

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
)	
v.)	
)	
GS LABS LLC,)	
)	
Defendant.)	

**BLUE KC’S REPLY IN SUPPORT OF ITS MOTION
TO FILE SECOND AMENDED COMPLAINT**

Although GS Labs, LLC (“GSL”) consents to Blue KC’s timely motion to file its Second Amended Complaint, GSL improperly attempts to reserve for itself a non-existent right to “plead anew” and assert “*any* counterclaim” in response to Blue KC’s Second Amended Complaint. Doc. No. 195. The Court should not permit GSL to delay the orderly progression of this litigation by injecting new counterclaims at this late date.

In Blue KC’s opening Complaint (Doc. No. 1), its First Amended Complaint (Doc. No. 14), and its proposed Second Amended Complaint (Doc. No. 150-1), Blue KC’s pleadings have remained consistent and targeted. Blue KC alleged, and continues to allege, that it is not required to pay GSL millions of dollars for COVID-19 test purportedly provided to Blue KC’s Members because:

- a.) GSL violated its duty of good faith and fair dealing when it purported to set its cash prices for COVID-19 diagnostic tests at grossly excessive rates;
- b.) GSL’s sham cash prices amount to unlawful price gouging and disaster profiteering under state and federal law;
- c.) GSL engaged in an unlawful scheme by knowingly and willfully concealing and misrepresenting material facts including, the actual cash prices for the services in question or, in the alternative, the lack of an established cash price; and

d.) GSL failed to comply with Section 3202 of the CARES Act and related regulations which requires that GSL accurately display on its website its established “cash price(s)”;

Doc. No. 1, ¶ 7; Doc. No. 14, ¶ 7; Doc. No. 150-1, ¶ 10. Because Blue KC has not changed the scope or theories of this litigation for at least seven months, and GSL has had opportunities to timely assert counterclaims, GSL should not be permitted to assert additional counterclaims at this late date.

BACKGROUND

Blue KC filed this action on July 20, 2021 seeking a declaration that GSL’s claims were grossly excessive and constituted an unlawful scheme or artifice and, therefore, Blue KC need not pay those claims. Doc. No. 1. In each of the three iterations of its pleadings, Blue KC sought declaratory relief on this basis as well as injunctive relief to prevent GSL from engaging in any efforts to collect the outstanding claims directly from Blue KC’s members. Doc. No. 1, ¶ 7 & 8, Count I & II; Doc. No. 14, ¶ 7 & 8, Count I & II; Doc. No. 150-1, ¶ 10 & 11, Count I & II.¹ In its First Amended Complaint (filed nearly seven months ago) and in its Second Amended Complaint, Blue KC also sought to recoup several hundred thousand dollars from GSL for the same reasons it sought a declaratory judgment. Doc. No. 14, ¶ 9, Count III; Doc. No. 150-1, ¶ 12, Count III.

GSL initially filed counterclaims with its Answer on August 5, 2021. Doc. No. 4. GSL’s first set of counterclaims, invoked multiple legal theories, each seeking payment of millions of dollars of unidentified bills for services. Blue KC moved for the dismissal of GSL’s original counterclaims as GSL failed to state a claim. (Doc. No. 23 & 24).² Specifically, Blue KC argued that the original counterclaims

¹ GSL’s standard patient consent forms state, in part, “**I understand that if my insurance company denies coverage or payment for the services provided to me, or fails to remit timely payment on my claims (within thirty (30) days), I assume full financial responsibility and will pay all charges in full.**” Doc. 150-1, p. 74 (emphasis in original).

² While Blue KC maintains each of GSL’s pending counterclaims should be dismissed for the reasons stated in its pending motion to dismiss (Doc. No. 23 & 24), should any of GSL’s claims survive the motion to dismiss, partial summary judgment should be granted to Blue KC for the reasons stated in its pending motion for partial summary judgment. Doc. No. 191 & 192.

should be dismissed because: (1) The CARES Act and FFCRA do not create a private cause of action (Doc. No. 24, pp. 14-16); (2) GSL's Counterclaim is impermissibly vague and does not satisfy *Twombly* (Doc. No. 24, pp. 16-18); (3) the majority of GSL's claims are preempted by ERISA, FEHBA, and/or the Medicare Act (Doc. No. 24, pp. 18-22); and (4) GSL failed to state a claim based in quasi-contract, promissory estoppel, unjust enrichment, quantum meruit, breach of implied contract, breach of the covenant of good faith and fair dealing, or under the MPPA (Doc. No. 24, pp. 22-29). Blue KC's motion to dismiss these counterclaims is ripe for the Court's consideration. Doc. No. 23-24, 38, 45, 110 & 194.

On January 18, 2022, GSL sought leave to assert additional counterclaims for alleged tortious interference, defamation, and antitrust violations. Doc. No. 104. Blue KC opposed GSL's motion to add its proposed amended counterclaims because these claims are futile and/or were filed in bad faith. Doc. No. 112. Specifically, Blue KC argued that the newly asserted and proposed counterclaims were futile and were filed in bad faith because: (1) GSL's tortious interference with business expectancy claim failed to identify a valid business expectancy and Blue KC is a party to the alleged expectancy (Doc. No. 112, pp. 11-15); (2) GSL's defamation claim failed to identify defamatory statements, the one defamatory statement identified was true, it was privileged, and GSL failed to plead damages (Doc. No. 112, pp. 15-26); and (3) GSL's antitrust claims failed to allege that GSL has antitrust standing, GSL failed to allege a proper, relevant market, and GSL failed to allege that Blue KC has market power in that market (Doc. No. 112, pp. 26-31). Like the original counterclaims, the parties' positions with respect to GSL's Motion for Leave to File its Amended Counterclaims are fully briefed. Doc. No. 103-104, 109, 112-113, 130, 148, & 185.

On March 15, 2022, GSL filed its Statement of Consent for Blue Cross and Blue Shield of Kansas City to File Second Amended Complaint. Doc. No. 195. GSL, however, did not limit its

“statement of consent” to merely acknowledging its lack of objection to Blue KC’s timely motion to file a Second Amended Complaint. Instead, GSL stated that:

the plain text of the Federal Rules of Civil Procedure contemplates that an answer to an amended complaint may include *any* counterclaim, regardless of the scope of the amendments to the complaint or what counterclaims were asserted in response to the original complaint.

Doc. No. 195, p. 1 (emphasis in original). After acknowledging that prevailing law does not take this position, GSL continued to argue that it should still have the right to “plead anew . . . because the [Second Amended Complaint] changes the theory and scope of the case when compared to the original complaint which is the last version of the complaint that GS Labs answered.” Doc. No. 195, p. 3.

ARGUMENT

GSL’s anticipatory request to assert “any” additional counterclaim should be denied because it has no right under Rule 15 to assert new counterclaims because Blue KC has not changed the theory or scope of the case. GSL has already asserted its counterclaims and sought leave to assert new counterclaims. The outlines of Blue KC’s position in this matter have been known to GSL since July of 2021. The Court ordered that all motions to amend pleadings be made by March 1, 2022. Doc. No. 116. GSL does not have free reign to add new counterclaims as the amendments made to the original complaint did not meaningfully expand the scope of Blue KC’s theories. GSL should not be permitted to introduce new counterclaims at this late juncture.

The leading case within the Eighth Circuit discussing when the filing of a counterclaim creates a right to assert new counterclaims is *Tralon Corp. v. Cedarrapids, Inc.*, 966 F. Supp. 812, 832 (N.D. Iowa 1997), *aff’d* 2000 WL 84400 (8th Cir. Jan. 21, 2000) (unpublished). In *Tralon*, the court held “when a plaintiff files an amended complaint *which changes the theory or scope of the case*, the defendant is allowed to plead anew as though it were the original complaint filed by the Plaintiff.” (emphasis added). However, the court went on to limit this rule by stating, “[t]he obvious corollary is that if an amended complaint does not change the theory or scope of the case, a [defendant] must seek leave of

court pursuant to Rule 15(a) before it can amend its answer to assert a counterclaim.” *Id.*; *see also CMI Roadbuilding, Inc. v. Iowa Parts, Inc.*, 2017 WL 9440803 at *4-5 (N.D. Iowa June 8, 2017); *Intermedics, Inc. v. Cardiac Pacemakers, Inc.*, 1998 WL 35253496 at *2 (D. Minn. July 7, 1998).

Here, the Second Amended Complaint tracks closely to the First Amended Complaint’s theory and scope. The amendments in the Second Amended Complaint added claim-specific details to Blue KC’s existing claims, refined and clarified the legal basis of its existing claims, and conformed the pleading to the evidence obtained to date. Doc. No. 150. Blue KC’s proposed Second Amended Complaint did not add any new counts or claims for relief which had not already been pled in its First Amended Complaint, and the theory or scope of the litigation did not change. (*Compare* Doc. No. 14 *with* Doc. No. 150-1).

GSL argues that the reference to criminal statutes that GSL are said to have violated in the Second Amended Complaint expands the scope of the lawsuit (*see* Doc. 195, p. 5, n. 5) – it does not. Blue KC has pled that “GS Labs knowingly and willfully executed a scheme or artifice to defraud health insurers and plans by posting a sham cash price that GS Labs and then demanding that group health plans and insurers pay those same sham cash prices.” *See* Doc. No 14, ¶ 153; *see also* Doc. No. 1, ¶ 115. Blue KC sought a judgment “[d]eclaring the claims GS Labs submitted to Blue KC are the product of an unlawful, abusive, or fraudulent scheme or artifice and, therefore, Blue KC has no obligation to pay the claims” Doc. No. 14, p. 37; *see also* Doc. No. 1, p. 28. This pleading is substantially similar to three federal criminal statutes explicitly cited in the Second Amended Complaint which state:

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--

- (1) to defraud any health care benefit program; or
- (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

18 USCA § 1347; Doc. No. 150-1, ¶ 157 & p. 44. The citation to the statute did not change the scope of the lawsuit or the legal theories pled – instead it merely explicitly cited what was already within the scope of the prior pleading.

Moreover, the Second Amended Complaint rests on the same theories and scope as the original complaint. In its First Amended Complaint, Blue KC introduced *a single* new Count which sought the return of funds that were paid to GSL. Doc. No. 14, Count III. In addition to seeking a declaratory judgment that Blue KC need not pay GSL’s claims because GSL made material misrepresentations relating to its purported “cash price” and its pricing was wildly excessive, Blue KC also a sought return of a comparatively small number of claims paid due to the same material misrepresentations relating to GSL’s purported “cash price” and its wildly excessive pricing. Doc. No. 14, ¶¶ 188-189. Or, in other words, this claim for unjust enrichment rests on the same legal and factual theories which underpin the remainder of Blue KC’s demand for relief. An addition of a closely related count does not afford the answering party the right to add counterclaims. *See Fair Isaac Corporation v. Experian Information Solutions Inc.*, 2009 WL 10677527 at *9 (D. Minn. Feb. 9, 2009) (“Fair Isaac’s addition of the per se price-fixing claim to the Third Amended Complaint did not change the theory or scope of the case so as to allow Experian and Trans Union to serve and file their antitrust and tortious interference counterclaims without leave of the Court”); *Nestle Purina Petcare Company v. The Blue Buffalo Company Ltd.*, 2016 WL 4272241 at *2 (E.D. Mo. Aug. 12, 2016) (“[plaintiff] added two state law claims that were substantially similar to the existing Lanham Act claim. As a result, Blue Buffalo does not have an automatic right to amend its responsive pleading.”).

Similarly, GSL argues “the SAC contains extensive detail on several kinds of plans that Blue KC administers rather than directly insuring. *See ECF No. 150-1, ¶¶ 57-70, 208.*” Doc. No. 195, p. 4. The identification of “plans that Blue KC administers” identified by GSL in the Second Amended Complaint have been identified since the First Amended Complaint filed in August of 2021. *Compare*

Doc. No. 14, ¶¶ 40-68 *with* Doc. No. 150-1, ¶¶ 37-70. These types of plans were also referenced in the original complaint. Doc. No. 1, ¶¶ 32-38 (“Blue KC operates as both a traditional insurer and as a claims administrator.”). Blue KC has not “expanded the factual scope of the case in several important ways.” Instead, Blue KC only pled additional factual detail to its existing claims.

Given that Blue KC has not meaningfully expanded the scope of its pleading, GSL’s request to “plead anew” and add “any” additional counterclaims should be denied. *See E.E.O.C. v. Morgan Stanley & Co., Inc.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002) (“If every amendment, no matter how minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause. This would deprive the Court of its ability to effectively manage the litigation.”). Since the filing of the First Amended Complaint, GSL has had an opportunity to assert or attempt to assert counterclaims, and it has availed itself of this opportunity by attempting to add additional, albeit deficient, counterclaims. Doc. No. 104. It has not stated good cause that would warrant allowing it to plead counterclaims anew after the deadline to amend pleadings has passed. *See* Doc. No. 116.

GSL’s existing counterclaims should be dismissed for the reasons stated in Blue KC’s motion to dismiss (Doc. No. 23) and its proposed additional counterclaims should be rejected for the reasons stated in Blue KC’s opposition to GSL’s Motion for Leave to add new counterclaims (Doc. No. 112). It should not be allowed to derail the orderly progression of this litigation by adding new claims late in litigation.

CONCLUSION

WHEREFORE, Blue KC respectfully requests that the Court:

- (1) Grant Blue KC’s unopposed motion for leave to file its Second Amended Complaint (Doc. No. 150);
- (2) Grant Blue KC’s pending motion to dismiss GSL’s existing counterclaims (Doc. No. 23);

- (3) Deny GSL's motion to for leave to file additional counterclaims (Doc. No. 104); and
- (4) Order that GSL is prohibited from asserting new counterclaims when answering the Second Amended Complaint.

Respectfully submitted,

CAPES, SOKOL, GOODMAN & SARACHAN, P.C.

By: /s/ Aaron E. Schwartz

Aaron E. Schwartz, #58745
8182 Maryland Avenue, Fifteenth Floor
St. Louis, MO 63105
(314) 721-7701 (Telephone)
(314) 721-0554 (Facsimile)
schwartz@capessokol.com

Attorney for Blue Cross and Blue Shield of Kansas City

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on all parties of record by emailing counsel of record this 29th day of March, 2022.

/s/ Aaron E. Schwartz