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.	)	

COUNTERCLAIM-PLAINTIFF GS LABS' SUGGESTIONS IN RESPONSE TO MOTION FOR LEAVE TO FILE SUR-REPLY

Counterclaim-Plaintiff GS Labs LLC ("GS Labs") opposes the motion for leave to file sur-reply by Blue Cross and Blue Shield of Kansas City ("BKC"), ECF No. 148, relative to a pleading that (1) was timely filed under the Court's amended scheduling order, ECF No. 57, and (2) hinges on collusive behavior and other misconduct that was revealed only through the discovery process in this matter. *See* ECF No. 104. BKC cited this Court's opinion from just a year ago for the proposition that allowing sur-replies is within the sound discretion of the trial court. *Consultus, LLC v. CPC Commodities*, No. 4:19-CV-00821-FJG, 2021 WL 274744, at *3 (W.D. Mo. Jan. 27, 2021). But BKC omitted the crux of the Court's opinion that "[s]ur-replies are largely disfavored in federal court" as well as its holding that denied leave to file a sur-reply and rather granted the underlying motion for leave to file the amended pleading at issue. *Id.*

GS Labs raised no new arguments in its reply brief, and BKC's proposed sur-reply seeks only to have the last word on the matter. GS Labs respectfully suggests the Court should rule as it did in *Consultus*, denying BKC's motion to file a sur-reply and granting GS Labs' motion to file first amended counterclaims. ECF No. 104.

I. GS Labs did not raise any new arguments in its reply that might justify departure from the general rule precluding sur-replies, and BKC should not be rewarded for neglecting to address GS Labs' antitrust claims in its original response papers.

Sur-replies are disfavored in federal court, "as they usually are a strategic effort by the nonmoving party to have the last word on a matter." *Consultus*, 2021 WL 274744, at *3 (quoting *In re Enron Corp. Secs.*, 465 F. Supp. 2d 687, 691 n. 4 (S.D. Tex. 2006)); *see also Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 659 (D. Kan. 1999) (leave to file a sur-reply generally granted "only in extraordinary circumstances" to minimize "battles over which side should have the last word") (internal citations omitted).

A sur-reply is generally unwarranted when the preceding reply does not raise new arguments. *Fuller v. Lion Oil Trading & Transp., LLC*, No. 1:19-CV-1020, 2020 WL 3057392, at *6 (W.D. Ark. June 9, 2020) (citing *Fleshner*, 2019 WL 271619, at *2); *see also F.T.C. v. Real Wealth, Inc.*, 2011 WL 6046442 at *3 n.1 (W.D. Mo. 2011) (sur-reply unwarranted when the reply contained "no new information for which the opportunity to respond is needed").

Contrary to BKC's broad accusations, GS Labs raised no new arguments in its reply. Instead, GS Labs merely replied to the arguments raised in BKC's lengthy response brief. *See* ECF No. 112. BKC filed an overlength brief, and it devoted fully twelve pages of its response papers to GS Labs' defamation claim but only four to the antitrust claims. ECF No. 112. It now asks the Court's leave to devote additional attention to the antitrust claims that GS Labs has raised, but there is no reason that BKC could not have done so in its earlier papers. *See, e.g., InterMark, Inc. v. J&KWaldie, LLC*, No. 16-1311-CV-W-BP, 2017 WL 7725252, at *1 (W.D. Mo. Mar. 16, 2017) (denying a motion for leave and striking an improperly filed sur-reply where party could have raised same issue earlier in briefing).

BKC certainly does not point to any new argument that GS Labs allegedly made in its

reply. The closest BKC comes to finding something new is in noting that the word "monopsony" does not appear in the FACC but does appear in GS Labs' reply brief supporting the FACC. ECF No. 148 at 4 ("The problem for GSL is that the word 'monopsony' does not appear in its [proposed Amended Counterclaims]."). However, this trivial objection "elevates form over substance in a manner inconsistent with the intent of the antitrust laws," *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981) (citation omitted), and improperly "prioritize[s] a complaint's use of magic words over its factual allegations" in contravention of federal pleading standards, *Williams v. Emps. Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017). It is not unusual for a party to explain legal theories or expand upon the basis of their claims in motion practice, and it certainly does not warrant a sur-reply.

GS Labs respectfully suggests the Court should deny BKC's motion to file a sur-reply and grant GS Labs' motion to file first amended counterclaims. ECF No. 104.

II. BKC's proposed sur-reply further supports the conclusion that the Court should deny BKC's motion to file a sur-reply and grant GS Labs' motion to file first amended counterclaims.

The Court should also reject the proposed sur-reply because it asserts premature fact disputes and rewrites the FACC's allegations in ways that do not warrant dismissal in any event.

First, and at a minimum, the sur-reply confirms that the Section 1 claim should proceed because BKC raises no argument capable of defeating GS Labs' allegations of a per se violation. *See* ECF No. 130 at 2, 7. BKC appears to argue that GS Labs cannot simultaneously assert that claim both under the rule of reason and the per se rule (or another standard). *See* ECF No. 148-1 at 5. But this argument is not correct—whether the per se rule applies or not "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997). Since this is "predicated on a factual inquiry into [a] restraint's

competitive effect," *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 596 (11th Cir. 1986) (emphasis added), a plaintiff may state a claim by alleging a single Section 1 cause of action under both the rule of reason and the per se rule, with a determination as to which rule to apply deferred until "a factual record" can be assessed. *See, e.g.*, *Int'l Constr. Prod. LLC v. Caterpillar Inc.*, 419 F. Supp. 3d 791, 806-07 (D. Del. 2019) (string-citing cases). The sur-reply's arguments exclusively attacking GS Labs' allegations under the rule of reason therefore have no impact on the viability of the Section 1 claim at this stage. *Id.* at 807 (denying motion to dismiss for this reason).

Second, with respect to antitrust injury, the sur-reply does not contest the established principle stated in GS Labs' reply that exclusionary and concerted action to suppress entry and expansion of a consumer-demanded service—by fixing prices, arranging a group boycott, restraining output, leveraging market power, and deceiving customers—harms competition by denying consumer choice and reducing output. *See* ECF No. 130 at 3-5. Instead, the sur-reply contends that the exclusion of GS Labs does not have that effect. ECF 148-1 at 2-3. But this argument, too, rests upon a factual dispute that cannot be resolved at the pleading stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Concerted exclusionary conduct directed at "a single competitor *may* violate" the antitrust laws "if it harms competition." *E.W. French & Sons, Inc. v. Gen. Portland Inc.*, 885 F.2d 1392, 1401 (9th Cir. 1989) (emphasis added). Therefore, allegations of "concerted efforts to prevent [a single] plaintiff from entering [a] local market" adequately pleads "harm [to] competition generally" where the inhibited entry and expansion is "alleged" to have that effect. *Riverview Invs., Inc. v. Ottawa Cmty. Imp. Corp.*, 769 F.2d 324, 328 (6th Cir. 1985). The Ninth Circuit recently credited allegations of this kind in *NorthBay Healthcare Group, Inc. v. Kaiser Foundation Health Plan, Inc.*, 838 F. App'x 231, 234-35 (9th

Cir. 2020) (discussed ECF No. 130 at 5). BKC cannot distinguish this case. *See* ECF No. 148-1 at 4. BKC's inability to distinguish is critical because this conduct is what GS Labs alleges here: that impairing GS Labs' entry and expansion will harm competition (in one or both of two relevant markets) because GS Labs sells an innovative and high-quality service preferred by customers. *See* ECF No. 104, ¶¶ 77, 135, 146-51, 169-73. BKC may challenge those well-pled allegations with evidence, but its argument here is premature.[1]

Third, the sur-reply's "market participant" argument contesting GS Labs' standing to challenge BKC's conduct in the relevant insurance market continues to misread and rewrite GS Labs' allegations. GS Labs has antitrust standing to challenge BKC's conduct both because it is an injured seller in the insurance market where BKC buys COVID testing services, *see* ECF No. 130 at 6 (citing *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948)), and because BKC has also excluded GS Labs to injure its rival insurers who also buy those services, *see id.* at 7 (citing *McCready*, 457 U.S. at 479). BKC complains that the FACC does not use "the word 'monopsony,'" ECF No. 148-1 at 4, but this elevation of form over substance does

[1] Courts consistently hold that the exclusion of an individual competitor can, as a matter of law, establish antitrust injury. *See, e.g.*, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) (plaintiff adequately pled antitrust injury from allegations that defendants conspired to exclude single plaintiff's allegedly innovative product from entering the market); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1129 (10th Cir. 2014) (holding that inhibiting growth of even "a single significant seller" can harm competition); *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc) (same); *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, 761 F. App'x 714, 718 (9th Cir. 2019) (evidence of reduction of a single firm's output established harm to competition at trial); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) (exclusion of a single healthcare provider harmed competition); *Toranto v. Jaffurs*, 297 F. Supp. 3d 1073, 1090 (S.D. Cal. 2018) (same); *H J Heinz Co v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 463 (S.D.N.Y. 1960) ("injury to a single competitor may constitute the requisite competitive injury"); *Lucas Indus., Inc. v. Kendiesel, Inc.*, 1995 WL 350050, at *6 (D.N.J. June 9, 1995) ("Courts have held that harm to even a single competitor can at times support an inference of harm to competition.")

not compel a different result. *See supra* Section I.

Fourth, the sur-reply's contention that the FACC's market allegations are "incoherent" contorts the pleading standards of Fed. R. Civ. P. 8 into an evidentiary burden. The FACC clearly articulates two distinct product markets. *See* ECF No. 130 at 8 (citing FACC ¶¶ 120-27, 132 and FACC ¶¶ 128-31, 33). The suggestion that BKC cannot "ascertain" what these markets are is belied by BKC's demonstrated understanding that the FACC concerns both (i) COVID testing services that providers like GS Labs sell to insurers like BKC for inclusion in their health plans, as well as (ii) COVID testing services that providers like GS Labs sell to patients. *See* ECF No. 148-1 at 4, 6 n.4, 7. There is nothing "inconsistent" or "incoherent" about alleging harm to both of these well-pled and fully noticed valid markets, the precise geographies of which will be delineated by expert economic analysis following fact discovery. *See, e.g., In re Blue Cross Blue Shield Antitrust Litig.*, 2017 WL 2797267, at *5 (N.D. Ala. June 28, 2017) (cited ECF No. 130 at 9-10). And the sur-reply further concedes that GS Labs can plead BKC's market power through allegations that BKC exercises power to exclude competition. *See* ECF No. 148-1 at 7 (noting GS Labs' citation to *Cent. Telecomm., Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 726 (8th Cir. 1986)). BKC simply chooses to ignore or dispute the FACC's allegations to that effect. *See* ECF No. 130 at 10-11 (citing ECF No. 104, ¶¶ 134-36, 153-55).

BKC will have the opportunity to present evidence opposing GS Labs' antitrust allegations at summary judgment and again at trial. But like the opposition before it, the sur-reply advances no argument that permits dismissal on the pleadings as a matter of law.

IV. Conclusion

For these foregoing reasons, the Court should deny BKC's motion to file a sur-reply and grant GS Labs' motion to file first amended counterclaims. ECF No. 104.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 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 Diehr
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