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.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT GS LABS LLC'S PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

I. INTRODUCTION

As the COVID-19 pandemic first swept across America last year, the United States Congress quickly drafted, debated, and passed two pieces of landmark legislation—the Families First Coronavirus Recovery Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act)—which increased COVID-19 testing availability and access in order to slow the virus's spread. *See* Pub. L. No. 116-127, 134 Stat. 177 (2020); Pub. L. No. 116-136, 134 Stat. 281 (2020). As Senator Van Hollen (D-Md) reflected, America was "unprepared on our testing infrastructure" when the pandemic struck, and "we need to ramp up the testing supply. We need to knock down the barriers to getting tests." 166 Cong. Rec. S1882-01, 166 Cong. Rec. S1882-01, S1884 (Sen. Van Hollen, D-Md). Through the FFCRA and the CARES Act, Congress achieved precisely that: knocking down barriers for individuals and providers by requiring insurers to pay for this critical testing.

Section 6001 of the FFCRA, titled "Coverage for Testing for COVID-19," states that group health plan and insurance issuers "shall provide coverage" for certain items and services related to COVID-19 testing and diagnosis. The CARES Act expanded upon the FFCRA by providing greater specificity regarding coverage. As to providers, Section 3202(b)(1) of the CARES Act requires that "each provider of a diagnostic test for COVID-19 shall make public the cash price for such test on a public internet website of such provider." As to insurers, Section 3202(a) instructs that insurers "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 issuers may negotiate a rate with such provider for less than such cash price."

Subsequent federal guidance reinforced insurers' obligations to reimburse providers. In joint interpretive guidance issued shortly after the CARES Act passed, the Departments of Health and Human Services (HHS), Labor (DOL), and the Treasury (collectively, the "Departments") reinforced that the FFCRA and CARES Act requirements extend to a large range of plan types,

including "both insured and self-insured group health plans," which in turn, extend to "private employment based group health plans (ERISA plans), non-federal governmental plans . . . and church plans," as well as plans under the Public Health Service Act (PHSA). *See* FAQs, Part 42, Q1 (Apr. 11, 2020). In other words, this guidance reinforced that the requirements of the CARES Act applied to all health care plan types even those whose contractual terms are governed by another federal statutes, such as ERISA.

In response to the COVID-19 global pandemic and need for increased laboratory testing, GS Labs LLC ("GS Labs" or Defendant") has incurred over $37 million in investment costs to assist in eliminating barriers to testing by opening convenient, accessible, high-quality testing sites around the nation. GS Labs testing sites eliminated barriers to COVID-19 testing by providing drive through locations, early morning and evening testing, weekends and holiday testing, on-line scheduling within fifteen minutes, and the ability to service one thousand appointments per day. GS Labs took on this risk and investment based on the clear direction from Congress that the COVID-19 tests provided during this public health emergency would be covered by insurers like Blue Cross Blue Shield of Kansas City ("Blue KC" or "Plaintiff"), and in the manner established by Congress. On that basis, GS Labs provided the benefit of safe, accurate, and efficiently administered COVID-19 diagnostic tests to over 12,000 members of Blue KC. Providing low-barrier COVID-19 testing reduces the spread of the disease by confirming positive cases so that individuals can take appropriate actions, which in turn alleviates stress on healthcare providers.

In stark contrast to GS Labs' diligent efforts and substantial investment in reaching the scale necessary to serve the public, Blue KC has disregarded the very clear and simple directive in the CARES Act. Blue KC has paid approximately $55,000 of the $9.9 million in claims for COVID-19 testing provided to Blue KC's members, or about *.005 of the cash price*. Instead, Blue KC has chosen to strategically blitz a provider of COVID-19 testing services with litigation and motion practice rather than negotiate in good faith, perhaps hoping that its stance will reverberate

throughout a landscape in which providers nationwide are already struggling to collect their cash price from insurers like Blue KC. Particularly as the health insurance industry has reported sizable profits during the pandemic,[1] Blue KC's First Amended Complaint amounts to another excuse to delay payment to GS Labs and other providers, it operates to shutter more providers struggling to collect their publicly posted cash prices, and in turn threatens the public health.

Unsatisfied by raising claims only for declaratory or injunctive relief, Blue KC now couples its effort to evade its statutory obligation with an outlandish legal theory under which it may sue GS Labs on behalf of parties that recognized the value provided by GS Labs and paid its publicly listed cash price. Enter Count III, blithely alleging that GS Labs somehow was unjustly enriched when Blue KC cannot even plead that the entirety of the amount it seeks as restitution *was received by GS Labs in the first place*. Stated differently, Blue KC alleges in one breath that certain anonymous third-party payors (hereinafter, the "Third-Party Payors") paid $268,544.92 for the COVID-19 tests provided by GS Labs and now purports to sue on their behalf for unjust enrichment, but in the next states its "understanding that payments were made to FEP enrollees *and not directly to GS Labs*." Am. Compl., ¶195, n.37. Moreover, if the Third-Party Payors did, in fact, pay GS Labs its cash price for the tests, this payment only underscores that other entities understood the appropriate course envisioned by Congress. This Court should reject Blue KC's veiled attempt to twist the compelling fact that the Third-Party Payors paid the cash price into a story of how Blue KC was apparently victimized by its own attenuated buyers' remorse. Blue KC's Count III is a bridge too far, the Court should see it for the misguided delay tactic that it is, and the Court should dismiss Count III for failure to state a claim for which relief may be granted and for failure to establish subject matter jurisdiction in the first place.

Stating further, Blue KC's entire argument rests on the premise that because other entities

[1] Major U.S. Health Insurers Report Big Profits, Benefiting from the Pandemic, New York Times, August 5, 2020, available at https://www.nytimes.com/2020/08/05/health/covid-insurance-profits.html.

may have paid a lower price than GS Labs' published cash price—for instance, those having engaged in the very good-faith negotiations directed by the CARES Act that Blue KC neglected to pursue—therefore the Third-Party Payors overpaid. But this argument enjoys no support in law, and therefore Blue KC cannot plead any unjust circumstances or particularized injury suffered. Moreover, Blue KC's wholly unsupported characterization of GS Labs' cash price as a "sham," as well as its various unsupported claims of misrepresentation and willful concealment clearly trigger the heightened pleading standard of Fed. R. Civ. P. 9(b). Yet, Blue KC provides no particulars at all and therefore violates longstanding case law in this Circuit ensuring that a defendant has the basic information necessary to prepare a response and preventing opportunistic plaintiffs from filing allegations of fraud merely in the hopes of conducting protracted and costly discovery. In fact, Blue KC fails even to provide a short and plain statement of the claim showing it is entitled to relief. Stating further, GS Labs must respectfully but ardently challenge Blue KC's simplistic characterization of its price as a "sham" rather than a price taking into account its infrastructure investment, business risk, and good faith intention to serve the public despite the financial risk.

Blue KC's unjust enrichment claim fails for a variety of other reasons. As stated, Blue KC does not allege that GS Labs received the full $268,544.92—for the lion's share of this amount, Blue KC notes its "understanding that payments were made to FEP enrollees *and not directly to GS Labs*." Am. Compl., ¶195, n.37. Not only is Blue KC suggesting that it is above the law and owes *nothing* for COVID-19 tests performed by GS Labs during a public health emergency, Blue KC asserts that GS Labs should be forced to pay restitution or disgorgement of profits for money that in some instances *GS Labs never received*. The Court should not indulge Blue KC's contrived legal theory, and rather should dismiss Blue KC's Count III for failure to state a claim and for lack of subject matter jurisdiction.

II. RELEVANT FACTUAL BACKGROUND

Blue KC acknowledges that GS Labs posted its cash price for the COVID-19 tests

provided. See Am. Compl., ¶¶ 3, 89, 90, 120. In other words, it is undisputed that GS Labs publicly posted cash prices on its website as required by the CARES Act. Blue KC appears to assert that the Third-Party Payors paid the publicly posted cash price for GS Labs' COVID-19 diagnostic test services, but then in other instances appears unwilling to make this averment. *See* Am. Compl. ¶¶ 187, 195. To wit, for some of the restitution it purports to seek, Blue KC alleges only its "understanding that payments were made to FEP enrollees and not directly to GS Labs." Am. Compl. ¶ 195.

Blue KC further asserts that GS Labs "intentionally omitted materials [sic] facts" and "made intentional misrepresentations of material fact relating to the claims" with the intent to induce Blue KC "and others" to rely on such alleged misrepresentations. *Id*. ¶ 188. In point of fact, GS Labs provided thousands of medical records to Blue KC to substantiate its claims. The Third-Party Payors, which allegedly assigned or otherwise permitted Blue KC to sue GS Labs, either "did not know or fully appreciate" that GS Labs made "materially false statements and material omissions" or made the payments "upon the mistaken belief the claims were in fact due, owed, and payable." *Id*. ¶¶ 190, 196. Significantly, Plaintiff does not specifically allege the "material facts" at issue or omitted material facts. Blue KC appears to allege that GS Labs' correspondence relating to a patient from the state of Washington somehow impacts GS Labs' posted cash price. *See, e.g*., ¶¶ 89-91, 144. Blue KC does not allege, because it would be untrue, that no individuals paid the cash price—in fact, many other carriers and individuals did so, recognizing the value of GS Labs' service, including the Third-Party Payors.

Blue KC purports that it has standing to sue for restitution on behalf of the Third-Party Payors in its Amended Complaint for the following reasons: (1) with respect to certain groups, Blue KC obtained assignment of rights during August 2021 and was "directed to litigate these claims;" (2) with respect to certain other groups, "existing ASAs [administrative service agreements]" gave Blue KC the right and discretion to sue on their behalf; and (3) with respect to

a third set of groups, payments were made from "Blue KC's accounts." *See id.* ¶ 196.

In total, Blue KC arrives at the conclusion that these Third-Party Payor plans, programs, and policy types are owed $268,544.92. *Id.* ¶ 195. But conspicuously absent is an allegation even that the Third-Party Payors paid this dollar amount to GS Labs. Rather, as to one of the Third-Party Payors—the Federal Employee Program, seeking fully $105,086.00—Blue KC simply notes its "understanding that payments were made to FEP enrollees and not directly to GS Labs." *Id.* ¶ 195, n.37. And even in seeking to lay the standing that is foundational to Blue KC's legal theory, Blue KC halfheartedly asserts that "with respect to other plans or programs, including the FEP program, the payments were made from Blue KC's accounts." *Id.* ¶ 195. Again, Blue KC appears unable to articulate whether such moneys were paid to GS Labs in the first place.

Blue KC makes the unsupported and outrageous claim that GS Labs is not entitled to be paid—not one penny—for its COVID-19 testing services, and is therefore unjustly enriched by having received some portion of payment from the Third-Party Payors. *See id.* ¶¶ 196-97. As such, Blue KC seeks a judgment that GS Labs was unjustly enriched and that this money be returned to these entities, among related specific demands, including the establishment of a constructive trust for its benefit. *Id.* ¶ 202.

III. LEGAL STANDARDS

A. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1)

"Federal courts are courts of limited jurisdiction. The requirement that jurisdiction be established as a threshold matters springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Godfrey v. Pulitzer Pub. Co.*, 161 F.3d 1137, 1141 (8th Cir. 1998) (quotation marks omitted). Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a motion to dismiss based on a lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). A Rule 12(b)(1) motion allows the court to address this threshold question, as "judicial economy demands that the issue be decided at the outset rather than deferring it until

trial." *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990).

"A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack' on jurisdiction." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (internal quotation marks and citation omitted). "In a facial attack, 'the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).'" *Id*. (quoting *Osborn*, 918 F.2d 724, 729 n.6 (8th Cir. 1990) (internal citations omitted)). Where a movant raises a factual attack, the court "considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id*.

B. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief," while Rule 12(b)(6) provides for a motion to dismiss based on the "failure to state a claim upon which relief can be granted." *See* FED. R. CIV. P. 8(a)(2), 12(b)(6). To survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *McShane Constr. Co., LLC v. Gotham Ins. Co.*, 867 F.3d 923, 927 (8th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"A complaint states a plausible claim for relief if its 'factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft*, 556 U.S. at 678). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a motion to dismiss. *Ashcroft*, 556 U.S. at 678 (citation omitted). The "plaintiff's obligation to provide the grounds" for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

C. Pleading Standard of Federal Rule of Civil Procedure 9(b)

Under Rule 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The purposes of 9(b) include: (i) ensuring that defendants have specific notice necessary to prepare a response; (ii) preventing opportunistic plaintiffs from filing allegations of fraud merely in the hopes of conducting embarrassing discovery and forcing settlement; and (iii) protecting the reputations of defendants and their employees against harm from mere accusations of fraud. *See U.S. ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 888 (8th Cir.), *cert denied*, 540 U.S. 875 (2003); *U.S. ex rel. Rost v. Pfizer*, 507 F.3d 720 (1st. Cir. 2007) (overruled on other grounds); *Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017, 1036 n.25 (4th Cir. 1997).

"Rule 9(b)'s particularity requirement demands a higher degree of notice than that required for other claims, and is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *See, e.g., U.S. ex rel. Joshi v. St. Luke's Hosp. Inc.*, 441 F.3d 552, 556-57 (8th Cir. 2006) (citations omitted). To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *Id.*

IV. ARGUMENT

A. Count III Should Be Dismissed Because Blue KC Lacks Standing and Fails to State a Claim for Unjust Enrichment.

1. Blue KC Lacks Standing to Assert Unjust Enrichment On Behalf of the Unnamed Third-Party Payors.

In its Amended Complaint, Blue KC asserts an unjust enrichment claim entirely on behalf of unspecified Third-Party Payors. In an attempt to generate the façade of standing, Blue KC emphasizes that certain Third-Party Payors gave Blue KC the "right" or "discretion" to sue, "directed" Blue KC to litigate, or otherwise assigned the claims to Blue KC after paying claims.

See, e.g., Am. Compl. ¶ 196. However, Article III standing does not permit Blue KC to bring an unjust enrichment claim on behalf of these anonymous Third-Party Payors.

To satisfy Article III standing, "the plaintiff must have suffered an injury in fact, the injury must be fairly traceable to the defendant's actions, and the injury must be likely to be redressed by a favorable judicial decision." *Gould v. Farmers Ins. Exchange*, 288 F. Supp. 3d 963, 967 (E.D. Mo. 2018) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). To establish the requisite first element, the injury in fact, "a plaintiff must show that she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548. For an injury to be "particularized," it "must affect the plaintiff in a *personal and individual* way." *Ashcroft*, 504 U.S. at 560 n. 1 (emphasis added). For an injury to be "concrete," it must be "real, and not abstract" and "must actually exist" as to that plaintiff. *Spokeo*, 136 S Ct. at 1540 (internal quotations omitted) (citing Black's Law Dictionary 479 (9th. Ed 2009); Webster's Third International Dictionary 472 (1971)).

Blue KC is attempting to appropriate another entity's particularized injury in fact to evade the requirements of Article III standing. Blue KC was not affected "personally and individually" in this instance; the Third-Party Payors allegedly were. *See* Am. Compl. ¶ 192. Blue KC cannot effectively absorb other entities' injuries in an abstract manner and supplant these grievances into its own pending lawsuit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Spokeo*, 136 S. Ct. at 1540.

However, Blue KC essentially admits it is doing precisely that. For example, Blue KC explains that in August 2021, a month after filing this action, several National Alliance ASOs groups "directed" Blue KC to litigate their alleged injuries as well. *See* Am. Compl. ¶ 196. Not only does Blue KC withhold the names of these plans, let alone when they incurred any injury, but Blue KC does not even attempt to explain *how Blue KC suffered an injury* at the point in time in which these plans decided to pay the cash price for GS Labs' services. The closest Blue KC gets

to asserting how it is personally affected is vaguely alleging that certain payments were made from "Blue KC's accounts," but provides no particularized allegations to support this conclusory statement. Even the amount allegedly suffered by the Third-Party Payors is a mere "approximate" amount, based on an "approximate" number of claims. *See id*. ¶¶ 195-96.

Taken together, Blue KC has not satisfied the basic threshold requirement of Article III standing of alleging an injury in fact that is concrete and particularized, and its unjust enrichment claim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

2. Blue KC's Unjust Enrichment Claim Should Be Dismissed as a Matter of Law as to the Moneys Listed in Count III that GS Labs Did Not Directly Receive.

Even if this Court were to find that Blue KC had standing as to its unjust enrichment claim, Blue KC's claim fails to allege a benefit that Plaintiff conferred to Defendant, and it should be dismissed pursuant to Rule 12(b)(6). The "essential" elements of an unjust enrichment claim under Missouri law are as follows: '(1) the *defendant* was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of *the plaintiff*; and (3) that it would be unjust to *allow the defendant* to retain the benefit.'" *Cent. Parking Sys. Of Mo., LLC v. Tucker Parking Holdings, LLC*, 519 S.W.3d 485, 498 (Mo. App. E.D. 2017) (*quoting Holliday Inv., Inc. v. Hawthorn Bank*, 476 S.W.3d 291, 295 (Mo. App. W.D. 2015)).

Here, Blue KC makes the bold allegation that GS Labs was unjustly enriched because plans (notably ***not*** Blue KC) paid for COVID-19 testing provided to its members at GS Labs' cash prices as required by the CARES Act. Specifically. Blue KC alleged that "[s]everal plans and programs administered by Blue KC paid at least some of GS Lab's claims." *See* Am. Compl. ¶ 187. *Blue KC did not pay* the claims alleged in Count III, and therefore, the enrichment was not "at the expense" of Blue KC, and as such, failed to allege an element of an unjust enrichment claim.

Moreover, in its Amended Complaint, Blue KC has generated a chart showing five plan types of the Third-Party Payors and the approximate amount paid at the full cash price. *See* Am.

Compl. ¶ 195. The chart shows an approximate total of $268,544.02, a significant portion of which corresponds to the Federal Employee Program (FEP) plan type. *See id.* Nowhere does Blue KC allege that GS Labs received all $268,544.92 because as Blue KC's usual practice for out-of-network providers, some of these plans, and possibly all, paid the members, *not GS Labs*. As noted in a footnote, Blue KC asserts that its "understanding" is that "payments were made to FEP enrollees and *not directly to GS*." *See id.* n. 37 (emphasis added). Significantly, paying FEP enrollees and not the provider is another violation of the CARES Act which specifically provides that insurers "*shall reimburse* the provider of the diagnostic testing." Section 3202(a) of the CARES Act (emphasis added). Leaving aside Blue KC's acknowledgement of violating the CARES Act, pleading merely an "understanding" of where funds were directed does not nearly meet the pleading standards of this Court, and amounts to nothing more than threadbare recitals with conclusory accompanying allegations. *Ashcroft*, 556 U.S. at 678 (citation omitted).

The Eighth Circuit and Missouri courts have repeatedly held that the benefit in question must be conferred by the plaintiffs directly to the defendants. For example, in *Stockdall v. TG Investments, Inc.*, the Court found that an unjust enrichment counterclaim failed where a third party paid the plaintiffs because the defendant "fail[ed] to allege or put forth facts showing the benefit conferred upon [Stockdall et al] was conferred by TGI. The benefit *must* be conferred upon [Stockdall] *by* TGI." *See* 129 F. Supp. 3d 871, 880 (E.D. Mo. 2015) (emphasis added) (citing *Speaks Family Legacy Chapels, Inc. v. Nat'l Heritage Enter., Inc.*, No. 2:08-CV-04148-NKL, 2009 WL 2391769, at *4 (W.D. Mo. Aug. 3, 2009) (dismissing unjust enrichment claim because plaintiffs did not allege any of plaintiffs' money or services passed *directly* from plaintiffs to defendants*); see also Am. Civil Liberties Union/E. Mo. Fund v. Miller*, 803 S.W.2d 592, 595 (Mo. 1991) ("An essential element of this tort is 'a benefit conferred upon the defendant by the plaintiff.'") (quoting *Erslon v. Vee-Jay Cement Contracting Co.*, 728 S.W.2d 711, 713 (Mo. App. 1987)).

Similarly here, Blue KC does not even allege that the $268,544.92 even reached GS Labs, and fully admits that specifically for the FEP claims, the payments were made to "FEP enrollees," not to GS Labs. *See* Am. Compl. ¶ 195. Thus, as a matter of law, the unjust enrichment claim fails as to these FEP payments, as well as to any other payments revealed to be made not directly to GS Labs,[2] and should be dismissed. As such, because an unjust enrichment claim requires that the defendant was enriched by the receipt of a benefit that was at the plaintiff's expense, not even the initial elements of an unjust enrichment claim can be met, and Blue KC's claim must be dismissed. *See Cent. Parking Sys.*, 519 S.W.3d at 498.

3. Blue KC's Unjust Enrichment Claim Fails as a Matter of Law Because Blue KC Does Not Plead Circumstances That Are Unjust.

As explained, there was no benefit conferred to GS Labs by Blue KC, and there certainly was no *unjust* benefit. "The most significant of the elements for a claim of unjust enrichment is the last element, which is the requirement that the enrichment of the defendant be unjust." *Associate Engineering Co. v. Webbe*, 795 S.W.2d 606, 608 (Mo. App. E.D.1990); *S&J, Inc. v. McLoud & Co.*, 108 S.W.3d 765, 768 (Mo. Ct. App. 2008). Again, GS Labs provided COVID-19 testing to plan beneficiaries—a service Congress required to be covered and paid for by private insurance at the posted cash price. GS Labs has not been paid at this cash price, nor at any price near its cash price by Blue KC, nor has Blue KC negotiated in good faith as directed by the CARES Act.

Plaintiff's attempt to invert the facts into a "formulaic recitation of the elements" fails to successfully plead a single element, let alone meet the heightened pleading standard of Rule 9(b) to which Blue KC should be held. First, it is Blue KC—the Plaintiff—that was enriched by the receipt of the benefit in the form of COVID-19 tests for its members from GS Labs, and

[2] GS Labs reserves the right to supplement this aspect of its motion to dismiss, and memorandum in support, to the extent the exhibit Blue KC avers it is "able to supply" reveals additional similarly situated payments. *See infra.* n. 2.

appreciated that its insureds were receiving that benefit. The benefit to Blue KC is much more widespread than the provision of a safe, convenient, and accurate COVID-19 test to its members. As noted recently by the Biden Administration, "testing is a key tool to identify infected individuals and prevent the spread of the virus."[3] The fact that vaccinated individuals can become infected and spread the virus makes broader testing even more important. In addition, patients can be asymptomatic or have symptoms that are similar to other respiratory infections, sometimes referred to as the "common cold," which makes symptoms non-diagnostic. Further, only if a patient knows they are positive for COVID-19 can they appropriately isolate from others to curb the spread of the disease. In other words, GS Labs' provision of quick, low-barrier COVID-19 testing reduces the spread of this disease by confirming positive cases so that individuals can take appropriate actions. Obviously, reducing the spread of the virus alleviates stress on emergency departments and intensive care units, thus reducing claims for Blue KC and other insurance plans.

Second, through GS Labs' continued refusal to pay the amount owed, it is GS Labs—the *Defendant*—that has incurred the expense. Finally, through having received the COVID-19 tests for over 12,000 members and not paying the amount owed, it is unjust to allow *Plaintiff* to retain that benefit. Stated differently, leaving aside Blue KC's failure to plead any benefit, it has also failed to plead any circumstances that are unjust. Blue KC is rather the party that has been unjustly enriched in this matter, as detailed in GS Labs' counterclaim, and Blue KC's effort to shoehorn its facts into its own unjust enrichment clearly fails to pass inspection.

To the extent Count III can instead be read as Blue KC alleging it is unjust that it paid the cash price while certain nonparty individuals engaged in negotiations with GS Labs for a discounted price—whether other insurers that negotiated in good faith as directed by the CARES Act or individuals—such an argument also fails to allege an unjust enrichment claim. This

[3] Path Out of the Pandemic," available at https://www.whitehouse.gov/covidplan/#testing-masking.

alternate reading relies on the underlying theory that Blue KC and the plans it administers are "entitled" to a lower price simply because some entity or individual at some time once negotiated for that price. But the premise that Blue KC should be entitled to a lower price because hypothetical entities or individuals may have paid a lower price enjoys no support in law, and therefore Blue KC cannot plead any unjust circumstances. To the contrary, the fact that the Third-Party Payors found GS Labs' cash price fair, and on that basis paid this cash price itself demonstrates lack of unjust circumstances. Discovery will reveal that a large number of individuals likewise approved of GS Labs' value proposition and paid its cash price, and Blue KC does not allege otherwise. Blue KC simply assumes what it is trying to prove—that GS Labs' cash price is too high—and on that basis demands relief without any support to do so.

And it is here especially where Blue KC must be held to the rigors of Rule 9(b), as Blue KC characterizes GS Labs' cash price as a "sham" and "misrepresentation" with no support. Rule 9(b) exists for just this reason, to ensure that defendants have specific notice necessary to prepare a response, to prevent opportunistic plaintiffs from filing allegations of fraud merely in the hopes of conducting protracted discovery, and to protect the reputation of companies and their employees against the harm that results from mere accusations of fraud. *Costner*, 317 F.3d at 888 (8th Cir.) Because any unjust circumstances arise only from Blue KC's *claim* that GS Labs' cash price is a "sham" and "misrepresentation," Blue KC's failure to aver to the standards of Rule 9(b) serves as a separate and independent basis to dismiss Count III.

Or perhaps Blue KC's vague and conclusory allegations are meant to claim that it is unjust that it paid the cash price while certain nonparty individuals received a financial hardship discount from GS Labs. The alleged so-called "intentional misrepresentation" then is simply the fact that GS Labs provided a discounted price to patients seeking COVID-19 testing after demonstrating a financial need. The Department of Health and Human Services directly addressed this issue and stated,

> "We 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).

Essentially, with no legal support, Blue KC claims that it is "entitled" to a lower price simply because an uninsured individual who represented a financial hardship received a COVID-19 test for free or at a price lower than the posted cash price. This argument is absurd, and the Court should reject such callous indifference to the plight of the public ravaged by COVID-19.

Finally, GS Labs reiterates that it entered the industry at significant expense and—as seen in this very litigation—risk of non-payment by insurers such as Blue KC. In doing so, GS Labs was buoyed by the assurances of Congress, including as follows:

> 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).

Prices for the required coverage could be established in one of two ways: the provider and insurer may negotiate a price or, if negotiations do not result in agreed-upon rates, the price would then be the provider's publicly posted "cash price." CARES Act § 3202(a). GS Labs is proud to have provided safe, accurate, and efficient COVID-19 rapid tests to nearly 12,000 members of Blue KC. Blue KC has utterly failed in its obligation to meet either obligation under the CARES Act—it both failed to negotiate in good faith, offering no meaningful upward departure from Medicare reimbursement rates (instead filing this suit) and then refusing to reimburse GS Labs' publicly posted cash price upon its decision to cease negotiations.

Blue KC has not pled any unjust circumstances that might entitle it or the Third-Party

Payors to relief, because GS Labs has committed no injustice and rather has delivered on its promise to provide the public with the needed testing to combat the pandemic. As such, Blue KC's claim must be dismissed.

4. Blue KC's Unjust Enrichment Claim Fails as a Matter of Law Because the CARES Act, Not ERISA, Governs the Payment Mechanism At Issue, And Even if ERISA Did Apply, Blue KC Seeks Prohibited Compensatory Damages.

Blue KC's unjust enrichment claim fails to the extent that it relies on Third-Party Payors that are governed by ERISA plans because the payment provision at issue is not governed by ERISA, but is set forth in another federal statute: the CARES Act. However, even if ERISA did apply, the relief that Blue KC seeks is prohibited because Blue KC seeks relief not in the form of specifically identifiable funds, which might qualify as appropriate equitable relief, but instead as general reimbursement akin to compensatory damages.

Blue KC's theory of unjust enrichment asserts that GS Labs was not entitled to the money it received from the Third Party Payors and accordingly seeks what it characterizes as restitution. But Blue KC's claim fails as to any Third-Party Payors that are governed by ERISA plans and should be dismissed. Stated differently, Blue KC does not appear to dispute that FFCRA and the CARES Act govern insurers' obligation to pay for COVID-19 testing for their members. As such, Blue KC's claims for COVID-19 testing in this case are not governed by ERISA, so it is irrelevant if Third-Party Payors that paid the cash price for such claims are ERISA plans. In short: this is not an ERISA case at all. Yet, Plaintiff's First Amended Complaint—as well as its recently filed Motion to Dismiss GS Labs' Counterclaims—suggests otherwise, in all likelihood in an attempt to avail itself of what it believes to be favorable provisions of ERISA. The unjust enrichment claim fails to the extent that it relies on the fact that ERISA to plead its claim and entitlement to relief.

However, even if an ERISA plan were at issue, the type of legal restitution Blue KC seeks under Count III is prohibited by ERISA. Section 1132(a) of ERISA permits plan participants to

seek "classic" equitable remedies, which do not extend to compensatory damages. *See Knieriem v. Grp. Health Plan, Inc.*, 434 F.3d 1058, 1061 (8th Cir. 2006). "Restitution can be equitable or compensatory, and the distinction lies in the origin of the award sought." *Id.* (citing *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 943 (8th Cir. 1999)). "Restitution seeks to punish the wrongdoer by taking his ill-gotten gains, thus, removing his incentive to perform the wrongful act again. Compensatory damages on the other hand focus on the plaintiff's losses and *seek to recover in money the value of the harm done to him*." *Id.* (emphasis added) (citing 1 Dan. D. Dobbs, Law of Remedies § 4.1(1), at 369-71 (2d ed. 1993)).

The Supreme Court has explained that restitution "in equity" is ordinarily where money "could clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 213 (2002). For example, the Court explained that where a 502(a)(3) claim for restitution to recover "from a specifically identifiable fund was a claim for 'appropriate equitable relief' because recovery of a specific asset is appropriately characterized as equitable restitution." *Dakotas & W. Minn. Elec. Indus. Health & Welfare Fund v. First Agency, Inc.*, 865 F.3d 1098, 1102 (2017) (quoting *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 362-63 (2006)). In contrast, in *Knudson*, the Court dismissed a claim for equitable restitution under 502(a)(3) for recovery of benefits from a third party, as "suits seeking . . . to compel the defendant to pay a sum or money to the plaintiff are suits for 'money damages.'" *See Dakotas*, at 1102 (quoting 534 U.S. at 210). Relatedly, in *Knierium*, the Eighth Circuit found that restitution seeking "the monetary benefit that [the defendant] should have paid for the withheld procedure" was sufficiently compensatory, not equitable, also noting that the funds sought as "not identifiable, or even known." 434 F.3d at 1061-62.

Here, Blue KC seeks relief for restitution based on allegations that the Third-Party Payors were "not obligated to pay" the full cash price because GS Labs allegedly misrepresented facts, omitted facts, and acted in bad faith. Am. Compl. ¶¶ 192-93. Further, Blue KC notes that before

bringing this suit, Blue KC "demanded that all amounts paid to GS Labs . . . be returned," but GS Labs "has not returned the money paid to it . . . nor has it provided assurances that it will return such amounts." *Id.* ¶¶ 199-200. As such, Blue KC argues that GS Labs is not entitled "to retain the money for services allegedly rendered" to the Third-Party Payors and seeks restitution in the form of "the return of money had and received." *Id.* ¶¶ 197, 201-02. Blue KC does not allege that it is seeks restitution from any "specifically identifiable fund."

Here, similarly, Blue KC does not even allege—let alone state sufficient plausible facts to satisfy *Twombly*—that the payments at issue are in a "specifically identifiable fund." Blue KC admits as much by requesting that the Court impose going forward a "trust for the benefit" of Blue KC and an order enjoining GS Labs from "disposing of or transferring any of the ill-gotten funds *still in their possession and control*," in a last-ditch hope that GS Labs did segregate such funds from the anonymous Third-Party Payors and "still" has some funds remaining. Am. Compl. ¶¶ 202I, I. Furthermore, in its restitution claim, the Third-Party Payors are essentially seeking to compel GS Labs to return the amount the Third-Party Payors paid, now that Blue KC has reevaluated GS Labs' cash price and decided that it is too high. This is not "equitable" relief; this is simply seeking a return of the amount Third-Party Payors paid at the cash price—and thus, the precise type of relief not provided in equity under ERISA. *See Dakotas*, at 1102.

As a result, Count III of Blue KC's Amended Complaint should be dismissed as to any ERISA-governed plans at issue.

B. Count I Should Be Dismissed to the Extent Blue KC Seeks Declaratory Relief Specific to ERISA-Governed Plans

In Count I of its Amended Complaint, Blue KC newly alleges that "with respect to unpaid claims arising from ERISA-governed plans in which Blue KC is a plan fiduciary, Blue KC seeks a bill for instructions or other equitable relief under ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3)." *citing Dakotas*, 865 F.3d at 1103. Blue KC accordingly seeks relief under ERISA § 502(a)(3) and

"other appropriate equitable relief," as well as attorneys' fees pursuant to 29 U.S.C. § 1132(g)(1). However, Blue KC does not seek to redress violations of ERISA nor to enforce ERISA's terms. Rather, Blue KC requests, with no legal authority, a declaration from this Court that Blue KC has a right to pay nothing to GS Labs after being billed the posted cash price for the COVID-19 diagnostic testing. This supposed right does not derive from the ERISA statute, or from the terms of any Blue KC member's plan. Rather, the obligation to pay the posted cash price originates from Section 3202(a) of the CARES Act, and the payment is required by the CARES Act regardless of whether the individual tested is covered by an ERISA plan.

ERISA is a "comprehensive legislative scheme" that includes an "integrated system of procedures for enforcement." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (quotation omitted). The United States Supreme Court has long held that relief available under ERISA is limited to "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Dakotas*, 865 F.3d at 1101 (2017) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (emphases original)). ERISA § 1132(a)(3) allows a civil action to be brought by a plan participant or plan beneficiary: "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) *to redress such violations* or (ii) *to enforce any provisions of this subchapter or the terms of the plan.*" 29 U.S.C. § 1132(a)(3) (emphasis added). However, Blue KC is seeking neither to "redress . . . violations" nor "to enforce" the ERISA statute or the terms of any ERISA plan—the two types of appropriate equitable relief available. Again, the obligation to pay GS Labs' posted cash price originates in Section 3202(a) of the CARES Act, and Congress created this requirement regardless of whether the individual tested is covered by an ERISA plan.

With neither an ERISA plan nor plan provision at issue, Blue KC's inevitable failure to allege either fact is precisely the type of inadequate claim that courts in this circuit routinely

dismiss. *See, e.g.*, *HM Compounding Services, Inc. v. Express Scripts, Inc.*, No. 4:14-CV-1858, 2015 WL 4162762, at *11 (E.D. Mo. July 9, 2015) (dismissing ERISA claims because the plaintiff failed to "state any factual allegations which would clarify the grounds on which its ERISA claims are based," such as identifying "any ERISA plan(s) or plan term(s)"); *Midwest Special Surgery, P.C. v. Anthem Ins. Co.*, No. 4:09CV646, 2010 WL 716105, at *2 (E.D. Mo. Feb. 24, 2010) (finding that the plaintiff failed to properly plead an ERISA plan to relief where the complaint sought general "reimbursement for medical services provided . . . under numerous health plans which qualify as employee welfare benefit plans as defined by ERISA")).

Because the basis for the relief Blue KC seeks is a requirement found in Section 3202(a) of the CARES Act, not in any ERISA plan or statutory provision, Count I should be dismissed to the extent it seeks equitable relief and attorneys' fees for claims arising from ERISA plans.

V. CONCLUSION

Based on the foregoing, Count III of Blue KC's Amended Complaint for Unjust Enrichment should be dismissed in its entirety for lack of standing, for failure to state a claim for which relief may be granted, and for failure to allege fraud with the particularity required by Rule 9(b). Likewise, Count I of Blue KC's Amended Complaint should be dismissed to the extent Blue KC seeks declaratory relief specific to ERISA-governed plans.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2021, 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