already-established infrastructure. GS Labs had to invest an enormous amount of capital to develop quickly its capacity to deliver COVID-19 testing services. Likewise, GS Labs is unable to allocate developmental costs across different industries or services because GS Labs provides *only* COVID-19 testing services.

31. In addition to the enormous amount of capital that GS Labs invested in infrastructure this past year, which necessarily increases GS Labs' costs and consequently its prices, GS Labs provides testing services that are unmatched by any other testing facility.

32. In its complaint, Blue KC wholly ignores any underlying costs borne by GS Labs, instead choosing to simply mischaracterize GS Labs in an effort to smear the company and advance its preferred narrative.

33. Realizing the stakes for the public in this unprecedented situation, GS Labs scaled to nearly 30 locations across the country, investing millions of dollars into its own high-throughput

and high-volume PCR laboratory in Omaha, Nebraska. Moreover, as existing providers were not rising to the challenge of improving testing, GS Labs responded to Congress' call, rapidly expanding to new locations to serve the American public. Simply put, GS Labs raised the standard of diagnostic testing in parts of the country where it operated by providing safe, innovative, accessible, rapid and quality tests to hundreds of thousands of Americans.

34. In addition to high quality and efficient testing, a core tenet of GS Labs is legal and regulatory compliance. In October 2020, GS Labs retained McKesson Laboratory Solutions to provide a dedicated laboratory consultant, who would be responsible for advising on lab testing regulations and compliance, as well as additional highly experienced laboratory professionals. GS Labs has also retained a number of health policy and legal consultants, including legal counsel, to specifically advise on all issues pertaining to out-of-network, laboratory billing, and compliance, specifically within the federal legal framework of COVID-19 lab testing, FFCRA, and the CARES Act.

35. Congress recognized the critical need for GS Labs and others to step up during this health care crisis by requiring insurance companies such as Blue KC to pay such labs out-of-network rates to support a greater supply of testing, particularly from smaller labs, with higher marginal costs, which are unlikely to have a contract with insurers.

36. As noted in an article published through the USC-Brookings Schaeffer Initiative for Health Policy, a partnership between Economic Studies at Brookings and the University of Southern California Schaeffer Center for Health Policy & Economics, "when pursuing widespread testing through the insurance model ... there is good reason to require, temporarily, generous out-of-network COVID-19 test payment to support a greater supply of testing, particularly from smaller labs with higher marginal costs that insurers have little incentive



to contract with.”<sup>3</sup> The CARES Act took that approach, explicitly requiring insurers like Blue KC to pay the publicly listed cash price.

37. Stated differently, Congress explicitly incentivized businesses like GS Labs to do their part during the pandemic. Secure in the knowledge that complying with the CARES Act would assure payment of the publicly listed cash price, GS Labs answered that call.

#### **IV. Federal Law Requires Blue KC to Pay GS Labs its Cash Price for COVID-19 Testing.**

38. Congress enacted the Families First Coronavirus Recovery Act (FFCRA) on March 18, 2020 with broad bipartisan support in response to the unprecedented COVID-19 pandemic and public health emergency. To encourage COVID-19 testing to help slow the virus, FFCRA ensured that Americans would not incur the cost of those tests. Section 6001 requires group health plans and health issuers offering group or individual health insurance coverage to provide benefits for certain items and services related to COVID-19 testing during the public health emergency, and they must do so without imposing cost-sharing, prior authorization, or other medical management requirements.

39. The CARES Act was enacted on March 27, 2020 with even more overwhelming Congressional support (96-0 in the U.S. Senate and by voice vote acclamation in the House of Representatives). Section 3201 of the CARES Act amended Section 6001 to include a broader range of diagnostic items and services that must be covered.

40. Congress specifically addressed the “pricing of diagnostic testing” with Section 3202(a) of the CARES Act stating:

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<sup>3</sup> Expanded coverage for COVID-19 testing must include limits on costs, Loren Adler and Sabrina Cortlette, USC-Brookings Schaeffer on Health Policy, available at <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/02/03/expanded-coverage-for-covid-19-testing-must-include-limits-on-costs/>



A group health plan or a health insurance issuer providing coverage of items and services described in section 6001(a) of division F of the Families First Coronavirus Response Act (Public Law 116–127) with respect to an enrollee shall reimburse the provider of the diagnostic testing as follows:

(1) If the health plan or issuer has a negotiated rate with such provider in effect before the public health emergency declared under section 319 of the Public Health Service Act (42 U.S.C. 247d), such negotiated rate shall apply throughout the period of such declaration.

(2) *If the health plan or issuer does not have a negotiated rate with such provider, such plan or issuer shall reimburse the provider in an amount that equals the cash price for such service as listed by the provider on a public internet website, or such plan or issuer may negotiate a rate with such provider for less than such cash price.*

41. In other words, Congress specifically set the price for COVID-19 testing to be the “cash price,” not a specific rate, not Medicare rates, and not an average price set by providers of this necessary and critical service.

42. This out-of-network testing provision in the CARES Act was strategically intended to incentivize testing during the public health crisis.

43. Congress also did not include adjectives such as “objectively reasonable” as Blue KC has used in its Complaint.

44. The language Congress used was intentional.

45. As noted above, Missouri Senator Roy Blunt from Missouri stated, “testing for the coronavirus is going to be paid for. It is going to be paid for by Medicare. It is going to be paid for by Medicaid. *It is going to be paid for by private insurance.*” 166 Cong. Rec. S1976-03, 166 Cong. Rec. S1976-03, S1996 (Sen. Blunt, R-Mo) (emphasis added).

46. Senator Lamar Alexander from Tennessee stated,

In addition, in the end, the only way to end this crisis-and the only way to get the American economy moving again-is to contain the disease. **This will require, as soon as possible, adopting a new goal. That goal should be to test every American who needs it for COVID-19 as soon as possible,** and then isolate and care for the few who are sick and fast-track treatments and

vaccines so that Americans can go back to work and go out to eat and resume a normal life again. This legislation will make all COVID-19 tests free.

The government has shut down the economy to fight this disease, and the government has to help pay the cost of the suffering that this disease has caused, but **the sooner we make more tests available and stop telling Americans not to get a test, the better.**

166 Cong. Rec. S1895-03, 166 Cong. Rec. S1895-03, S1895 (Sen. Alexander, R-Tenn)(emphasis added).

47. See also, comments from Senator Chris Van Hollen from Maryland:

**Testing of the coronavirus-it is clear that the coronavirus got an 8- to 10-week head start in this country, and we were woefully unprepared, especially with respect to tests to try to identify the spread of the virus and where it was and how fast it was moving. We were also unprepared on our testing infrastructure.**

**While we are now ramping up, we are still far behind.** There are still far too many bottlenecks in the system. At Johns Hopkins University in Baltimore, they are doing their own testing, but their testing has been limited by shortages in reagents. That was true a week ago; it continues to be true today. And the University of Maryland Medical System, another major research hospital system in our State, has not yet begun to do their testing because of continued shortages of reagents. That is absolutely unacceptable.

We are also hearing of shortages in swabs-simple swabs-simply to take the test. **We need to ramp up the testing supply. We also need to knock down the barriers to getting tests.** We need to adopt the South Korean model, and many of us have been calling for this for a long time. We see States and Governors moving forward with this, but the Federal Government needs to take a much more active role in establishing that infrastructure.

166 Cong. Rec. S1882-01, 166 Cong. Rec. S1882-01, S1884 (Sen. Van Hollen, D-Md) (emphasis added).

48. Moreover, when the Centers for Medicare & Medicaid Services (“CMS”) and the Department of Health and Human Services (“HHS”) drafted the regulations for the implementation of the CARES Act, “cash price” was defined as the “the charge that applies to an individual who

pays cash (or cash equivalent) for a COVID–19 diagnostic test.” See 85 Fed. Reg. 216, 71142, at 71204, 42 C.F.R. § 182.20.

49. Congress, as well as both the Trump and Biden Administrations, have clarified that group health plans and health insurance issuers like Blue KC must cover and reimburse COVID-19 testing and related services.

50. Such rules have been laid out not just in the text of the FFCRA and CARES Act, but also in a series of “Frequently Asked Questions” (“FAQs”) documents issued and publicly posted by HHS.

51. In compliance with Section 3202(b)(1), GS Labs posted on its public website the cash price of its COVID-19 diagnostic test.

52. Because Blue KC has not negotiated in good faith a rate with GS Labs (or even attempted to do so), Blue KC is obligated to reimburse GS Labs for COVID-19 testing services at its published rates, unless reimbursement for the type of claim at issue is adjusted by contract or by statute.

53. Federal guidance under the FFCRA and CARES Act is also clear that Blue KC’s obligation extends to a wide array of coverage and testing types. The FFCRA/CARES Act payment rules apply to “group health plans and health insurance issuers offering group or individual health insurance coverage (including grandfathered health plans).” This definition specifically includes “both insured and self-insured group health plans,” including “private employment based group health plans (ERISA plans), non-federal governmental plans...and church plans.” See FAQs, Part 42, Q1 (April 11, 2020).

54. Blue KC's reimbursement obligations also apply to all manners of in vitro COVID-19 diagnostic testing, including serological (otherwise known as "antibody") testing. *See* FAQs, Part 42, Q1 (April 11, 2020); FAQs, Part 43, Q4 (June 23, 2020).

55. In other words, there can be no debate that federal law requires Blue KC to pay for COVID-19 testing services provided by GS Labs. Regulators have even warned that plans and issuers shall not attempt to "limit or eliminate other benefits . . . to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID-19." *See* FAQs, Part 42, Q9 (April 11, 2020).

56. Blue KC's failure to pay approximately 34,621 claims is a clear violation of those obligations.

57. Blue KC's actions are particularly reprehensible given the increased operational costs and burdens that GS Labs has undertaken to join the fight against COVID-19.

58. GS Labs remained open and tested thousands and thousands of patients during the heart of the pandemic, absorbing increased costs to protect patients and employees, as well as obtaining and providing test results in a timely manner. To force GS Labs to absorb this risk without reimbursement is the exact opposite of what Congress mandated that health plans must do in the FFCRA and CARES Act.

59. Many other insurers have recognized the value proposition that GS Labs presents in providing expanded hours, same-day appointments, drive-through testing, rapid test results, and nursing support.

60. These insurers have chosen to reimburse GS Labs for the full cash price on its public website or have reached agreement with GS Labs on another price, as provided in the CARES Act.

**V. Federal Law Requires Blue KC to Pay GS Labs' Cash Price for the COVID-19 Testing Provided to Its Members.**

61. GS Labs' cash prices reflect its expanded hours, same day appointments, drive through testing, rapid test results, and nursing support.

62. Existing providers were not rising to the challenge of improving testing capacity in their communities, so GS Labs established and rapidly expanded its operations, which came at a significant cost.

63. As intended by the CARES Act, the cash price was set to cover GS Labs' startup and operating costs; its mobilization into many communities of need and its high standard of service means that its costs are higher than that of other providers.

64. Moreover, GS Labs' prices are not out of the ordinary.

65. A recent survey by Kaiser Family Foundation found that one in five or 20% of COVID-19 had a cash price of more than \$300.00. See COVID-19 test prices and payment policy, available at <https://www.healthsystemtracker.org/brief/covid-19-test-prices-and-payment-policy>.

66. Finally, GS Labs' prices are not unreasonable, as many third-party payers around the country have agreed to reimburse claims at GS Labs' full cash price.

67. The fee for a self-pay patient is the same as the amount charged the insurance carrier. However, if the patient requires financial assistance, he or she may apply to participate in GS Labs' financial-hardship program. For patients who indicate they have no insurance or an economic hardship, at the time of signing up on the website there is an invitation to request financial assistance, by interacting with GS Labs online or by phone as indicated below:

**1**

**OUT-OF-POCKET OPTIONS**

\*Please use the form next to here if you're in need of our Community Financial Assistance program.

**Rapid Antigen Test - \$179**

**Standard PCR Test - \$229**

Complete the form below to qualify for up to a 50% discount on the Out-Of-Pocket costs.

Name

Email Phone

Do you have health insurance?

Yes

No

**NEXT**

If an individual indicates that he or she does not have health insurance, then the following prompt appears:

**1**

**OUT-OF-POCKET OPTIONS**

\*Please use the form next to here if you're in need of our Community Financial Assistance program.

**Rapid Antigen Test - \$179**

**Standard PCR Test - \$229**

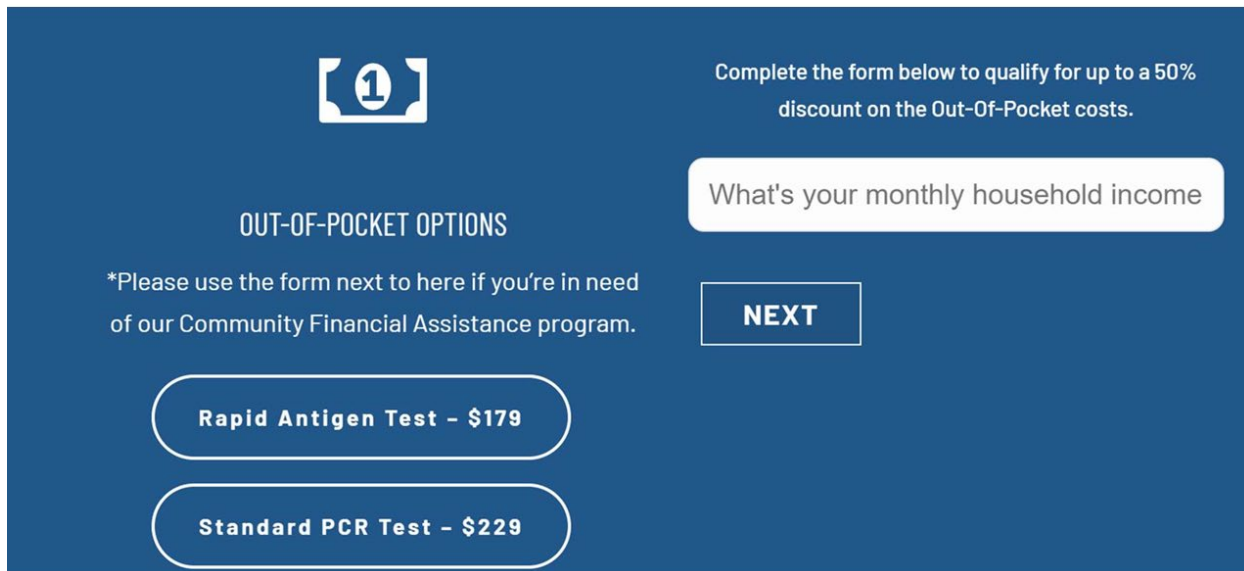
Complete the form below to qualify for up to a 50% discount on the Out-Of-Pocket costs.

How many dependents do you have? *(Required)*

How many dependents do you have? ▾

**NEXT**

After entering the number of dependents, the patient then receives the following prompt:



GS Labs uses this information to determine a patient’s eligibility for the financial-hardship program.

68. Patients who qualify for participation in the financial hardship program receive a need-based discount for COVID testing. In the past, participants in the financial-hardship program paid 30% of the cash price for COVID testing (*i.e.*, \$114.50 for the antigen test and \$115.50 for the PCR test). After GS Labs recently reduced its cash prices, that amount was changed to 50% of the new cash price (*i.e.*, \$89.50 for the antigen test and \$114.50 for the PCR test).

69. The Department of Health and Human Services specifically noted, “[w]e do not believe that posting a ‘cash price’ should prevent a provider of a diagnostic test for COVID–19 from offering testing for free to individuals as charity care or in an effort to combat the public health crisis, rather, the ‘cash price’ would be the maximum charge that may apply to a self-pay individual paying out-of-pocket.” 85 Fed. Reg. 71142, 71152 (Nov. 6, 2020).

70. Nothing in the CARES Act suggests that Blue KC is *entitled* to pay only a small fraction of the published cash price simply because GS Labs provided certain patients discounts based on a financial hardship.

71. To date, *thousands* of individual patients paying out of pocket have paid the full cash price—the price that Blue KC refuses to pay.

## **VI. Federal Law Prohibits Blue KC from Shifting Costs to Its Members**

72. Insurance carriers, such as Blue KC, “must provide this coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.” *See* FFCRA, § 6001(a); FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation (hereinafter “FAQs”), Part 44, pp. 1-2 (February 26, 2021).

73. The FAQs advise plans and issuers to maintain their claims processing and other information technology systems in ways that protect patients from inappropriate cost sharing and to document any steps they are taking to do so. HHS has stated that it will take enforcement action, where appropriate, to ensure that consumers receive the protections to which they are entitled under the FFCRA and the CARES Act. FAQs, Part 42, pp. 8-9 (April 11, 2020) (“The Departments would continue to take enforcement action against any health insurance issuer or plan that attempts to limit or eliminate other benefits, or to increase cost-sharing, to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID-19.”).

74. In addition to not paying the cash price as required by the CARES Act, Blue KC attempted to shift its burden to its members by informing them in the Explanation of Benefits that they were responsible for a portion of the fee in direct violation of the CARES Act. See the following example EOB (redacted to protect patient privacy):





Should you have any questions, call  
(816) 395-3686 or (800) 320-9550,  
or visit our Web site at MyBlueKC.com

Payee Name:	GS LABS
Payee ID #:	64379013
Payment Date:	05/10/2021
Payment:	\$8,160.76
Check	2137169

**Remittance Advice**

Claim #	Account #	Patient Member ID	Provider:GS LABS Provider ID:64379013		Plan ID: PREFERRED-CARE Original Claim									
Beginning Service Date	Units	Total Charge	Allowable Amount	Procedure Code	Other Carrier Paid Amount	Line No.	Provider Write-off	Member Other Liability	Capitated Service	Member Deductible	Member Copay	Member Coinsurance	Member Responsibility	Plan Payment
03/26/2021	1	\$380.00	\$82.76	87811	\$0.00	1	\$0.00	\$297.24		\$0.00	\$0.00	\$0.00	\$297.24	\$82.76
03/26/2021	1	\$50.00	\$50.00	G2023	\$0.00	2	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$50.00
03/26/2021	1	\$380.00	\$90.46	86328	\$0.00	3	\$0.00	\$289.54		\$0.00	\$0.00	\$0.00	\$289.54	\$90.46
<b>Totals:</b>	<b>3</b>	<b>\$810.00</b>	<b>\$223.22</b>		<b>\$0.00</b>		<b>\$0.00</b>	<b>\$586.78</b>		<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$586.78</b>	<b>\$223.22</b>

75. In addition, on Blue KC’s website regarding COVID-19 directed to its members, it specifically warns of out-of-pocket fees for going to an out of network provider for COVID-19 testing, in violation of the CARES Act. See <https://www.bluekc.com/consumer/covid/tests.html>.

76. Despite GS Labs billing Blue KC at the posted cash price in accordance with the CARES Act, Blue KC has included in its Remittance Advice to patients since the litigation commenced that “Provider is subject to litigation for abusive billing practices,” as reflected in the example below:



Should you have any questions, contact your local Blue Cross and Blue Shield plan.

Payee Name:	GS LABS
Payee ID #:	844333441001
Payment Date:	09/27/2021
Payment:	\$0.00
<b>NO PAYMENT</b>	

**Remittance Advice**

Claim #:	Account #:	Patient:	Member ID:	Provider: GS LABS	Provider ID: 844333441001	Plan ID: PREFERRED-CARE BLUE	Original Claim							
Beginning Service Date	Units	Total Charge	Allowable Amount	Procedure Code	Other Carrier Paid Amount	Line No.	Provider Write-off	Member Other Liability	Capitated Service	Member Deductible	Member Copay	Member Coinsurance	Member Responsibility	Plan Payment
04/10/2021	1	\$380.00	\$0.00	87811	\$0.00	1	\$0.00	\$380.00		\$0.00	\$0.00	\$0.00	\$380.00	\$0.00
04/10/2021	1	\$380.00	\$0.00	86328	\$0.00	2	\$0.00	\$380.00		\$0.00	\$0.00	\$0.00	\$380.00	\$0.00
04/10/2021	1	\$50.00	\$0.00	G2023	\$0.00	3	\$0.00	\$50.00		\$0.00	\$0.00	\$0.00	\$50.00	\$0.00
<b>Totals:</b>	<b>3</b>	<b>\$810.00</b>	<b>\$0.00</b>		<b>\$0.00</b>		<b>\$0.00</b>	<b>\$810.00</b>		<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$810.00</b>	<b>\$0.00</b>

Line 1 - Explanation of Member Other Liability: YWU - Provider is subject to litigation for abusive billing practices. Provider has indicated it will not bill you for these charges. \$380.00  
 Line 2 - Explanation of Member Other Liability: YWU - Provider is subject to litigation for abusive billing practices. Provider has indicated it will not bill you for these charges. \$380.00  
 Line 3 - Explanation of Member Other Liability: YWU - Provider is subject to litigation for abusive billing practices. Provider has indicated it will not bill you for these charges. \$50.00

77. On information and belief, these Remittance Advice documents had the purpose and effect of steering patients away from GS Labs and, at least in some cases, toward Blue KC’s affiliate in the COVID testing market.

78. Moreover, the FAQs clarify that plans and issuers are prohibited from imposing specific screening criteria on coverage of COVID-19 diagnostic testing for an asymptomatic person who has no known or suspected exposure to COVID-19.

79. Thus, “[w]hen an individual seeks and receives a COVID-19 diagnostic test from a licensed or authorized health care provider, or when a licensed or authorized health care provider refers an individual for a COVID-19 diagnostic test, plans and issuers generally must assume that the receipt of the test reflects an ‘individualized clinical assessment’ and the test should be covered without cost sharing, prior authorization, or other medical management requirements.” FAQs, Part 44, pp. 2-3.

80. In an effort to open up access for testing related to the coronavirus pandemic, CMS published “CMS NEWS” for immediate release on April 30, 2020, clarifying that “a written

practitioner's order is no longer required for the COVID-19 test" listing indications for getting a COVID-19 Test.

81. Notably, CMS will no longer require a written order from the treating physician or other practitioner for beneficiaries to get COVID-19 tests, nor for influenza tests meant to rule out other infections.

82. GS Labs employs an ordering physician who is licensed in every state where GS Labs is located, and he has issued standing orders compliant with CMS's guidelines and indications for obtaining a COVID-19 test.

83. Blue KC's refusal to pay for testing for its members by imposing additional screening criteria is in violation of the CARES Act.

**VII. Blue KC Inappropriately Withheld Full Payment for COVID-19 Testing Services in Bad Faith.**

84. In connection with the COVID-19 diagnostic testing and related testing provided to Blue KC members who received testing services at issue in this lawsuit, GS Labs timely submitted claims for payment to Blue KC and billed the cash price for the relevant service publicly posted on GS Labs' website, as permitted by the CARES Act.

85. As noted by Blue KC, counsel for GS Labs sent counsel for Blue KC a letter dated March 2, 2021 providing notice of claims for COVID-19 testing for Blue KC's members, outlining Blue KC's obligations under the CARES Act, providing the cash prices publicly posted.

86. In addition, the letter provides an invitation to negotiate a lower rate with GS Labs on future COVID-19 testing.

87. Blue KC had the opportunity, as recognized by the CARES Act, to "negotiate a rate with [GS Labs] for less than [the cash price on the website]," but Blue KC did not make any meaningful effort to do so.

88. In addition, Blue KC did not provide a consistent or logical response to the submitted claims.

89. For a limited number of claims, Blue KC appropriately paid the claims for COVID-19 tests in full. See the following example EOB (redacted to protect patient privacy):



Should you have any questions, call  
(816) 395-3686 or (800) 320-9550,  
or visit our Web site at MyBlueKC.com

Payee Name:	GS LABS
Payee ID #:	64379013
Payment Date:	05/03/2021
Payment:	\$2,540.07
Check	2132343

**Remittance Advice**

Claim # Account #	Patient: Member ID:	Provider:GS LABS Provider ID:64379013	Plan ID: PREFERRED-CARE Original Claim												
Beginning Service Date	Units	Total Charge	Allowable Amount	Procedure Code	Other Carrier Paid Amount	Line No.	Provider Write-off	Member Other Liability	Capitated Service	Member Deductible	Member Copay	Member Coinsurance	Member Responsibility	Plan Payment	
03/16/2021	1	\$380.00	\$380.00	87811	\$0.00	1	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$380.00	
03/16/2021	1	\$50.00	\$50.00	G2023	\$0.00	2	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$50.00	
03/16/2021	1	\$380.00	\$380.00	86328	\$0.00	3	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$380.00	
<b>Totals:</b>	<b>3</b>	<b>\$810.00</b>	<b>\$810.00</b>		<b>\$0.00</b>		<b>\$0.00</b>	<b>\$0.00</b>		<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$810.00</b>	

90. For other claims, Blue KC paid an arbitrary fraction of the required amount while informing its members they were responsible for the rest of the claims instead of promptly paying for the necessary COVID-19 testing. See the following example EOB (redacted to protect patient privacy):



Should you have any questions, call  
(816) 395-3686 or (800) 320-9550,  
or visit our Web site at MyBlueKC.com

Payee Name:	GS LABS
Payee ID #:	64379013
Payment Date:	05/10/2021
Payment:	\$8,160.76
Check	2137169

**Remittance Advice**

Claim # Account #	Patient Member ID	Provider:GS LABS Provider ID:64379013		Plan ID: PREFERRED-CARE Original Claim										
Beginning Service Date	Units	Total Charge	Allowable Amount	Procedure Code	Other Carrier Paid Amount	Line No.	Provider Write-off	Member Other Liability	Capitated Service	Member Deductible	Member Copay	Member Coinsurance	Member Responsibility	Plan Payment
03/26/2021	1	\$380.00	\$82.76	87811	\$0.00	1	\$0.00	\$297.24		\$0.00	\$0.00	\$0.00	\$297.24	\$82.76
03/26/2021	1	\$50.00	\$50.00	G2023	\$0.00	2	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$50.00
03/26/2021	1	\$380.00	\$90.46	86328	\$0.00	3	\$0.00	\$289.54		\$0.00	\$0.00	\$0.00	\$289.54	\$90.46
<b>Totals:</b>	<b>3</b>	<b>\$810.00</b>	<b>\$223.22</b>		<b>\$0.00</b>		<b>\$0.00</b>	<b>\$586.78</b>		<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$586.78</b>	<b>\$223.22</b>

91. For over *5,000 claims*, Blue KC demanded production of medical records and refused to pay for the COVID-19 testing. For example,



Should you have any questions, call  
(816) 395-3686 or (800) 320-9550,  
or visit our Web site at MyBlueKC.com

Payee Name:	GS LABS
Payee ID #:	64379013
Payment Date:	05/03/2021
Payment:	\$2,540.07
Check	2132343

**Remittance Advice**

Line 1 - Explanation of Other Non Covered: YMQ - Please submit a copy of the Medical Records. Once this information is received, we will reprocess the claim. \$380.00  
 Line 2 - Explanation of Other Non Covered: YMQ - Please submit a copy of the Medical Records. Once this information is received, we will reprocess the claim. \$50.00  
 Line 3 - Explanation of Other Non Covered: YMQ - Please submit a copy of the Medical Records. Once this information is received, we will reprocess the claim. \$380.00

Claim # Account #	Patient Member ID	Provider:GS LABS Provider ID:64379013		Plan ID: BLUE CROSS BLUE SHIELD Original Claim										
Beginning Service Date	Units	Total Charge	Allowable Amount	Procedure Code	Other Carrier Paid Amount	Line No.	Provider Write-off	Member Other Liability	Capitated Service	Member Deductible	Member Copay	Member Coinsurance	Member Responsibility	Plan Payment
12/30/2020	1	\$380.00	\$0.00	87811	\$0.00	1	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
12/30/2020	1	\$50.00	\$0.00	G2023	\$0.00	2	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
12/30/2020	1	\$380.00	\$0.00	86328	\$0.00	3	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>Totals:</b>	<b>3</b>	<b>\$810.00</b>	<b>\$0.00</b>		<b>\$0.00</b>		<b>\$0.00</b>	<b>\$0.00</b>		<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>

Line 1 - Explanation of Other Non Covered: YNP - Please submit a copy of the Medical Records. Once this information is received, we will reprocess the claim. \$380.00  
 Line 2 - Explanation of Other Non Covered: YNP - Please submit a copy of the Medical Records. Once this information is received, we will reprocess the claim. \$50.00  
 Line 3 - Explanation of Other Non Covered: YNP - Please submit a copy of the Medical Records. Once this information is received, we will reprocess the claim. \$380.00

92. To date, GS Labs produced 3,000 medical records amounting to over 20,000 pages of documents, and still has not been paid in full for the services provided and documented in the medical records.

93. Regardless of access to records, Blue KC's requests contravene the instructions in the FFCRA, CARES Act, and FAQs, which clarify that Blue KC must reimburse out-of-network laboratories like GS Labs without engaging in "medical management." It is disingenuous, not to mention illegal, for Blue KC to claim that it must review detailed clinical records to determine a patient's symptoms before covering the COVID-19 test.

94. Federal guidance states that, under the FFCRA and CARES Act, plans and issuers cannot "use medical screening criteria to deny (or impose cost sharing on) a claim for COVID-19 diagnostic testing" for asymptomatic patients, and they "cannot require the presence of symptoms or a recent known or suspected exposure, or otherwise impose medical screening criteria on coverage of tests." FAQs, Part 44 Q1 (Feb. 26, 2021).

95. Blue KC's actions in withholding payment on legitimate claims for services GS Labs provided and demanding an unreasonable volume of documentation are clear violations of Blue KC's FFCRA and CARES Act reimbursement obligations.

96. Blue KC's abusive records requests and withholding of payment directly violate a Congressional mandate requiring carriers to reimburse in- and out-of-network COVID-19 testing services during the pandemic.

97. The parties had a few negotiation discussions regarding the COVID-19 testing provided to Blue KC members including a discussion on July 1, 2021, where Blue KC made various false accusations including alleging that GS Labs was not CLIA certified, but offered to pay GS Labs a fraction of the required cash price.

98. In addition, Blue KC agreed to look into the number of records requests made to GS Labs and attempt to work to reduce the number significantly, acknowledging the outrageous number of such requests.

99. In response, GS Labs agreed to provide a significant discount of its fees to resolve the dispute.

100. A little more than two weeks after the July 1, 2021 conversation when Blue KC agreed to work with GS Labs on the medical records requests, Blue KC filed a 29-page complaint including 144 separate paragraphs. Clearly, this pleading was drafted or in the process of being drafted at the time when GS Labs thought it was negotiating with Blue KC in good faith to resolve the cost of providing critical testing to Blue KC's members.

101. In Missouri, Blue KC has a duty to acknowledge and promptly adjudicate claims, in addition to its duties to engage in good faith and fair dealing with regard to the implied contractual relationship that exists between GS Labs and Blue KC. Blue KC has breached these duties and GS Labs has suffered damages.

102. GS Labs attempted to engage in communications and discussions with Blue KC in an effort to resolve this dispute through good faith negotiations, but in the midst of the beginning stages of negotiation, Blue KC blind-sided GS Labs by filing this lawsuit and press release.

### **VIII. Blue KC's Involvement with and Control over Third-Party Administrative Services Only Health Plans**

103. In addition to its role as a direct provider of insurance coverage, Blue KC also provides administrative services to other health plans, particularly health plans offered by large employers that self-insure.

104. Under these third-party health plans—often referred to as “Administrative Services Only” plans or “ASO” plans—the plan funder (ordinarily an employer) assumes the risk of the

plan and contracts with an insurance company to provide administrative services and manage the day-to-day operations of the plan.

105. Blue KC provides such administrative services to a number of ASO plans.

106. In some cases, ASO plans—particularly plans for employers or unions headquartered in the Greater Kansas City area—contract directly with Blue KC for administrative services.

107. On information and belief, examples of ASO plans contracting directly with Blue KC include those associated with prominent Kansas City companies like Truman Medical Center and Ferrellgas Partners, as well as leading labor unions including the International Brotherhood of Electrical Workers Local 124; the Mo-Kan Sheet Metal Workers Welfare Fund; Pipe Fitters Union Local 533; and Plumbers Union Local 8.

108. In other cases, ASO plans—particularly plans for employers headquartered outside the Greater Kansas City area—contract with other members of the Blue Cross Blue Shield network for administrative services. On information and belief, in such cases, if providers submit claims to the ASO plan for services provided in the Greater Kansas City area, Blue KC will adjudicate and manage such claims even though Blue KC does not have a direct contractual relationship with the plan.

109. On information and belief, examples of such ASO plans include plans associated with Ford Motor Company and Walmart Inc.

110. On information and belief, as the administrative services provider to ASO plans, Blue KC has the contractual authority and responsibility to adjudicate and pay claims submitted to the ASO plans.



111. On information and belief, Blue KC has the contractual responsibility to correctly adjudicate and pay claims submitted to ASO plans to which it provides administrative services.

112. On information and belief, Blue KC exercises de facto complete control over the claims adjudication and reimbursement processes for the ASO plans to which it provides administrative services.

113. GS Labs has provided COVID-19 testing to the members of many ASO plans to which Blue KC provides administrative services, and GS Labs has submitted claims for reimbursement to those ASO plans based on the testing services provided.

114. On information and belief, in its role as administrative-services provider to certain ASO plans, Blue KC has caused those plans to refuse to reimburse lawful and appropriate claims for reimbursement submitted by GS Labs to those ASO plans.

115. Blue KC has no lawful basis or justification to cause the ASO plans not to reimburse the claims submitted by GS Labs.

## **IX. Blue KC's Conduct Violates the Antitrust Laws**

116. Blue KC's failure to discharge its obligations under the CARES Act is part of a pattern of anticompetitive conduct Blue KC has deployed with the purpose and effect of driving GS Labs—an innovative, new, consumer-friendly, high-quality<sup>4</sup> COVID testing provider—out of the market for lab-based COVID testing services. Blue KC's anticompetitive conduct also includes suppressing competition among insurers to secure negotiated rates with COVID testing service providers such as GS Labs, and favoring Blue KC's preferred providers (including one that

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<sup>4</sup> In the context of these antitrust claims, quality captures a mix of factors including the reliability of tests, speed of results, convenience, consumer experience, supply chain management, and other features of COVID testing providers that improve the service for consumers.

Blue KC owns and operates) at the expense of patients seeking greater access to more convenient high quality lab-based COVID testing services in and around the State of Missouri.

117. Blue KC has pursued its anticompetitive scheme by withholding and delaying payment to GS Labs on behalf of a massive subscriber base, the source of its immense market power. Blue KC has further amplified its stranglehold on the market by colluding with other BCBS affiliates to withhold and delay payment to GS Labs, in effect carrying out a buyer's cartel to boycott the provider and depress its reimbursement rates.

118. Blue KC's exclusionary and collusive conduct has done significant harm to competition, protecting a dominant insurer's profits and dominant market position by suffocating the success of an innovative, new, scalable lab services provider. GS Labs provides a high-quality consumer-preferred alternative not otherwise present in the market: rapid, accurate, and accessible lab-based COVID testing at convenient locations, with the capacity to calibrate output to meet demand that eliminates wait times for tests and results, even during unpredictable periods of viral surge. Foreclosing GS Labs from patients and reimbursement denies GS Labs access to the inputs and cashflow that allow it to provide these services, and, importantly, that would allow GS Labs to continue to make additional investments in new testing sites that increase the availability of its rapid, high-quality, and highly accessible COVID testing at a time when its services are at their highest demand since the start of the pandemic.

119. In the middle of a surge in COVID-19 infections driven by the highly transmissible Omicron variant, Blue KC's anticompetitive conduct harms competition in ways that have chilling implications on public health. Many Americans have been unable to access COVID tests, and the severe supply shortage of COVID tests and testing sites has resulted in massive lines, wait times,<sup>5</sup>

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<sup>5</sup> See, e.g., Tia Johnson, *Staff shortages, high demand cause long lines for COVID testing at Truman Sports Complex*, FOX 4 NEWS KANSAS CITY, <https://fox4kc.com/news/staff-shortages-cause-long-lines-wait-at-free-covid-19-testing->

overrun hospital emergency rooms,<sup>6</sup> delayed results, and a multitude of missed opportunities to detect and mitigate the spread of COVID-19, including in Missouri and the Kansas City area,<sup>7</sup> where Blue KC operates with market power based on its dominant market share of the commercial insurance market.

**A. The Relevant Product Markets**

**1. COVID Testing Market**

120. Lab-based COVID testing providers compete to offer laboratory COVID testing services, generally at mobile and ad-hoc COVID testing sites set up to provide patients with rapid turnaround diagnostic testing for the COVID-19 virus in close proximity to their homes. COVID testing providers can be private labs, like GS Labs, which are located in roadside strip-malls and other convenient locations, but can also include laboratories operated out of hospitals, urgent care clinics, and other mixed service providers.

121. The COVID testing services that these providers offer comprise six primary types of tests for infection by COVID-19: Rapid Antigen, Antibody, Biofire (PCR) High Risk, ePlex (PCR) High Risk, Low Risk PCR, Intermediate Risk PCR, and Specimen Collection. No other tests are interchangeable for purposes of diagnostic testing for current or past infections of the COVID-19 virus. People looking for rapid diagnostic testing for COVID do not have any alternative.

122. Lab-based COVID testing providers compete with each other to attract patients based on quality, including access and location, convenience (easy and last-minute booking of

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[at-truman-sports-complex/](#) (last visited Jan. 17, 2022) (“Some sat in line for about three hours waiting for their turn to self-administer a COVID-19 test.”).

<sup>6</sup> See, e.g., Haley Harrison, *Doctors: Kansas City's hospital capacity is maxed out as COVID-19 cases surge*, KMBC NEWS, available at <https://www.kmbc.com/article/kansas-city-hospital-capacity-maxed-covid-19-surge/38678092> (last visited Jan. 17, 2022) (“‘This is hands down the toughest surge the medical community has had to face since the pandemic began in 2020,’ said Dr. Steven Stites, chief medical officer at the University of Kansas Health System.”

<sup>7</sup> *Id.* (“Doctors are making a plea to Kansas City: Don't visit the emergency room for COVID-19 testing.”).

appointment; early and late opening hours; drive-through options, etc.), customer service, wait times, the turnaround for providing test results, and the accuracy of the test results. GS Labs excels in all of these areas. For example, GS Labs offers an innovative technology platform to support high-volume scheduling, accessible and convenient drive-up testing, and same-day testing results in as little as 20 minutes.

123. At-home COVID testing is not a reasonable substitute for the test that can be obtained from a lab-based COVID testing provider. At-home tests are less accurate, more difficult to self-administer, their results are not certified by a licensed lab, and only very recently were subject to an Executive Order requiring commercial insurers to cover their cost.<sup>8</sup> At-home COVID testing is not reasonably interchangeable with the testing offered by lab-based COVID testing providers, and are thus excluded from the relevant COVID Testing Market.

124. GS Labs requires reimbursement from commercial insurers at levels sufficient to offset the significant capital investment and operating costs required to open, staff, and operate testing sites under incredibly unpredictable circumstances. GS Labs sets its cash price and requires reimbursement from commercial insurers at a level that will position it to be responsive to waves of infection of the COVID virus, which require lab-based COVID testing providers to regularly open, close, and move facilities quickly and with little notice.

125. Unlike hospitals that offer a wide range of medical services, which allow for fluctuations of revenues across different service lines through changing market conditions, new COVID testing providers like GS Labs responding to Congress's incentive in the CARES Act to enter this market, generally offer only COVID testing. As a result, new entrant COVID testing providers like GS Labs cannot rely on a diversity of services to even out spikes and lulls in demand,

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<sup>8</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/14/fact-sheet-the-biden-administration-to-begin-distributing-at-home-rapid-covid-19-tests-to-americans-for-free/>

and their revenues need to cover the expenses of ramping up and winding down testing capacity under erratic market conditions. GS Labs, for example, was set up in the early stages of the COVID-19 pandemic for the purpose of providing lab-based COVID testing to communities around the country. GS Labs offers no other services. When COVID infection rates wane, lab-based COVID testing providers like GS Labs have to quickly reallocate resources in order to maintain financial viability and preserve the operational and financial capacity to quickly meet demand during the next surge. This dynamic business model requires capital to cover lease obligations and other fixed administrative costs during periods of decelerated demand, and cash on hand to invest quickly in expansion and entry in response to accelerated demand.

126. Timely and complete reimbursement (as mandated by federal law) from commercial (private) insurers is a critical input for new lab-based COVID testing providers. Without reimbursement from health insurance companies, a provider like GS Labs cannot adequately respond to fluctuations in demand. Medicare and Medicaid reimbursement rates are very low, and often near or below the cost of providing a laboratory-run COVID test. Therefore, to run a viable business and have the ability to quickly adjust the supply of COVID tests up and down to meet demand during waves of COVID infections, lab-based COVID testing providers like GS Labs need to be able to rely on a steady flow of commercially insured patients whose commercial insurers are required by Section 3202(a) of the CARES Act to reimburse the providers.

127. A lab-based COVID testing provider like GS Labs deprived of reimbursement from commercial insurers loses the ability to open new testing sites, expand services at existing sites, or continue to operate and expand with the speed and efficiency that patients demand. And in some cases, non-payment by commercial insurers can lead to testing sites being closed down. The resulting harm to patients who rely on the lab-based COVID testing services is more acute

precisely when lab-based COVID testing is needed most: during periods with spikes in COVID infections.

## **2. Commercial Insurance Market for COVID Testing**

128. Because of the role that insurance plays in the reimbursement of medical costs, COVID testing providers are sellers in a related Commercial Insurance Market for COVID Testing in which insurers compete with each other to buy COVID testing services from providers that they can offer in-network in the health plan products that they sell to employers.

129. Blue KC and other insurers, including other BCBS affiliates in some instances, compete to attract employers to become subscribers to their health plan products. Those subscribers pay a premium to the insurer, and when they seek care from a provider who is part of the network of providers with whom the insurer has a contractual arrangement, the insurer covers the cost of that care (subject to any cost-sharing, such as co-insurance or co-pays, that is a term of the insurer's insurance product). In assembling a network of providers for their health plan products, Blue KC and its rival insurers compete with each other to secure negotiated rates with various providers.

130. Lab testing services, including COVID diagnostic testing, are among the suite of medical services that commercial insurance subscribers expect to be included in their health plan products. As a result, insurers compete to offer sufficient COVID testing providers to their subscribers. Insurers are unable to turn to other providers to ensure that they are offering adequate COVID testing to their subscribers. For an insurer developing a health plan product, COVID testing providers are not reasonably interchangeable or substitutable with providers of other medical services. At the same time, COVID testing providers looking to get access to commercially insured patients must negotiate with commercial insurers, who act as the gatekeepers

to those patients for the providers. GS Labs, for example, has no option but to negotiate with commercial insurers if it wants to offer its COVID testing services to patients with commercial insurance.

131. Insurers engage in bilateral negotiations with COVID testing providers to buy their services at a pre-determined rate of reimbursement that will be paid to the provider when the insurer's subscribers obtain COVID testing services from it. GS Labs and other COVID testing providers act as the "sellers" in offering their COVID testing services, and Blue KC and other insurers act as the "buyers" in looking to secure access to those services for their members. The transactions in the relevant market are the negotiated rates that are agreed upon between COVID testing providers and insurers through their bilateral negotiations. In this Commercial Insurance Market for COVID Testing, commercial insurers compete with each other for access to the COVID testing providers.

#### **B. Geographic Markets**

132. Patients requiring COVID testing are at risk of being infected with a dangerous airborne virus. To the extent patients are choosing between alternative sites to get tested, they look to minimize the travel time needed to get there in order to lower the chances that they will expose others to the virus and to more quickly return home to quarantine or recover from their illness. As a result, patients seek providers of COVID testing services locally, at locations that are convenient to their home or workplace. Therefore, lab-based providers compete in the COVID Testing Market in localized geographic markets, including counties and cities and towns, across Missouri.

133. Insurers build provider networks based on where their subscribers are located and where their subscribers seek medical services. For larger employers, which have offices in

multiple localities within Missouri or neighboring states and whose employees also reside near those areas, insurers look to offer health plan products that have a broader geographic coverage for COVID testing. In turn, the preferences and demand of subscribers drive the demand of insurers looking to secure negotiated rates with COVID testing providers to include in their network of health insurance products. At the same, due to convenience and the administrability of a health plan, Blue KC and its rival insurers conduct a negotiation with GS Labs for in-network coverage on a statewide basis (for all the counties or localities where it sells its health insurance products). Therefore, the relevant geographic markets for the Commercial Insurance Market for COVID Testing is comprised of the state of Missouri, the counties in which Blue KC has exclusive service area for its Blue marks, or localities within Missouri, or localities crossing into neighboring states.

**C. Blue KC Has Market Power in the Insurance Market for COVID Testing**

134. Blue KC has market power as a buyer in the Commercial Insurance Market for COVID Testing. Blue KC's market power when buying access to the services of a COVID testing provider in the Commercial Insurance Market for COVID Testing is largely derived from the size of its subscriber base. As the gatekeeper that controls the provider's ability to attract those insured lives, Blue KC's market power increases with how many subscribers it has.

135. Blue KC has approximately 58% of the commercially insured lives in the Kansas City area with PPO products, and approximately 78% of the commercially insured lives the Kansas City area with HMO products.<sup>9</sup> Across all of PPO, HMO, Affordable Care Act exchange, and point-of-service products, Blue KC's share is approximately 46% of all commercially insured lives in the Kansas City area, and 60% of all commercially insured lives in the St. Joseph area. These

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<sup>9</sup> Based on enrollment share calculations provided by the AMA in "Competition in Health Insurance: A Comprehensive Study of U.S. Markets," September 28, 2021.



dominant market shares give Blue KC significant market power in the Commercial Insurance Market for COVID Testing. As a result of this market power, Blue KC's refusal to pay for tests performed at GS Labs can have a significant impact on its business and its viability as a competitor in the COVID Testing Market. Its market power is amplified by its ability to steer a significant number of potential patients for COVID testing services away from GS Labs and towards other providers, including labs affiliated with Blue KC, through misrepresentations and misleading communications about GS Labs as detailed below.

136. Blue KC also wields market power from its dominant Blue brand, which commands power from its national reach and long history. Approximately one in three Americans have insurance from one of the Blue Cross Blue Shield insurance companies.<sup>10</sup> Blue KC also has power through the vast provider networks Blue KC and other Blue Cross Blue Shield insurance companies have amassed, which included as of 2015 contracts with 96% of hospitals and 92% of professional healthcare providers.<sup>11</sup>

**D. Blue KC Uses its Market Power in the Commercial Insurance Market for COVID Testing to Harm and Eliminate Competition in the COVID Testing Market**

137. The CARES Act requires an insurer that does not reach an agreement with a COVID testing provider to reimburse the COVID testing provider at the provider's listed cash price. An insurer with market power that represents a larger number of subscribers can wield it to demand a lower reimbursement rate with a COVID testing provider. That is equally true of the circumstance where that provider requests a cash price for previous tests already performed as it is when that provider attempts to negotiate a settled price for future tests yet to be performed. This is because the insurer can withhold payment for a large volume of business that is necessary for

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<sup>10</sup> American Hospital Association Letter to Hon. William Baer, Antitrust Division, U.S. Department of Justice (Feb. 29, 2016).

<sup>11</sup> *Id.*

the provider to reach scale in its operations and be a viable competitor in the COVID Testing Market.

138. By refusing or delaying payment to GS Labs for treating its subscribers, or pressuring it to accept cut-rate reimbursement rates that would drive it out of business or could curtail its ability to expand testing capacity. Blue KC is able to shut them out from recovering the costs of providing COVID tests to a large segment of the population, threatening their ability to remain financially viable and an active competitor in the COVID Testing Market. In addition, Blue KC also engages in deceptive and misleading conduct to steer its massive subscribers away from a given provider and toward other COVID testing providers preferred by the insurer, including Blue KC's own offering, Spira Care.

139. The intent of this exclusionary anticompetitive conduct has been to leverage its market power in the Commercial Insurance Market for COVID Testing in order to harm and eliminate marketwide competition in the COVID Testing Market.

140. One way that Blue KC wields its market power over COVID testing providers is to market and advertise to its members that COVID testing providers other than GS Labs are "preferred providers" with Blue KC. This means, for example, that when a Blue KC member goes on the insurer's website to seek advice on where to get a COVID test, they are provided with the below prompt highlighting several in-network COVID testing providers with whom Blue KC has negotiated rates. <https://www.bluekc.com/consumer/covid/tests.html>. Moreover, Blue KC members are told that going to any other provider "may require you to pay higher out of pocket fees and submit a claim for reimbursement." The misleading suggestion of added cost and inconvenience has the intention and effect of dissuading subscribers from going to other COVID testing providers such as GS Labs, which offers a more convenient and accessible service with

faster results. In this way, Blue KC can steer members to other COVID testing providers and, as a consequence, significantly reduce the likelihood that members will go to GS Labs.

## How to get a test

You have a variety of in-network options if you're interested in receiving a COVID-19 test. The following locations work with your plan, meaning you won't have to pay out of pocket to receive a test (**please note** that testing sites not included below may require you to pay higher out of pocket fees and submit a claim for reimbursement):

- Your Local County Health Department
- **LabCorp** and **Quest** diagnostic testing centers
- **CVS** and **Walgreens** pharmacies
- The **pixel by LabCorp** at home testing kit

**IMPORTANT:** In accordance with federal guidance, these tests will not be covered to screen for general workplace health and safety (such as employee "return to work" program(s) or for public health surveillance for SARS-CoV-2 or for any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19.

If you have questions about COVID-19 or testing, please contact your primary care provider.

141. Blue KC goes further to steer its members away from GS Labs with misinformation specific to GS Labs. Blue KC has a page on its website dedicated to GS Labs, that contains misinformation about GS Labs, asserting that "GS Labs is not working with us in good faith. It continues to insist on unreasonable reimbursement rates." The website also highlights this lawsuit, asserting that it filed the lawsuit because "Blue KC and our members are not required to pay GS

Labs' unreasonable, inflated reimbursement demands." <https://www.bluekc.com/consumer/bluekc/articles/154.html>.

142. Subscribers understand that, under usual circumstances, seeking care from a provider who is not in-network (whether it is a lab, their primary care physician, or any other healthcare provider) will cause them to incur higher out-of-pocket costs. Subscribers are aware that getting care from such a provider will likely lead to them having to pay higher co-insurance, co-pay, or other cost-sharing charges. These charges have the express purpose and intended effect of dissuading subscribers from seeking care from providers who are out-of-network and instead opting for in-network providers. Although the CARES Act provides that subscribers are to incur no out-of-pocket costs for COVID testing, not all members are aware of that, and it is reasonable to expect that some Blue KC members, fearing higher out-of-pocket costs, will avoid GS Labs when deciding to get a COVID test because it is not listed among the in-network options for their health plan.

143. Blue KC has taken advantage of what their subscribers will know about the higher out-of-pocket costs associated with seeking care from "out-of-network" providers and exacerbated the misunderstanding by sending deceptive and misleading Explanation of Benefits notices, such as the below example (redacted to protect patient privacy), to their subscribers.



Should you have any questions, call  
(816) 395-3686 or (800) 320-9550,  
or visit our Web site at MyBlueKC.com

Payee Name: GS LABS

Payee ID #: 64379013

Payment Date: 05/10/2021

Payment: \$8,160.76

Check 2137169

### Remittance Advice

Claim #	Patient #	Provider:GS LABS	Plan ID: PREFERRED-CARE											
Account #	Member ID	Provider ID:64379013	Original Claim											
Beginning Service Date	Units	Total Charge	Allowable Amount	Procedure Code	Other Carrier Paid Amount	Line No.	Provider Write-off	Member Other Liability	Capitated Service	Member Deductible	Member Copay	Member Coinsurance	Member Responsibility	Plan Payment
03/26/2021	1	\$380.00	\$82.76	87811	\$0.00	1	\$0.00	\$297.24		\$0.00	\$0.00	\$0.00	\$297.24	\$82.76
03/26/2021	1	\$50.00	\$50.00	G2023	\$0.00	2	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$0.00	\$50.00
03/26/2021	1	\$380.00	\$90.46	86328	\$0.00	3	\$0.00	\$289.54		\$0.00	\$0.00	\$0.00	\$289.54	\$90.46
<b>Totals:</b>	<b>3</b>	<b>\$810.00</b>	<b>\$223.22</b>		<b>\$0.00</b>		<b>\$0.00</b>	<b>\$586.78</b>		<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$586.78</b>	<b>\$223.22</b>

144. These notifications tell subscribers that they are responsible for hundreds of dollars of the cost of receiving a COVID test from GS Labs, in direct contravention of the CARES Act. This is intended to and has the effect of amplifying subscriber steerage away from GS Labs, as patients will incorrectly conclude that they may face higher out-of-pocket costs by going to them. Whether or not the member is actually legally bound to share in those costs, through such deceptive tactics Blue KC steers patients away from GS Labs and towards its in-network COVID testing providers.

145. Because Blue KC's subscribers make up such a significant proportion of the highly sought-after commercially insured lives, Blue KC's ability to steer its members away from GS Labs gives it significant leverage over the provider when it comes to negotiating the amount that it will pay GS Labs for the COVID tests that it provides to its subscribers. Wielding this market power over the Commercial Insurance Market for COVID Testing, Blue KC can rely on its deceptive and misleading tactics to divert a meaningful volume of potential patients away from GS Labs and towards other lab providers with whom it has negotiated a reimbursement rate. As a

result, whether negotiating for payment of already-performed tests or for negotiated rates for future tests, GS Labs must consider the prospects of losing access to Blue KC's members and therefore to a potentially significant stream of commercially insured patients, whose business is critical to funding its pro-consumer competitive activities in the COVID Testing Market.

146. Blue KC's anticompetitive motive for suppressing competition in the COVID Testing Market is to pad its profits by hindering the expansion of, or removing altogether, a higher-cost, higher-quality, higher-volume supplier of COVID testing services. The math is simple.

147. The higher quality and higher performing testing sites offered by GS Labs come at a higher cost. Paying premium wages to employees and training them, investing in consumer-friendly technology that streamlines the patient experience, and generating sufficient cashflow to fund ramp up and wind-down of testing capacity in response to COVID-19 infection rates cause GS Labs to have a higher cost structure than many of its rivals in the COVID Testing Market. This higher cost structure is directly attributable to the better service that it offers. But this means that GS Labs' innovative, pro-consumer, and pro-competitive business model can only be sustained if reimbursement from commercial insurers covers those higher costs.

148. Moreover, GS Labs' business model is built around having the ability to rapidly ramp up its capacity for providing COVID testing in a given area in response to surges in COVID-19 infection rates. This means that GS Labs increases the number of tests available, resulting in higher output in the COVID Testing Market. GS Labs' innovative and scalable business model leads to more sites being opened and more tests being conducted.

149. By contrast, the business model of some of GS Labs' rivals, including those that Blue KC offers as in-network COVID testing providers to its subscribers, are low-cost, low-quality, low-output operations that can run on shoe-string reimbursement levels from commercial

insurers. But that comes at great expense to their patients, because those legacy labs tend to have much longer wait times for test results, a poorer customer experience, and fewer and less convenient locations than GS Labs. They are also slower to ramp up to higher testing capacity during COVID-19 infection surges.

150. GS Labs' innovative, scalable high-output, high-quality business model, while pro-competitive and pro-consumer, poses a threat to Blue KC's bottom-line. Higher reimbursement rates and more testing being performed mean lower profits for Blue KC. Since the CARES Act *requires* it to pay for all tests that its member get from GS Labs, Blue KC faces a perverse incentive: to drive down the availability of higher-quality, better-performing COVID testing providers such as GS Labs because reimbursing them at higher rates and for a higher quantity of tests will cause them to have lower profits than by propping up the lower-quality, worse-performing legacy lab providers who it already has in-network.

151. Therefore, Blue KC has a strong motive to depress output and eliminate competition in the COVID Testing Market, particularly when it comes to cutting off an innovative high-quality and high-growth operator like GS Labs. By wielding its market power to cut off GS Labs' access to a significant proportion of insured lives by refusing or delaying payment and making economically non-viable demands for in-network negotiated rates, Blue KC can keep GS Labs below its minimum efficient scale and thereby suppress its ability to expand and potentially shut it out entirely from the market.

152. Blue KC also has another strong motive for hindering competition in the COVID Testing Market by locking GS Labs out of it. Blue KC operates Spira Care,<sup>12</sup> which offers its own lab-based COVID testing services to patients in some of the same localities that GS Labs operates

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<sup>12</sup> <https://www.bcbs.com/press-releases/blue-kc-announces-new-spira-care-center-opening-wyandotte-county%09>

in. This puts Blue KC in direct competition with GS Labs: Spira Care and GS Labs both compete for patients in the COVID Testing Market. As a result, by locking GS Labs out of the COVID Testing Market, Blue KC can diminish a competitor to its own lab-based COVID testing provider. Indeed, in contrast to the misleading and deceptive statements that Blue KC has made to GS Labs patients that (incorrectly) states they are responsible for out-of-pocket costs when getting a COVID test, the Spira Care website clearly informs patients that COVID-19 tests at their centers “are covered by Blue KC at no cost to the member.”<sup>13</sup>

**E. Blue KC Engages in Exclusionary Anticompetitive Conduct to Eliminate Competition in the Commercial Insurance Market for COVID Testing.**

153. Blue KC’s exclusionary anticompetitive conduct is also intended to maintain or enhance its monopoly position in the Commercial Insurance Market for COVID Testing.

154. Blue KC has an incentive to delay or depress payment to GS Labs, or to refuse to deal with it outright, in order to suppress its activities in the market and prevent the threat of a pro-consumer, high-quality COVID testing provider driving members to other rival insurers’ health plan products. By keeping GS Labs below a minimum efficient scale that would allow it to operate and grow its capacity in the market, Blue KC can prevent its rival insurers from out-competing it with a health plan product offering higher quality in-network providers. Blue KC would prefer to maintain the status quo in the Commercial Insurance Market for COVID Testing, in which lower-quality and lower-cost COVID testing services from legacy lab providers are the only ones that are available to subscribers and rival insurers cannot out-compete it on the merits by building a more robust product with innovative new providers. It can do this because of the market power that it wields as a result of the significant share of the insured lives that it represents.

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<sup>13</sup> <https://www.spiracare.com/covid-19.html>.



155. Because of its monopoly and market power in the Commercial Insurance Market for COVID Testing, Blue KC's exclusion of GS Labs can depress competition market-wide. There is no reasonable prospect that a rival insurer will be able to support GS Labs' presence in the market in a meaningful way on its own. Thereby, by shutting GS Labs out of the Commercial Insurance Market for COVID Testing, Blue KC has the intent and ability to eliminate GS Labs as an option for itself *and its rivals*. Because its market share is so large, representing such a large number of insured lives, it has market power to drive GS Labs out of the market (or diminish its presence significantly), so that no insurer competing in the Commercial Insurance Market for COVID Testing can have access to a meaningful volume of GS Labs testing services so as to out-compete Blue KC by growing its subscribers base with a superior health plan product that has GS Labs in-network.

**F. Blue KC Coordinates and Colludes with other BCBS Affiliates**

156. Not content with having the strong advantage of its own market power in negotiations with GS Labs, Blue KC found a way to join forces with other BCBS behemoths to help it wield even more market power to exclude GS Labs from the Relevant Markets. Realizing that they represent an even larger share of covered lives combined than each does individually, Blue KC and certain BCBS affiliates exchanged competitively sensitive pricing and other information with each other that would serve no apparent purpose other than to align or influence each other's strategies and approach to their negotiations with GS Labs.

157. Blue KC and other BCBS affiliates had occasion to—and in some instances it is clear that they, in fact, did—exchange competitively sensitive information and engaged in discussions with each other that would permit them to align on a joint approach in dealing with GS Labs during negotiations over preferred provider status or negotiated rates of reimbursement.

158. Blue KC and other BCBS affiliates communicated with each other by email, phone, and text message under the guise of “fraud prevention” to discuss and align on a number of competitively sensitive topics, including the status and approach to their respective negotiations with GS Labs and their intentions with respect to denying payment to GS Labs. Specifically, Blue KC and other BCBS affiliates improperly exchanged information about their confidential business dealings with GS Labs, including claims processing, denials, and rate negotiations. For instance:

a. On or about [REDACTED], a [REDACTED] received via text message from a representative of [REDACTED] [REDACTED], and that information was reported to [REDACTED] via email;

b. On or about [REDACTED], a representative of [REDACTED] had discussions with [REDACTED] and [REDACTED] regarding [REDACTED];

c. On or about [REDACTED], a [REDACTED] had a conversation with a representative of [REDACTED] about [REDACTED];

d. On or about [REDACTED], representatives of [REDACTED] and [REDACTED] exchanged information about whether [REDACTED];

e. On or about [REDACTED], representatives of [REDACTED] and [REDACTED] had a meeting or phone call at which [REDACTED] were discussed.

159. Many of these communications between Blue insurers were filtered through the companies' respective legal departments in an (ultimately unsuccessful) attempt to hide the conspiracy under the cloak of privilege.

160. Blue KC and numerous BCBS affiliates whose subscribers GS Labs has served have refused to make payment on prior tests or to negotiate rates for future tests. Many of those BCBS affiliates, including Blue KC, have used a refusal to pay (outright) as a negotiating tactic to try to extract cut-rate reimbursement at or near the Medicare fee level. In communications among BCBS affiliates, including Blue KC, some BCBS affiliates noted [REDACTED]. Others were silent about those concerns and continued communicating with each other about their dealings with GS Labs.

161. In addition, different BCBS affiliates made similar, and in some cases identical (down to the penny) offers to GS Labs for reimbursement of specific COVID tests. These extremely unlikely identical offers and other similarities in the timing and nature of the positions taken by Blue KC and other BCBS affiliates further indicate that the purpose, and also the effect, of the exchanges of information was to align the negotiating positions of the insurers in order to deny, delay, or depress payment to GS Labs.

162. Moreover, the Insurance Market for COVID Testing Services exhibits competitive and other conditions that make it ripe for a collusive agreement. It displays an oligopolistic market structure, and is predominantly controlled by a few players. In addition, there are just a few procedures offered by providers of COVID Testing Services, and those tests are standardized and homogeneous across providers, which makes the market more conducive to collusion.

163. While Blue KC and the other BCBS affiliates' coordination was purportedly to address "fraud" by GS Labs, this was mere pretext for their conduct and an attempt to hide their collusive and anti-competitive intentions. BCBS affiliates, including Blue KC, worked in lock-step to align around the same baseless arguments and unfounded allegations as the purported basis to refuse, delay, or depress payment to GS Labs. But it is clear from the negotiations that the common concern driving their collective resistance to pay GS Labs for its tests is not the appropriateness of those tests but the price.

164. Blue KC and other BCBS affiliates had no reason to exchange highly competitively sensitive information—such as specific pricing information, status of denials, or their intended next steps in their dealings with GS Labs—for the purposes of any investigation into the appropriateness of GS Labs' testing. The motivation for that could only plausibly be to join forces to make the impact of a refusal or delay in payment, and to put downward pressure on a negotiated rate, all the more damaging to GS Labs. This reveals that the allegations of fraud were a pretext that the BCBS affiliates could use to meet, exchange information, and align on how they could carry out their high-pressure anti-competitive campaign on a collective instead of individual basis.

165. Because Blue KC and certain of its other BCBS affiliates in some instances compete in the Insurance Market for COVID Testing, the exchange of competitively sensitive information and joint conduct with respect to rate negotiations or dealings with GS Labs means that those insurers engaged in cartel behavior that rose to a naked price-fixing arrangement.

166. A BCBS affiliate may contract with a healthcare provider in a county contiguous to its service area under certain conditions, and it may also contract with certain types of nationwide providers, including for laboratory services (as is the case here), among others. In these circumstances, the competing insurers have an especially strong incentive to align their strategies

with respect to rate negotiations and other dealings with a COVID testing provider. Each BCBS affiliate knows that if a rival insurer, including another affiliate, agrees to a lower price or other less favorable terms with a provider such as GS Labs, then that may put pressure on it to agree to a similar term. By collectively refusing or delaying payment to GS Labs, in effect carrying out a boycott of the provider, Blue KC and certain other BCBS affiliates acted as a buyer's cartel in the Commercial Insurance Market for COVID Testing.

167. This is not the first time Blue Cross Blue Shield insurance companies have engaged in collusive conduct. In a long-running multi-district litigation, the BCBS insurance companies have been accused of *per se* illegal market division and other antitrust violations. *See In Re: Blue Cross Blue Shield Antitrust Litigation*, MDL No. 2406, No. 2:13-cv-20000 (N.D. Ala.). The MDL includes two different class action track complaints, *Conway v. Blue Cross Blue Shield of Alabama* (Provider Track Complaint) and *Galactic Funk Touring, Inc. v. Blue Cross Blue Shield of Alabama* (Subscriber Track Complaint). The BCBS insurance companies agreed to settle the subscriber side of the case for a massive \$2.97 billion, along with injunctive relief that will require them to compete more vigorously against each other.

### **G. Anticompetitive Effects and Antitrust Injury Caused by Blue KC's Exclusionary and Collusive Conduct**

168. The effect of Blue KC's exclusionary and collusive anticompetitive conduct has been to significantly harm competition in the relevant markets.

169. By steering patients away from GS Labs and refusing to reimburse for COVID tests delivered to Blue KC subscribers, Blue KC has suffocated GS Labs' success, withholding a critical source of revenue that has prevented GS Labs from reaching or maintaining a minimum efficient scale. Foreclosing GS Labs from further entry and expansion has an especially pernicious effect

on the relevant markets because of the uniquely innovative, and output-enhancing role that GS Labs can play. More so than the legacy lab testing companies, or any other rival for that matter, GS Labs has been a leader in the industry in terms of the number of sites it is able to open in a short period of time, the quality of the experience it offers to its patients, and the fast turnaround time of its test results.

170. Therefore, by reducing GS Labs' footprint and hindering competition in the relevant markets, Blue KC has through its anticompetitive conduct prevented its subscribers and other patients in the relevant markets from having access to more, higher-quality, better-performing COVID testing. In its place, Blue KC has propped up legacy labs that offer a worse experience, longer test result turnaround times, less convenience, and fewer locations. The consequences are that people are at higher risk of not detecting COVID-19 in time to get adequate treatment or prevent them from spreading it to others, with potentially devastating consequences to themselves and their community. It also means that patients not infected with the virus, but waiting for several days to get their test results, are prevented from going about their lives.

171. Blue KC's practice—in exercise of its market power individually and in colluding with other BCBS affiliates collectively—of withholding, delaying, and depressing payment to GS Labs has prevented GS Labs from accessing significant cashflow that it would have used to invest in more testing capacity with the expansion of existing sites and opening of new ones in the relevant markets. The ability to get reimbursement from commercial insurers is one of the key factors that drives GS Labs' ability to enter or expand its presence in a market. GS Labs' ability to raise or finance additional capital is limited by its balance sheet and restrictions on access to capital from lenders. The massive accounts receivables from dominant insurers like Blue KC, compounded by similar non-payment from other Blue Cross Blue Shield affiliates, were therefore

the single most significant potential source of cash flow for GS Labs to help it expand testing capacity. By contrast, in geographies where GS Labs has been able to negotiate viable rates with other insurers, it has reinvested that injection of cashflow right back into expanding its testing capacity at existing sites or opening new ones.

172. Blue KC's anticompetitive conduct of withholding, delaying, and depressing payment to GS Labs, therefore, had a direct and proximate impact on GS Labs' ability to expand its existing sites or open new ones to increase capacity in response to increased demand for COVID testing. GS Labs has proven itself to be an innovator in the COVID Testing market, a nimble new entrant able to open high-quality, high-performing, high-throughput testing sites. It can open a new site in mere weeks to accommodate an explosion in demand. Congress intended to spur new entrants like GS Labs by requiring coverage and reimbursement under the CARES Act. But as a direct result of Blue KC's anticompetitive conduct that, even as surges of COVID-19 infections created a massive public health need for expanded testing capacity amidst a massive shortage, GS Labs was foreclosed and prevented from expanding its capacity. By cutting off GS Labs' primary source of funding for expansion, Blue KC's exclusionary anticompetitive conduct had the effect of decreasing the output of COVID tests in the market.

173. Even now, at a time when the country is going through its biggest wave yet of COVID-19 infections, a moment when there is a massive shortage of testing capacity and a critical public health need for it to help contain the spread of the virus and limit harm or death to the public,<sup>14</sup> Blue KC continues to withhold, delay, and suppress payments to GS Labs that could have

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<sup>14</sup> On January 12, 2022, a regional director of operations for Adventhealth Centra Care stated "We have a three to four hour wait for testing, everybody's wanting to get testing." Andres Gutierrez, *Kansas City-area urgent care clinics dealing with influx of patients amid COVID-19 surge*, KSHB KANSAS CITY, Jan. 12, 2022, <https://www.kshb.com/news/local-news/kansas-city-area-urgent-care-clinics-dealing-with-influx-of-patients-amid-covid-19-surge> (last visited Jan. 17, 2022).

been used to help expand testing capacity across the relevant markets. But for Blue KC's exclusionary anticompetitive conduct, testing capacity in Missouri would be larger. The loss of output in the market from a high-quality provider is an anticompetitive effect. Without a predictable flow of adequate reimbursement from a large share of the commercially insured lives in Missouri, GS Labs has lost significant revenue that could force it to close badly needed sites or even exit certain localities altogether.

174. Blue KC's coordinated effort to withhold payment from GS Labs alongside other BCBS affiliates has exacerbated the harm to competition Blue KC has caused through its own unilateral anticompetitive conduct. By sharing information and colluding with dominant insurers in other areas where GS Labs operates or might look to expand, Blue KC has effectively cut off entry or expansion of GS Labs during a critical time when demand for COVID tests has skyrocketed due to the Omicron surge.

**COUNT I**  
**VIOLATION OF FAMILIES FIRST CORONAVIRUS RESPONSE ACT**  
**AND CARES ACT**

175. GS Labs incorporates by reference the allegations contained in paragraphs 1-174, as if fully restated here.

176. Blue KC offers group health plans and is a health insurance issuer offering group or individual health insurance coverage, as those terms are defined under section 6001 of the FFCRA.

177. The COVID-19-related testing services that GS Labs provided to Blue KC's health plan members and beneficiaries constitute in vitro diagnostic products for the detection of COVID-19 or the diagnosis of the virus that causes COVID-19, as provided by section 6001 of the FFCRA.



178. GS Labs has not entered into an agreement for the provision of health care services with Blue KC, and as such, there are no negotiated rates agreed upon by the parties for the provision of COVID-19 testing or any other services.

179. In compliance with the CARES Act, GS Labs posted its cash price for COVID-19 testing on its public website.

180. Under section 3202(a)(2) of the CARES Act, if health plans such as Blue KC do not have a negotiated rate with a provider such as GS Labs for providing COVID-19 testing related services, the health plan is obligated to pay the provider its posted cash price for providing those services.

181. Blue KC, despite numerous and persistent demands and requests, has failed and refused to provide anything remotely close to GS Labs' cash price for providing the COVID-19 testing related services.

182. In addition, Blue KC has provided administrative services for certain ASO plans.

183. Exercising its authority as an administrative-services provider to the ASO plans, Blue KC has caused those plans to fail and refuse to pay GS Labs' cash price for providing COVID-19 testing related services.

184. The following chart reflects the amount of testing provided by GS Labs to Blue KC members and the total amounts that Blue KC has paid to GS Labs for COVID-19 testing for the period between November 28, 2020 and January 13, 2022.

Test	CPT Code	Claims	Amount Billed	Paid by Blue KC
<b>Rapid Antigen</b>	<b>87811</b>	<b>12,672</b>	<b>\$4,815,360</b>	<b>\$101,211</b>
<b>Antibody</b>	<b>86328</b>	<b>10,135</b>	<b>\$3,851,300</b>	<b>\$87,113</b>
<b>Biofire (PCR) High Risk</b>	<b>0202U</b>	<b>629</b>	<b>\$613,833</b>	<b>\$14,390</b>
<b>ePlex (PCR) High Risk</b>	<b>0225U</b>	<b>113</b>	<b>\$110,627</b>	<b>\$3,037</b>
<b>Low Risk PCR</b>	<b>87635</b>	<b>526</b>	<b>\$202,510</b>	<b>\$5,988</b>
<b>Intermediate Risk PCR</b>	<b>87637</b>	<b>64</b>	<b>\$31,936</b>	<b>\$988</b>
<b>Specimen Collection</b>	<b>G2023</b>	<b>12,793</b>	<b>\$639,980</b>	<b>\$15,536</b>
<b>Total</b>			<b>\$ 10,265,546</b>	<b>\$228,263</b>

185. By reason of the foregoing, GS Labs has been injured.

186. Based on the above, GS Labs is entitled to judgement against Blue KC in an amount to be determined at the trial of this matter, plus interest thereon, together with the costs and disbursement of this action, including reasonable attorneys' fees.

**COUNT II**  
**DECLARATORY JUDGMENT**

187. GS Labs incorporates by reference the allegations contained in paragraphs 1-186, as if fully restated here.

188. The COVID-19-related testing services that GS Labs provided to Blue KC's health plan members and beneficiaries constitute in vitro diagnostic products for the detection of COVID-19 or the diagnosis of the virus that causes COVID-19, as provided by section 6001 of the Families First Coronavirus Response Act.

189. GS Labs has not entered into an agreement to provide services to Blue KC and, as such, there is no negotiated rate agreed upon for the provision of these services.

190. In compliance with the CARES Act, GS Labs posted its cash price for COVID-19 testing on its public website.

191. Under section 3202(a)(2) of the CARES Act, if health plans such as Blue KC do not have a negotiated rate with a provider such as GS Labs for providing COVID-19 testing related services, the health plan is obligated to pay the provider its posted cash price for providing those services.

192. Blue KC, despite numerous and persistent demands and requests, has failed and refused to provide anything remotely close to GS Labs' cash price for providing the COVID-19 testing related services. Blue KC has paid nothing for the vast majority of COVID-19 tests that GS Labs has provided for Blue KC's members.

193. In addition, exercising its authority as an administrative-services provider to the ASO plans, Blue KC has caused those plans to fail and refuse to pay GS Labs' cash price for providing COVID-19 testing related services.

194. An actual, present, and justiciable case or controversy exists between the parties as a result of Blue KC's continued refusal to pay GS Labs, in contravention of FFCRA and the CARES Act.

195. The parties' dispute is appropriate for declaratory relief, as adjudication would address both the current outstanding payments owed to GS Labs and provide guidance for the parties regarding services that have yet to be provided.

196. Pursuant to the CARES Act, GS Labs is entitled to receive its posted cash price from Blue KC for the COVID-19 tests GS Labs has provided, and continues to provide, to their insureds.

197. Pursuant to 28 U.S.C. § 2201, GS Labs seeks a declaratory judgment from this Court that Blue KC and the ASO plans are required to pay GS Labs its posted cash price for COVID-19 testing services GS Labs has provided and continues to provide to their insureds, in accordance with the CARES Act.

WHEREFORE, GS Labs respectfully requests this Court enter a judgment declaring that Counterclaim Defendants are required to pay GS Labs its posted cash price for COVID-19 testing services GS Labs has provided and continues to provide to their insureds, in accordance with the CARES Act and for such other and further relief as this Court deems just and proper.

**COUNT III**  
**BREACH OF IMPLIED CONTRACT/PROMISSORY ESTOPPEL**

198. GS Labs incorporates by reference the allegations contained in paragraphs 1-197 as if fully restated here.

199. Pleading in the alternative, Blue KC promised that, in exchange for GS Labs' provision of COVID-19 diagnostic testing, it would reimburse GS Labs for those services provided.

200. Blue KC undertook conduct that conveyed to GS Labs that coverage for COVID-19 testing would be afforded to patients, but then refused to issue proper payment when the bills were submitted by GS Labs. GS Labs provided COVID-19 diagnostic testing in reliance upon Blue KC's promise.

201. GS Labs' reliance was reasonable.

202. GS Labs' reliance was detrimental, as Blue KC has not reimbursed it for those services.

203. Blue KC expected, or reasonably should have expected, that GS Labs would rely on Blue KC's compliance with the CARES Act.

204. GS Labs detrimentally relied on Blue KC's promises to pay by continuing to provide testing services to Blue KC members. GS Labs' reliance on the promises caused it to suffer a definite and substantial detriment and has caused it damage.

205. Blue KC should have foreseen or did foresee that GS Labs would rely on Blue KC's promise to reimburse GS Labs as set forth above given the parties' conduct.

206. As a direct and proximate result of GS Labs' reasonable reliance on Blue KC's unambiguous promise, GS Labs has suffered at least \$10,265,546 in damages, excluding interest, for unreimbursed testing. The full damages total will be proven at trial.

207. Injustice can be avoided only by enforcing Blue KC's promise.

WHEREFORE, GS Labs respectfully requests this Court enter judgment in favor of GS Labs and against Blue KC in the amount of GS Labs' damages, including all costs and interest, and for such other and further relief as this Court deems just and proper.

**COUNT IV**  
**UNJUST ENRICHMENT**

208. GS Labs incorporates by reference the allegations contained in paragraphs 1-207 as if fully restated here.

209. Pleading in the alternative, with Blue KC's knowledge and consent, GS Labs conferred benefits upon Blue KC by providing its insureds—and those of ASO plans to which Blue KC provides administrative services—with COVID-19 diagnostic testing.

210. Blue KC appreciated that their insureds were receiving a benefit from GS Labs, the COVID-19 diagnostic testing. GS Labs provided valuable COVID-19 testing services to plan members and to Blue KC as the claims administrator and/or insurer.

211. By providing medically necessary testing services to Blue KC's members, GS Labs conferred a benefit upon Blue KC because GS Labs' provision of healthcare services facilitated its obligations to arrange and pay for COVID-19 testing services and other testing services for its members.

212. In addition, Blue KC benefited from the insurance premiums from members and beneficiaries in exchange for out-of-network healthcare coverage. To satisfy its legal obligations, Blue KC required the services of GS Labs to render the testing services. GS Labs rendered testing services to Blue KC's members and beneficiaries. Thus, GS Labs conferred a benefit on Blue KC.

213. Blue KC knew that GS Labs provided the medically necessary testing services to members in satisfaction of its obligations to its members and to members of ASO plans to which Blue KC provides administrative services.

214. Moreover, at all relevant times, Blue KC refused to pay GS Labs for the COVID-19 testing services GS Labs provided to the patients at all, or to pay correctly, contrary to the CARES Act requirements.

215. In addition, exercising its authority as an administrative-services provider to the ASO plans, Blue KC has caused those plans to fail and refuse to pay GS Labs' cash price for providing COVID-19 testing related services.

216. Despite proper demand being made on Blue KC for payment for these services, Blue KC has failed to reimburse GS Labs for the services provided.

217. Blue KC has received and retained a benefit and have been unjustly enriched through the use of funds that earned interest or otherwise added to its profits when said money should have been paid in a timely and appropriate manner to GS Labs.

218. Blue KC has wrongfully accepted and retained the benefit of GS Labs' provision of testing services to its insureds under circumstances where it would be unjust to do so without payment for those services.

219. As a direct and proximate result of Blue KC's conduct, GS Labs has suffered at least \$10,265,546 in damages, excluding interest, for unreimbursed testing. The full damages total will be proven at trial.

WHEREFORE, GS Labs respectfully requests this Court enter judgment in favor of GS Labs in the amount of GS Labs' damages, including all costs and interest, and for such other and further relief as this Court deems just and proper.

**COUNT V**  
**QUANTUM MERUIT**

220. GS Labs incorporates by reference the allegations contained in paragraphs 1-219, as if fully restated here.

221. Pleading in the alternative, with Blue KC's knowledge and consent, GS Labs conferred benefits upon it by providing its insureds with COVID-19 diagnostic testing, as well as to the insureds of ASO plans to which Blue KC provides administrative services.

222. Blue KC acquiesced to GS Labs providing the diagnostic testing services to its insureds.

223. Blue KC did not inform GS Labs that the testing services were not needed or wanted.

224. Blue KC has failed and refused to pay the required rate for the diagnostic testing provided.

225. As a direct and proximate result of Blue KC's conduct, GS Labs has suffered at least \$10,265,546 in damages, excluding interest, for unreimbursed testing. The full damages total will be proved at trial.

WHEREFORE, GS Labs respectfully requests this Court enter judgment in favor of GS Labs in the amount of GS Labs' damages, including all costs and interest, and for such other and further relief as this Court deems just and proper.

**COUNT VI**  
**BREACH OF QUASI-CONTRACT OR IMPLIED CONTRACT**

226. GS Labs incorporates by reference the allegations contained in paragraphs 1-225, as if fully restated here.

227. Pleading in the alternative, Blue KC has shown, by a course of conduct, dealings, and the circumstances surrounding the relationship, to GS Labs, that Blue KC would pay for the COVID testing services provided to Blue KC's members and beneficiaries.

228. Accordingly, an implied contract or quasi-contract has been created through Blue KC's course of conduct and interaction with GS Labs.

229. With Blue KC's knowledge and consent, GS Labs conferred benefits upon Blue KC by providing Blue KC's insureds with COVID-19 diagnostic testing.

230. Blue KC appreciated that its insureds were receiving a benefit from GS Labs, the COVID-19 diagnostic testing.

231. In fact, with respect to a few limited claims, Blue KC paid GS Labs its cash prices for COVID testing because GS Labs rendered valuable testing services for the benefit of Blue KC and its members.



232. The parties' implied contract indicated that Blue KC would pay GS Labs the statutorily defined value of GS Labs' services (as provided by the FFCRA and the CARES Act) for the COVID-19 testing services provided by GS Labs.

233. GS Labs rendered medically necessary testing services to the patients identified, and in doing so, GS Labs reasonably expected Blue KC to properly compensate GS Labs.

234. A reasonable person in the position of Blue KC would know, or reasonably should have known, that GS Labs was performing the services expecting that Blue KC would pay for them appropriately.

235. Despite indicating to GS Labs by a course of conduct, dealings and the circumstances surrounding the relationship that Blue KC would properly and timely reimburse GS Labs for the cash price of testing services, Blue KC failed to do so on numerous occasions.

236. The failure of Blue KC to properly reimburse GS Labs constitutes a breach of the implied contract between Blue KC and GS Labs.

237. Blue KC has refused to appropriately reimburse GS Labs for the diagnostic testing provided to Blue KC's insureds.

238. Blue KC's acceptance of the diagnostic testing for its insureds without appropriate payment to GS Labs would be inequitable.

239. As a direct and proximate result of Blue KC's conduct, GS Labs has suffered at least \$10,265,546 in damages, excluding interest, for unreimbursed testing. The full damages total will be proven at trial.

WHEREFORE, GS Labs respectfully requests this Court enter judgment in favor of GS Labs and against Blue KC in the amount of GS Labs' damages, including all costs and interest, and for such other and further relief as this Court deems just and proper.

**COUNT VII**  
**VIOLATION OF MISSOURI'S PROMPT PAY STATUTE (Mo. Rev. Stat. § 376.383)**

240. GS Labs incorporates by reference the allegations contained in paragraphs 1-239, as if fully restated here.

241. Blue KC is considered to be “health carrier” as defined in Section 376.1350 of the Missouri Revised Statutes as Blue KC is “an entity subject to the insurance laws and regulations of [Missouri] that contracts or offers to contract to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services, including a sickness and accident insurance company, a health maintenance organization, a nonprofit hospital and health service corporation, or any other entity providing a plan of health insurance, health benefits or health services; except that such plan shall not include any coverage pursuant to a liability insurance policy, workers' compensation insurance policy, or medical payments insurance issued as a supplement to a liability policy.”

242. GS Labs is considered to be a “claimant” pursuant to Section 376.383 as it is a corporation “asserting a right to payment arising out of a contract or a contingency or loss under a health benefit plan as defined in section 376.1350.”

243. Missouri Prompt Pay Statute requires Blue KC to pay GS Labs' COVID-19 testing claims within 45 days of the date GS Labs electronically submits a clean claim, provided that the COVID-19 testing claims meet the requirements of a clean claim.

244. With respect to the plans that Blue KC insures, Blue KC's processing of COVID-19 testing claims for beneficiaries it insures is governed by the prompt payment requirements of Section 376.383.6 (1) of the Missouri Revised Statutes which states, in part:

If the health carrier has not paid the claimant on or before the forty-fifth processing day from the date of receipt of the claim, the health carrier shall pay the claimant one percent interest per month and a penalty in an amount equal to one percent of the claim per

day. On claims where the amount owed by a health carrier exceeds thirty-five thousand dollars on the unpaid balance of a claim, the health carrier shall pay the claimant one percent interest per month and a penalty in an amount equal to one percent of the claim per day for a maximum of one hundred days, and thereafter shall pay the claimant two percent interest per month. The interest and penalty shall be calculated based upon the unpaid balance of the claim as of the forty-fifth processing day. The interest and penalty paid pursuant to this subsection shall be included in any late reimbursement without the necessity for the person that filed the original claim to make an additional claim for that interest and penalty. A health carrier may combine interest payments and make payment once the aggregate amount reaches one hundred dollars.

245. GS Labs' COVID-19 testing claims meet all the criteria for payment under the Missouri's Prompt Payment Statute. On the dates the COVID-19 testing services were provided, Blue KC members of fully-insured health plans and the COVID-19 testing services were covered under the terms of the relevant Blue KC health plans.

246. Moreover, GS Labs was eligible for out-of-network payments under the terms of the relevant Blue KC health plans as mandated by the FFCRA and the CARES Act.

247. GS Labs submitted claims electronically as required by Section 376.382 to Blue KC on various dates between February 24, 2021 and July 28, 2021 for COVID-19 testing of Blue KC's beneficiaries totaling 34,964 claims and amounting to \$9,747,145.

248. As of the date of this filing, millions of dollars worth of claims submitted to Blue KC are over 45 days past due.

249. Blue KC did not provide a consistent or logical response to the submitted claims.

250. Blue KC appropriately paid a limited number of claims in full.

251. For other claims, Blue KC paid an arbitrary fraction of the required amount while informing its members they were responsible for the rest of the claims instead of promptly paying for the necessary COVID-19 testing. See the following redacted example EOB:

252. For over **5,000 claims**, Blue KC demanded production of medical records and refused to pay the cash price as required the CARES Act. To date, GS Labs produced 3,000

medical records, and still has not been paid in full for the services provided and documented in the medical records.

253. GS Labs made proper demands for services provided to Blue KC's beneficiaries.

254. In response to these proper claims, Blue KC engaged in unscrupulous and fraudulent conduct to avoid its obligation to reimburse GS Labs in accordance with Section 3202(a) of the CARES Act. This unlawful conduct does not excuse Blue KC from delaying full payment and/or perpetually paying the improper amount on COVID-19 testing claims.

255. By reason of the foregoing, GS Labs is entitled to recover from Blue KC the full underpaid amounts due to GS Labs on all relevant COVID-19 testing claims, together with any and all applicable statutory interests pursuant to Missouri Revised Statute § 376.383.

256. As a result of Blue KC's violations of Missouri's Prompt Pay Act, GS Labs has been damaged.

257. Based on the above, GS Labs is entitled to compensatory damages, interest, costs of suit, attorneys' fees, and such other relief as the Court deems equitable and just.

#### **COUNT VIII – TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY**

258. GS Labs incorporates by reference the allegations contained in paragraphs 1-257, as if fully restated here.

259. GS Labs had a valid and reasonable business expectancy and relationship with the ASO plans to which Blue KC provides administrative services. In particular, GS Labs submitted claims to each of those ASO plans seeking reimbursement for COVID-19 testing services provided to the plans' insureds.

260. GS Labs had reasonable grounds to expect that the ASO plans would pay those claims, including the fact that the federal CARES Act requires the plans to pay those claims.

261. Blue KC was aware of the claims submitted by GS Labs to the ASO plans, as well the ASO plans' obligations to pay those claims.

262. On information and belief, Blue KC had contractual obligations to cause the ASO plans to pay lawful claims for reimbursement, including the claims submitted by GS Labs to the plans.

263. Blue KC intentionally interfered with the ASO plans' reimbursement of claims submitted by GS Labs to the ASO plans.

264. On information and belief, Blue KC exercised its authority as an administrative-services provider to the ASO plans to cause those plans to deny the claims and/or to refuse to reimburse the claims at the rates prescribed by the CARES Act.

265. Blue KC had no justification for this conduct. In particular, that conduct caused both Blue KC and the ASO plans to violate the CARES Act, as well as other provisions of law.

266. Blue KC's conduct also lacked justification for another reason: it was part of an anticompetitive conspiracy to restrain trade in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Missouri Antitrust Law, Chapter 416 of the Missouri Revised Statutes.

267. On information and belief, Blue KC's conduct constitutes a breach of express or implied contractual obligations owed to the ASO plans and/or to other Blue Cross Blue Shield affiliates that have contracted directly with ASO plans, including express or implied contractual obligations to properly adjudicate and pay claims for reimbursement.

268. As a direct and proximate result of Blue KC's conduct, the ASO plans have failed to pay GS Labs reimbursements that they were legally obligated to pay.

## COUNT IX – DEFAMATION

269. GS Labs incorporates by reference the allegations contained in paragraphs 1-268, as if fully restated here.

270. As part of its self-serving efforts to avoid payment to GS Labs—and thereby pad its profits at the expense of public health—Blue KC has made a host of knowingly false statements about GS Labs.

271. Among other instances, on or about June 16, 2021, Blue KC sent written correspondence (the “June 16 Letter”) to a number of government regulators, including the Missouri Attorney General; the Nebraska Attorney General; the Kansas Attorney General; the Missouri Department of Insurance; the Missouri Department of Health and Senior Services; the Kansas Insurance Commissioner; the Centers for Medicare and Medicaid Services (“CMS”); and the Office of Inspector General of the U.S. Department of Health and Human Services.

272. The June 16 Letter contains a host of outright falsehoods and misleading statements, many of them reminiscent of Blue KC’s pleadings in this litigation.

273. Among other things, in the June 16 Letter, Blue KC represented to numerous government regulators that GS Labs “posted an illusory ‘cash price’ that was *never actually collected* from individual cash-paying consumers.” (emphasis added).

274. This claim was at the heart of Blue KC’s allegations against GS Labs and was highly material to both Blue KC’s complaint and the foreseeable response of government actors to that complaint.

275. At the time the June 16 Letter was sent, Blue KC knew that this claim was false.

276. Internal Blue KC documents obtained during discovery demonstrate that by at least

[REDACTED], Blue KC knew that [REDACTED]

277. These internal Blue KC documents directly refute Blue KC's claim [REDACTED] to government regulators that the cash price "was never actually collected from cash-paying consumers."

278. This claim is false.

279. In fact, *thousands* of individuals paying out of pocket have paid GS Labs' cash price for COVID testing.

280. As Blue KC's own records demonstrate, Blue KC *knew* the claim was false before Blue KC made the representation in its June 16 Letter.

281. On information and belief, Blue KC has made substantially identical false representations on multiple other occasions to governmental actors.

282. At least to the extent that such false representations [REDACTED], Blue KC knew that these representations were false.

283. As further evidence that Blue KC knew that its attacks on GS Labs were false, Blue KC had proposed that GS Labs become an in-network provider—an offer that Blue KC presumably would not make to a firm that it believed to be engaged in widespread fraud and misconduct.

284. When Blue KC made its false representations to governmental actors, it was acting in bad faith and for improper purposes wholly unrelated to ensuring compliance with applicable law.

285. Blue KC's false representations to governmental actors was for the improper purpose of attempting to evade payment of its substantial financial obligations to GS Labs.

286. Blue KC also made the false representations for the purpose of driving GS Labs—with its high-end and highly available COVID testing services—out of the Kansas City market, leaving only lower-quality (and lower-cost) testing options that would enable Blue KC to maximize its profits, at the expense of public health and its members' welfare.

287. As a direct and proximate result of Blue KC's false representations, GS Labs has sustained substantial harm, including substantial reputational harm and loss of goodwill.

288. GS Labs has also been forced to incur very substantial amounts responding to inquiries from government agencies.

**COUNT X – AGREEMENT IN RESTRAINT OF TRADE IN VIOLATION OF  
SHERMAN ACT, SECTION 1**

289. GS Labs restates and realleges the allegations of all the foregoing paragraphs, as if fully restated herein.

290. The agreement between Blue KC and other BCBS affiliates to engage in a concerted refusal to deal, exchange competitively sensitive information, and to align and coordinate their positions in negotiations, including on price, with respect to GS labs is an agreement among competitors in the Commercial Insurance Market for COVID Testing.

291. Blue KC and its co-conspiring BCBS affiliates exercise market power in the Commercial Insurance Market for COVID Testing in the Missouri, within localities in Missouri, and in areas along the border with neighboring states.

292. The agreement has caused anticompetitive effects in the relevant markets by eliminating competition between Blue KC and BCBS affiliates to depress the reimbursement rate paid to GS Labs and decreasing the number of insurers with whom GS Labs can deal and thereby



decreasing the number of patients to whom GS Labs can offer its services. If the conduct is not enjoined, here is a significant risk of additional harm to competition.

293. As such, the anticompetitive agreement between Blue KC and other BCBS affiliates is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

294. As a direct and proximate result of the anticompetitive conduct and effects of the agreement, GS Labs has suffered money damages of millions of dollars, which will continue to grow unless the unlawful conduct is enjoined.

#### **COUNT XI – MONOPOLIZATION IN VIOLATION OF SHERMAN ACT, SECTION 2**

295. GS Labs restates and realleges the allegations of all the foregoing paragraphs, as if fully restated herein.

296. Blue KC possesses market power in the Commercial Insurance Market for COVID Testing in Missouri, within localities in Missouri, and in areas along the border with neighboring states.

297. Blue KC has willfully maintained and enhanced its monopoly in the Commercial Insurance Market for COVID Testing and has leveraged its market power in that market in order to restrict competition in the COVID Testing Market, through its course of anticompetitive conduct. That exclusionary anticompetitive conduct includes: refusing or delaying payment to GS Labs for tests already performed on its subscribers; refusing to negotiate a reimbursement rate with GS Labs for tests that are performed on its subscribers in the future; steering patients away from GS Labs by, among other things, promoting and marketing other in-network COVID testing providers to its subscribers as well as misleading and deceiving its subscribers about the out-of-pocket costs that Blue KC's subscribers would incur by getting COVID testing services from GS

Labs; and coordinating, colluding, and exchanging competitively sensitive information with other BCBS affiliates in support and furtherance of its exclusion of GS Labs from the relevant markets.

298. Blue KC's exclusionary conduct has caused anticompetitive effects in the relevant markets by eliminating competition between Blue KC and BCBS affiliates to depress the reimbursement rate paid to GS Labs and decreasing the number of insurers with whom GS Labs can deal and thereby decreasing the number of patients to whom GS Labs can offer its services. The conduct has also resulted in a reduction of output in terms of the number of COVID tests available to the public, as well as a reduction of quality in terms of the convenience, availability, access, and test-result turnaround time that is available to the public. By decreasing the availability and quality of tests available to the public, there is also an increased health risk to the individuals seeking COVID testing and their communities. If the conduct is not enjoined, there is a significant risk of additional harm to competition.

299. As such, through its exclusionary anticompetitive conduct, Blue KC has monopolized the relevant markets in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2.

300. As a direct and proximate result of the anticompetitive conduct and effects of the exclusionary conduct, GS Labs has suffered money damages of millions of dollars, which will continue to grow unless the unlawful conduct is enjoined.

**COUNT XII – ATTEMPT TO MONOPOLIZE IN VIOLATION OF SHERMAN ACT,  
SECTION 2**

301. GS Labs restates and realleges the allegations of all the foregoing paragraphs, as if fully restated herein.

302. Blue KC has willingly and purposefully engaged in the pattern of conduct described above as part of a scheme to monopolize the Commercial Insurance Market, within localities in Missouri, and in areas along the border with neighboring states.

303. Blue KC's conduct manifests a specific intent to monopolize the Commercial Insurance Market through exclusionary anticompetitive conduct described above, including but not limited to refusing or delaying payment to GS Labs for tests already performed on its subscribers; refusing to negotiate a reimbursement rate with GS Labs for tests that are performed on its subscribers in the future; steering patients away from GS Labs by, among other things, promoting and marketing other COVID testing providers to its subscribers as well as misleading and deceiving its subscribers about the out-of-pocket costs that Blue KC's subscribers would incur by getting COVID testing services from GS Labs; and coordinating, colluding, and exchanging competitively sensitive information with other BCBS affiliates in support and furtherance of its exclusion of GS Labs from the relevant markets.

304. If left unchecked, Blue KC's anticompetitive, exclusionary conduct will lead to Blue KC effectively monopolizing the Commercial Insurance Market, to the extent a jury finds that Blue KC has not already monopolized the market.

305. As such, through its exclusionary anticompetitive conduct, Blue KC has attempted to monopolize the relevant markets in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2.

306. As a direct and proximate result of Blue KC's anticompetitive conduct attempting to monopolize the relevant markets, GS Labs has suffered money damages of millions of dollars, which will continue to grow unless the unlawful conduct is enjoined.

**COUNT XIII – CONSPIRACY TO MONOPOLIZE IN VIOLATION OF SHERMAN ACT, SECTION 2**

307. GS Labs restates and realleges the allegations of all the foregoing paragraphs, as if fully restated herein.

308. The agreement between Blue KC and other BCBS affiliates to engage in a concerted refusal to deal, exchange competitively sensitive information, and to align and

coordinate their positions in negotiations, including on price, with respect to GS labs, in concert with Blue KC's and other BCBS affiliates' exclusionary conduct with respect to GS Labs constitute a conspiracy to confer a competitive advantage on Blue KC and help it achieve and maintain its monopoly in the Commercial Insurance Market.

309. Blue KC and the other BCBS affiliates' actions manifest a specific intent to limit competition in the COVID Testing Market in order to help Blue KC and other BCBS affiliates maintain market power in their respective Commercial Insurance Markets. This conspiracy to monopolize has substantially foreclosed GS Labs from entering and expanding its supply of COVID tests through additional testing sites, additional access at existing sites, and introduction of more new and innovative ways to increase access to high quality COVID testing services.

310. As a direct and proximate result of the anticompetitive conduct by Blue KC and the other BCBS affiliates, GS Labs has suffered money damages of millions of dollars, which will continue to grow unless the unlawful conduct is enjoined.

WHEREFORE, GS Labs prays that the Court grant the following relief:

- (i) Declaring that Blue KC must pay GS Labs for COVID-19 testing in accordance with the CARES Act by paying GS Labs the posted cash price;
- (ii) Declaring that Blue KC violated its duty of good faith in refusing to pay GS Labs' Cash Price in compliance with the CARES Act;
- (iii) Enjoin Blue KC from informing its members that they are responsible for portions of the charge for the COVID-19 tests;
- (iv) Compensatory damages plus interest thereon, as allowed by law;
- (v) Treble damages for all injuries compensable under the antitrust laws;

- (ii) All costs and disbursements of this action, including reasonable attorneys' fees and expenses; and
- (iii) Such other and further relief as the Court deems just and proper.

Respectfully submitted,  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2022, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record.

/s/ Matthew P. Diehr

MATTHEW P. DIEHR