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

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

DEFENDANT GS LABS LLC'S SUGGESTIONS IN OPPOSITION TO BLUE KC'S MOTION TO DISMISS COUNTERCLAIM

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I. INTRODUCTION

With this lawsuit, Blue Cross Blue Shield of Kansas City ("Plaintiff" or "Blue KC") reveals that it believes itself to be above the law—acting in direct conflict with the role Congress intended health plans to play to combat the public health emergency. As stated in previous pleadings, the United States Congress quickly drafted, debated, and passed two pieces of landmark legislation that instruct the Court—the Families First Coronavirus Recovery Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (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.

Congress required that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage . . . ***shall provide coverage***, and shall not impose any cost sharing [] requirements or prior authorization" for certain items and services related to COVID-19 testing and diagnosis. *See* FFCRA, Section 6001(a) (emphasis added). Section 3202(a) of the CARES Act, titled "Pricing of Diagnostic Testing," states, "A group health plan or a health insurance issuer providing coverage of items and services described in section 6001(a)" of the FFCRA "***shall reimburse the provider of the diagnostic testing***" (emphasis added) by either "the cash price for such service as listed by the provider on a public internet website," or a rate negotiated with such provider. Therefore, in the absence of a pre-negotiated rate, the statutory text of the FFCRA and CARES Act unambiguously and explicitly require insurers to reimburse

providers for either the cash price posted, or a negotiated lower price. As explained *infra* Section IV.A., Congress thereby used precisely the sort of "rights-creating language" that courts have found to create private rights of action, it reflected a clear intent to benefit a class that includes GS Labs, and it provided no alternate means of enforcing Section 3202(a)'s reimbursement requirement.

GS Labs was formed in January 2020. As the COVID-19 pandemic began to pose an unprecedented public health challenge, and Congress voiced the need for additional COVID-19 testing services with the assurance that insurers would appropriately pay providers that took on this challenge, GS Labs' founders rapidly mobilized the necessary resources to answer Congress' call. In a fundamental shift to their business model, GS Labs incurred over $37 million to invest in groundbreaking testing technology and quickly launch 27 convenient, accessible, and 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 KC. Unlike existing facilities with diagnostic testing capability, GS Labs incurred significant costs in building its operations from the ground up. Further, GS Labs developed a custom technology platform that allows for high-volume scheduling, convenient intake process, and rapid delivery of results. The benefit that GS Labs afforded to Blue KC and its members is much more widespread than providing safe, convenient, and accurate COVID-19 testing—as noted recently by the Biden Administration, "testing is a key tool to identify infected

individuals and prevent the spread of the virus."[1] The fact that vaccinated individuals can become infected and spread the virus makes broader testing even more important, and the need for rapid testing remains crucial as America struggles to contain the recently emerged Delta variant, which spreads much more quickly than the original strain.[2]

Facing the inescapable fact that thousands of its members received valuable COVID-19 testing from GS Labs, which in turn advanced the country's efforts to stem the pandemic, Blue KC instead resorts to miscasting isolated incidents and disparaging the validity of GS Labs' operation—a business entity that scaled testing capacity to accommodate one thousand patients per day in an unimaginably short period of time. For instance, Blue KC has now devoted the opening pages of its most recent filing to advancing an irrelevant, sensationalized smear campaign—complete with ten new exhibits consisting of third-party correspondence it wrongly characterizes as "facts" of which the Court may take judicial notice. Blue KC desperately seeks to frame the issues in this case as "one price for insurers, but another price for the public," but GS Labs explicitly states that, in fact, ***more than 1,500 individuals paid the cash price***, and in any event Blue KC cannot escape the fact that such an issue cannot properly be resolved upon a motion to dismiss under Rule 12(b).

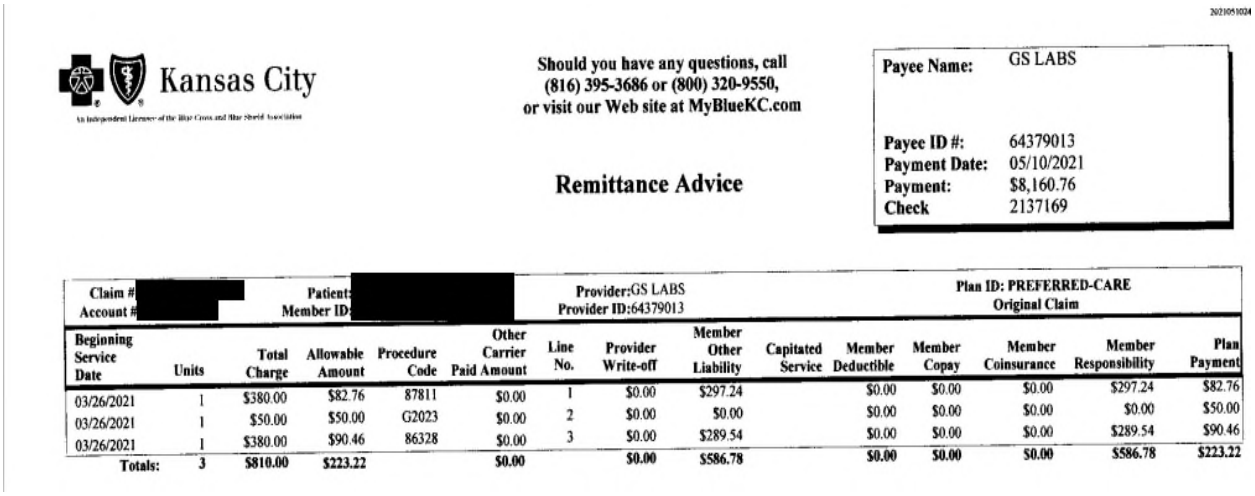
Because GS Labs has properly pled claims under the CARES Act Section 3202(a), creating a private right of action permitting GS Labs to enforce the statute's reimbursement requirements against a health insurer, the Court should deny the Motion to Dismiss Counts I and II. Because

[1] Path Out of the Pandemic," available at https://www.whitehouse.gov/covidplan/#testing-masking.
[2] "The now-dominant delta variant spreads so quickly that every missed opportunity to catch an infectious person can lead to many more new cases. In ideal conditions, a person who was sick with the original strain would infect about three others on average. With delta, it's around seven." Max Nisen, *We Need Quicker Tests to Contain the Delta Variant*, BLOOMBERG (Aug. 12, 2021, 12:32 PM), *available at* https://www.bloomberg.com/opinion/articles/2021-08-12/rapid-antigen-tests-can-stop-covid-spread-from-delta.

GS Labs has sufficiently pleaded its claims for relief under Missouri state law and no federal statute operates to preempt these claims, the Court should deny the Motion to Dismiss Counts III-VIII.

II. BACKGROUND

In connection with the COVID-19 diagnostic testing services provided to Blue KC members, GS Labs timely submitted claims for payment to Blue KC at the cash price publicly posted on GS Labs' website, as explicitly instructed by the CARES Act. *See* Def.'s Counterclaim ¶ 81, Doc. 4. However, to date, Blue KC has paid only approximately $55,000 or about *.005 of the total cash price* for the testing provided by GS Labs to Blue KC's members. Not only has Blue KC failed to pay the cash price as required by the CARES Act, Blue KC has also violated the FFCRA and CARES Act by attempted to push its responsibility to its members by informing them that they are responsible for part of the cost by sending an Explanation of Benefits (an example included below) showing that they are responsible for the bulk of the cost. (*See* Def.'s Counterclaim ¶¶ 8, 73, 87). To date, GS Labs has not billed a patient such as the one represented in this EOB or any patient who represented that they were covered by an insurance policy.



Kansas City

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

Remittance Advice

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

Claim #: [redacted] Patient: [redacted]
Account #: 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
Totals:	3	$810.00	$223.22		$0.00		$0.00	$586.78		$0.00	$0.00	$0.00	$586.78	$223.22

On March 2, 2021, counsel for GS Labs sent counsel for Blue KC a letter that provided notice of claims for COVID-19 testing for Blue KC's members, outlining Blue KC's obligations,

listing the cash prices publicly posted online, and noting that another Blue plan agreed to pay the cash price. *Id.* ¶ 82. GS Labs also invited Blue KC to negotiate a lower rate on future COVID-19 testing. *Id.* ¶ 83. GS Labs fully anticipates that this need for future testing is realistic, given President Biden's September 9, 2021 announcement that his Administration would utilize the Defense Production Act to "accelerate the production of rapid COVID-19 tests," and take steps to advance its commitment to ensuring all Americans enjoy "convenient access" to free testing.[3]

Blue KC has now had over six months to negotiate a rate with GS Labs for less than the cash price, but Blue KC made no meaningful effort to do so. *Id.* ¶ 84. Instead, Blue KC responded inconsistently: paying a few claims in full, some claims in part (while attempting to shift the remainder of responsibility to the individual members, in violation of the CARES Act), and for over 5,000 claims, demanding a large volume of medical records without paying any amount at all. *See id.* ¶¶ 85-88. Despite the burdensome and unreasonable nature of Blue KC's medical records production request, GS Labs produced 3,000 medical records, amounting to over 20,000 pages, with the expectation that Blue KC would then pay the cash price as it had with several other claims. *See id.* ¶ 89. As the months dragged on, GS Labs even offered on July 1, 2021 to provide a *significant* discount of the fees to which it was entitled to resolve the dispute. *See id.* ¶ 96.

To GS Labs' surprise, after GS Labs made meaningful efforts to find a mutually acceptable solution after Blue KC's failure to pay the cash price, Blue KC abruptly ended these negotiations nine days after receiving GS Labs' letter by filing the instant Complaint. *Id.* ¶ 98. In its July 10, 2021 Complaint, Blue KC sought declaratory judgment and injunctive relief and argued, among other things, that GS Labs violated its statutory obligation under the CARES Act and that the outstanding claims were defective and non-payable. *See generally* Compl., Doc. 1. Relatedly,

[3] *See Path Out of the Pandemic*, WhiteHouse.gov (last accessed Sept. 9, 2021), *available at* https://www.whitehouse.gov/covidplan/#testing-masking.

Blue KC sought a declaration that GS Labs forfeited its right to payment through alleged misrepresentations and omissions, negating Blue KC's obligation to pay, that GS Labs violated a duty of good faith in setting its cash price for the COVID-19 testing, that GS Labs should be enjoined from balance billing or otherwise attempting to collect from Blue KC members, and that Blue KC should be awarded appropriate costs and expenses. *See id*. at 28.

Forced to respond and publicly set the record straight, GS Labs filed its Answer, Affirmative Defenses, and Counterclaims on August 5, 2021. *See* Doc. 4. GS Labs' Counterclaims included the following: (1) violation of FFCRA and the CARES Act; (2) declaratory judgment requesting a judgment that Blue KC is required to pay the posted cash price, in accordance with the CARES Act; (3) breach of implied contract/promissory estoppel; (4) unjust enrichment; (5) quantum meruit; (6) breach of quasi-contract or implied contract; (7) breach of covenant of good faith and fair dealing; and (8) violation of Missouri's Prompt Pay Statute (Mo. Rev. Stat. § 376.383). *See generally id.* Blue KC then filed an Amended Complaint on August 26, 2021, adding a claim for unjust enrichment, seeking restitution for as-yet unnamed third-party plans, programs, and policy types administered by GS Labs that paid the cash price. *See* Doc. 14. GS Labs has moved to dismiss Count III of the Amended Complaint for failure to state a claim for which relief may be granted, as Blue KC's effort to sue on behalf of parties that did pay GS Labs' publicly posted cash price amounts to nothing more than Blue KC attempting to twist this compelling fact in its favor to hide its own buyer's remorse. *See* Doc. 31.

After this Court granted Blue KC a one-week extension to respond to GS Labs' Counterclaims, *see* Doc. 13, Plaintiff filed the instant Motion to Dismiss on September 7, 2021, seeking dismissal of GS Labs' Counterclaim with prejudice. *See* Mot., Doc. 23; Pl. Br. Supp. Mot., Doc. 24.

Blue KC cites correspondence between GS Labs and the Washington Attorney General's Office and other correspondence with health agencies to support the notion that GS Labs is engaged in a "scheme" by charging insurance companies a higher rate than consumers, but such accusations are wildly misleading and beyond the bounds of what should be considered a "fact" under Federal Rule of Evidence 201. Pl.'s Br. Supp. Mot. at 1. More specifically, Blue KC proffers a number of such documents as "facts" that can be judicially noticed, but ultimately leans on these documents not simply for the objective proposition that GS Labs corresponded with multiple government entities, but a subjective argument: that there are "a multitude of serious concerns with GSL's operations." Pl.'s Br. Supp. Mot. at 3. GS Labs respectfully requests that the Court decline to take judicial notice of Blue KC's exhibits. *See, e.g., DeVary v. Countrywide Home Loans, Inc*., 701 F. Supp. 2d 1096, 1111-12 (D. Minn. 2010) (declining to take judicial notice of "facts" because they would be "irrelevant" to the Court's conclusion as to the issue in the case: whether a statute authorized a particular action). Stating further, Blue KC's effort in this regard is in keeping with its misguided strategy to disparage and malign GS Labs to distract from the merits of the case—for instance, not only does complete review of the aforementioned letter reveal that GS Labs was simply explaining the practical reality that cash prices "*generally* are charged only to insurance companies, and not consumers" in the context of an insured individual, GS Labs notes for the Court's attention that, in fact, *more than 1,500 individuals paid the cash price*.

Substantively, Blue KC raises the following arguments: (1) the FFCRA and the CARES Act do not confer on GS Labs a private right of action; (2) GS Labs' suit is impermissibly vague by not identifying specific plans, policies, members, service dates, among other identifying information; (3) ERISA, FEHBA, and the statutes governing the Medicare Advantage program preempt state-law counts relating to many of the claims at issue; (4) GS Labs' equitable claims

under Missouri law are defective; (5) GS Labs' claim for breach of covenant of good faith and fair dealing fails because no contract exists between GS Labs and Blue KC; and (6) the Missouri Prompt Pay Act ("MPPA") count should be dismissed because GS Labs is not a claimant and GS Labs does not provide medical services as defined by the MPPA. *See* Mot., Doc. 23; Pl. Br. Supp. Mot., Doc. 24. GS Labs addresses each argument in turn.

III. LEGAL STANDARD

A. 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).

IV. ARGUMENT

A. The CARES Act and the FFCRA Create an Implied Private Right of Action.

Despite repeatedly alleging in its Amended Complaint that GS Labs' alleged CARES Act violations forms the basis for its own claims, *see, e.g.*, Am. Compl. ¶¶ 165, 167, Blue KC now argues that the FFCRA and the CARES Act do not confer a private right of action and that GS Labs' Counts I and II of its Counterclaim should be dismissed for that reason. In addition, Blue KC argues that Count II, seeking a declaratory judgment, should be dismissed as duplicative of Count I. Both arguments lack merit, and GS Labs addresses each in turn.

1. Blue KC's motion should be denied as to Counts I and II because the text, structure, and legislative history animating the FFCRA and CARES Act support an implied private right of action.

Blue KC first argues that the Court should dismiss Counts I and II because "no express private cause of action exists." Pl.'s Br. Supp. Mot. at 6. Section 6001 of the FFCRA, titled "Coverage for Testing for COVID-19," instructs, "A group health plan and a health insurance issuer offering group or individual health insurance coverage . . . ***shall provide coverage***, and shall not impose any cost sharing [] requirements or prior authorization" for certain items and services related to COVID-19 testing and diagnosis. *See* FFCRA, Section 6001(a) (emphasis added). Section 3201 of the CARES Act amended Section 6001 of the FFCRA to include a broader range of diagnostic testing and services insurers must cover with no cost-sharing requirements. Section 3202(a) of the CARES Act, titled "Pricing of Diagnostic Testing," states, "A group health plan or a health insurance issuer providing coverage of items and services described in section 6001(a)" of the FFCRA "***shall reimburse the provider of the diagnostic testing***" by either "the cash price for such service as listed by the provider on a public internet website," or a rate negotiated with such provider. Therefore, in the absence of a pre-negotiated rate, the statutory text of the FFCRA and CARES Act unambiguously and explicitly require insurers to reimburse providers for either the

cash price posted, or a negotiated lower price. Blue KC does not dispute that the statutes impose this requirement. *See, e.g.*, Am. Compl. ¶ 2.

While Section 3202 does not expressly create a private right of action, that fact does not end the inquiry, because Congress may also create implied rights of action. "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." *Id.* This analysis focuses on "the text and structure of" the relevant statute. *Id.* at 288. Here, several aspects of Section 3202's text and structure strongly indicate that Congress intended to create a private right of action.

First, Section 3202 uses precisely the sort of "rights-creating language" that courts have found to create private rights of action. *Alexander*, 532 U.S. at 288 (quotation omitted). Where a federal statute provides that something "shall" or "shall not" be done to a person, courts have found such "language sufficient to evince a congressional intent to create individually-enforceable federal rights." *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 700 (8th Cir. 2012) (quotation omitted); *see also Alexander*, 332 U.S. at 288 (explaining that "rights-creating" language includes statutory provision that "no person shall be subjected to discrimination" (brackets, ellipsis, and quotation omitted)).

Here, Section 3202 provides that "[a] group health plan or a health insurance issuer . . . ***shall reimburse the provider of the diagnostic testing***" by either "the cash price for such service as listed by the provider on a public internet website," or a rate negotiated with such provider. 134 Stat. 281, 367. Section 3202(a)'s use of the phrase "shall reimburse" demonstrates a congressional intent to create a private right of action to ensure that reimbursement occurs. *See Ctr. for Special Needs*, 676 F.3d at 700 (finding an implied right of action based on the use of "shall"); *compare*

Maine Community Health Options v. United States, 140 S. Ct. 1308, 1316 (2020) (finding that insurers had a right to payment from the Federal Government based on the mandatory statutory term "shall").

Second, the text of Section 3202 reflects an intent to benefit a class that includes GS Labs. In *Alexander*, the Supreme Court noted that "language making the would-be plaintiff a member of the class for whose benefit the statute was enacted suggest[s]" the creation of a private right of action. 532 U.S. at 290 (quotation omitted). Here, Section 3202 mandates reimbursement to a "provider of [COVID-19] diagnostic testing." 134 Stat. 281, 367. GS Labs clearly falls within that class.

Third, neither the CARES Act nor the FFCRA provide any alternate means of enforcing Section 3202(a)'s reimbursement requirement. Blue KC misleadingly claims that Congress did, in fact, create mechanisms to enforce Section 3202(a). *See* Suggestions in Support of Motion to Dismiss, at 7. But none of the provisions cited by Blue KC actually supports this claim. Section 6001(b) and (c) of the FFCRA only authorize federal enforcement of Section 6001(a) of the FFCRA. 134 Stat. 178, 201. But GS Labs's right to reimbursement does not arise under Section 6001(a); instead, it arises under Section 3202 of the CARES Act. Indeed, Section 6001(a)—which regulates cost sharing, prior authorization, and medical-management requirements—operates to protect the participants and beneficiaries of an insurance plan, not providers. *See id.* Thus, Section 6001(b) and (c) provide no avenue for redressing Blue KC's violations of Section 3202. Similarly, Section 3202(b)(2) only permits the government to penalize a "provider of a diagnostic test for COVID-19." 134 Stat. 281, 367. That provision ***does not*** permit the government to penalize an insurer like Blue KC, and thus it provides no avenue for redressing Blue KC's violations of Section 3202(a). Thus, no alternate avenues exist to enforce the rights created under Section 3202(a).

Stating further, Blue KC repeatedly notes that Congress expressly delegated enforcement authority to certain federal agencies in *other* CARES Act provisions, and cites cases holding that the express mention of administrative enforcement implies that an implied private right of action does not exist. *See* Pl.'s Br. Supp. Mot. at 6-7 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002); *Osher v. City of St. Louis, Missouri*, 903 F.3d 698, 702-03 (8th Cir. 2018)). But in these cases the precise *provision* at issue to the parties' arguments expressly provided for administrative enforcement. *See, e.g.*, *Osher*, 903 F.3d at 703 (analyzing the "operative provision" and concluding it was "phrased as a directive to the regulated agency"). Here, in contrast, Section 3202(a)—the operative CARES Act provision that requires insurers to pay providers—is completely silent on enforcement, and the only mention of administrative enforcement is in other provisions pertaining to other requirements. Section 3202(a)'s express silence is most reasonably interpreted as Congress supporting the conclusion that GS Labs enjoys a private right of action.

Absent a private right of action, there would be no way to ensure compliance with Section 3202(a), rendering that critical provision essentially ineffective. Avoiding such a conclusion flows directly from careful analysis of the statutory text, given that "(1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness." ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW § 4 (2012). Thus, the absence of any other enforcement mechanism strongly supports the conclusion that Section 3202(a) creates an implied right of action.

Fourth, Section 3202 requires specific transactions between identifiable parties, as opposed to generalized circumstances. "The structure of a statute indicates congressional intent to create a federal private cause of action when the statute focuses on individual, rather than aggregate effects." *Stenger v. Bi-State Development Agency*, 808 F.3d 734, 738 (8th Cir. 2015).

Section 3202 mandates that an insurer must make specific payments to a particular testing provider. 134 Stat. 281, 367. This focus on "individual effects" rather than "aggregate" ones further confirms that the statute creates a private right of action.

Fifth, the legislative history of the CARES Act supports the implication of a private right of action. For example, Senator Roy Blunt stated during debate over the CARES Act that "we need to do things in this bill that will support healthcare workers and *healthcare providers*," and that "testing for coronavirus is going to be *paid for . . . by private insurance*." 166 Cong. Rec. S1076-03, 166 Cong. Rec. S1976-03, S1996 (Sen. Blunt) (emphasis added). Regarding the need for testing in general, Senator Lamar Alexander opined that the "only way to get the American economy moving again" requires the goal "to test every American who needs it for COVID-19 as soon as possible," so "the sooner we make more tests available . . . the better." 166 Cong. Rec. S1895-03, 166 Cong. Rec. S1895-03, S1895 (Sen. Alexander). As another example, Senator Chris Van Hollen reflected that America was "unprepared on our testing infrastructure" when the pandemic struck, and that "[w]e need to knock down the barriers to getting tests." 166 Cong. Rec. S1882-01, 166 Cong. Rec. S1882-01, S1884. It would completely defy Congress's motivation to increase testing capacity and accessibility if there were no mechanism whatsoever to enforce the groundbreaking statutory requirement that insurers pay providers for testing services at this critical time. The strong legislative resolve to increase testing development and accessibility strongly counsels in favor of a remedy to ensure the implementation of that legislative purpose.

Sixth, it is notable that a United States District Court for the Western District of Missouri has already allowed at least one case to proceed for an alleged violation of the CARES Act, there brought by a private actor seeking damages for tortious interference and a declaratory judgment. *Washington v. Federal National Mortgage Association*, Case No. 4:20-00974, 2021 WL 2371506

at *6 (W.D. Mo. June 9, 2021). In *Washington*, the district court very recently denied a motion to dismiss both a claim for tortious interference and for declaratory judgment in connection with the defendant's alleged CARES Act violation,[4] finding that the plaintiff sufficiently pleaded that the alleged conduct at issue fell within "mandatory language" of the CARES Act. See 4:20-00974-CV-RK, 2021 WL 2371506, at *3, 6 (June 9, 2021). Therefore, Blue KC's conclusory statement that there is no cause of action under the CARES Act has already been rejected by at least one court in this very district.

Finally, Blue KC's remaining arguments focus on three non-binding cases outside the Eighth Circuit in which courts found that FFCRA or the CARES Act do not impliedly authorize a private right of action, and its argument. All of these cases are distinguishable. Two focus on Section 1102 of the CARES Act governing the Paycheck Protection Program (PPP), while the other focuses on a prisoner seeking compassionate release under the CARES Act. *See Am. Video Duplication, Inc. v. City Nat'l Bank*, No. 2:20-CV-04036, 2020 WL 6882735 (D.C. Cal. Nov. 20, 2020); *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742 (D. Md. 2020), *appeal dismissed*, No. 20-1438, 2020 WL 6042036 (4th Cir. May 28, 2020); *Matava v. CTPPS, LLC*, 3:20-CV-01709 (KAD), 2020 WL 6784263, at *1 (D. Conn. Nov. 18, 2020). None of these cases addressed the numerous factors described above that support the conclusion that Section 3202 creates a private right of action. Each of those cases turned on an entirely different analysis. *See, e.g.*, *Am. Video Duplicating*, 2020 WL 6882735, at *2 (court's reasoning focused on the CARES Act's "reference

[4] Defendant recognizes that Fannie Mae is "a United States Government sponsored enterprise under the conservatorship of the Federal Housing Financing Agency" making it a quasi-governmental entity, but the identity of the defendant does not negate the significance of this case: that this Court allowed a private individual to assert a private right of action (declaratory judgment claim) under the CARES Act, just as in this case. GS Labs also notes that the Eighth Circuit has found that "FNMA [or Fannie Mae] is not a governmental entity." *Union Nat. Bank of Little Rock v. Federal Nat. Mortg. Ass'n*., 860 F2d 847 (8th Cir. 1988)

to [PPP] agent fees" and how PPP loans were made available under the Small Business Administration's existing programs); *Profiles, Inc.*, 453 F. Supp. 3d at 752 (concluding that "nothing in [the CARES Act's] text evidences Congress's intent to enable PPP loan applicants to bring suits against PPP lenders").

For the reasons stated above, Section 3202(a) creates a private right of action permitting a provider of diagnostic testing to enforce the statute's reimbursement requirements against a health insurer. Therefore, the Court should deny Blue KC's Motion to Dismiss Counts I and II.

2. Blue KC's motion should be denied as to Count II because GS Labs is not seeking duplicative relief in Counts I and II.

Blue KC also argues that the request for declaratory relief in Count II should be "dismissed as repetitive of and subsumed by its first count," and that a judgment declaring that Blue KC is required to pay GS Labs is "essentially a covert repetition of its damage claim in its Count I." Pl.'s Br. Supp. Mot. at 8. However, while both Count I and II spring from the Court finding that Blue KC violated FFCRA and the CARES Act, if Count I were to fail, Count II may remain viable (and *vice versa*). *Compare, e.g.*, *NTD I, LLC v. Alliant Asset Management Co., LLC*, 4:16-CV-1246, 2017 WL 605234, at *7 (E.D. Mo. Feb. 15, 2017) (finding at the early stage of litigation that the "declaratory relief sought does not appear duplicative," as the breach of contract claim sought damages and the declaratory judgment sought "relief beyond damages—a determination of the respective interests of the parties" and "clarification" of one's parties "continuing obligation" for potential future interaction), *with City of Wyoming v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1155-56 (D. Minn. 2016) (finding that the Declaratory Judgment claim was "superfluous" as that claim "fails to alter the landscape of the complaint *in terms of remedies*") (emphasis added).

Here, GS Labs' Counts I and II are not duplicative and are similar to those the court allowed to proceed in *NTD I*. Count I in GS Labs' Counterclaim requests monetary damages, along with

appropriate costs and attorney's fees, for testing conducted between November 28, 2020 and July 28, 2021. Def.'s Counterclaim, ¶ 110, Doc. 4. Count II requests different relief: a declaration that Blue KC is required to pay GS Labs the posted cash price for "services GS Labs has provided *and continues to provide to Blue KC's insureds*, in accordance with the CARES Act and for such other and further relief as this Court deems just and proper." *Id.* ¶ 120 (emphasis added). In other words, even if Count I were to fail, Count II still seeks a declaration as to current and future testing of Blue KC's insureds, and also permits the Court to grant further equitable relief in its discretion. A declaration for continued services, unique to Count II, is especially important as COVID-19 cases remain high in Missouri and as Blue KC members may choose GS Labs as their provider for future tests. As such, Counts I and II are sufficiently distinct, and the Court should deny Blue KC's Motion to Dismiss Counts I and II.

B. GS Labs' Counterclaim is Sufficiently Pleaded Under *Twombly*.

Blue KC argues that GS Labs "generally alleges the total amount it claims is owed from Blue KC but fails to describe any covered individual who was tested," among related identifying information, and that this alleged failure does not meet the *Twombly* standard that requires "facts to state a claim to relief that is plausible on its face." *See* Pl.'s Br. Supp. Mot. at 8-9. Not only is this ironic, given Blue KC's Amended Complaint having added an unjust enrichment claim based wholly on anonymous third parties' payments of the full cash price, but it attempts to distort the basis for GS Labs' claims.

The cases from other circuits Blue KC cites for the proposition that claims are "routinely dismissed" for omitting "claim-specific" detail are readily distinguishable because those claims turn on the terms of specific insurer contracts or benefit plans. For example, the court in *Mantooth v. Health Care Service Corporation* examined a breach of insurance contract claim brought by an

individual claimant, who failed to allege basic information on how her contract was breached and what terms were breached. No. 20-CV-578-TCK-JFJ, 2021 WL 256803, at *2 (N.D. Okla. Jan. 25, 2021). As another example, in *Almont Ambulatory Surgery Center, LLC v. UnitedHealth Group, Inc.*, the court similarly critiqued that plaintiffs alleged that "no plan terms justified the failure to pay" certain fees, but "do not actually allege that the specific services . . . were covered" under the plan or "describe the plan terms that would support such coverage." 99 F. Supp. 3d 1110, 1158 (C.D. Cal. 2015).

GS Labs fully appreciates that to satisfy *Twombly*, its pleadings should allege what provision of a particular document is violated when that provision forms the basis of the claim. That is precisely what GS Labs has done by providing the *specific provision*, Section 3202(a), of the 800+ pages CARES Act, which incorporates Section 6001 of the FFCRA. Section 3202(a) is the operative CARES Act provision stating Blue KC's obligation—not the provision in a particular contract or in a term within a benefits plan administered by Blue KC. In accordance with *Twombly*, GS Labs has alleged specific factual allegations and plausible legal theories as to the specific statutory provisions violated and the parties' course of dealing. In addition, as noted in its Rule 26 Disclosures provided directly to counsel for Blue KC on September 15, 2021, GS Labs will provide "claims data showing all claims submitted to Blue KC by GS Labs for COVID-19 testing provided to Blue KC's members' once the parties have entered into a Protective Order. Furthermore, as a practical matter, given Blue KC's repeated demands for voluminous medical data for the claims at issue—of which GS Labs has provided 20,000 pages and counting—Blue KC is fully aware which claims are at issue in this case. Given both HIPAA practices and the practical reality that there are thousands of claims at issue that cannot be practicably listed, GS Labs declines to gratuitously—and irresponsibly, in terms of patient privacy—exceed the pleading

requirements to list all such information. Blue KC admits that it does not oppose affording leave to GS Labs to replead when additional claim-specific detail becomes available, *see* Pl.'s Br. Supp. Mot. at 10, n. 3, and GS Labs reserves the right to do so in the course of discovery.

C. GS Labs' State Law Claims Are Not Preempted.

1. ERISA does not preempt the state law claims.

The U.S. Supreme Court, in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004), provided the standard governing ERISA preemption of state causes of action: "[I]f an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's action, then the individual's cause of action is completely preempted by ERISA § 502(a)(1)(B)." The plain language of the ERISA statute explicitly instructs that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . .." 29 U.S.C. § 1144(a)). The Eighth Circuit has broadly interpreted this provision, holding that "Congress preempted all state laws which *relate to employee benefit plans*, not only state laws which directly attempt to regulate an area expressly regulated by ERISA." *Dependahl v. Falstaff Brewing Corp*., 653 F.2d 1208, 1215 (8th Cir. 1981) (emphasis added).

Blue KC argues in a conclusory fashion that ERISA preempts any claims for "benefits due under ERISA-governed plans" among the claims at issue and that any exceptions are not applicable here. Pl.'s Br. Supp. Mot. at 10 and 11. However, Blue KC is misconstruing the factual basis upon which GS Labs seeks relief. The terms of an ERISA plan here are not at issue in this case. Rather, GS Labs' claims for a specific amount owed arise from an independent legal duty set forth in Section 3202(a) of the CARES Act: namely, that insurers reimburse providers at the cash price

rate. Similarly, GS Labs' claims are not preempted because its basis for seeking relief is about the rate of payment owed: the cash price.

Case law in the Eighth Circuit distinguishes between claims regarding "right to payment" and "rate of payment." *Cardinal Neurosurgery & Spine, Inc. v. Greater St. Louis Constr. Laborers Welfare Fund*, No. 4:10-CV-2216 (CEJ), 2011 WL 13254420, at *3 (E.D. Mo. Sept. 22, 2011) (citing *Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 331 (2d Cir. 2011)). While disputes regarding "right to payment" relate to "coverage and eligibility under the terms of the welfare plan are pre-empted by ERISA," such as disputes over whether a service is "medically necessary," a dispute over the "rate" of payment involves the "computation of payments due" or the "executions of those payments," and are not preempted. *See Cardinal Neurosurgery*, 2011 WL 13254420, at *3 (E.D. Mo. Sept. 22, 2011). Here, unlike Blue KC's claim in its Amended Complaint that it has "no obligation at all to pay" (i.e., a right to payment inquiry), GS Labs' Counterclaims are solely focused on seeking relief in connection with Blue KC's obligation to pay GS Labs *the full cash price* (i.e., a particular *rate*). Further, Blue KC's obligation is not set forth in an ERISA-governed plan but is instead established by the FFCRA and further clarified in the CARES Act. Therefore, GS's claim is not the typical type of "right to payment" claim that may be preempted as relating to coverage or eligibility under the terms of a specific plan, and Blue KC's Motion should be denied as to this point.

2. FEHBA does not preempt the claims.

Blue KC argues that many of the claims at issue in GS Labs' Counterclaim implicate the Federal Employee Program (FEP), which is a federal sponsored health benefits plan for federal employees and their dependents and is governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914. Pl.'s Br. Supp. Mot. at 12. Blue KC argues that to the extent GS Labs asserts claims with respect to FEP enrollees, its claims must be dismissed for two reasons:

(1) because any payment of GS Labs' claims would be paid using federal treasury funds, sovereign immunity bars all claims brought by providers seeking payment from FEHBA administrators; and (2) FEHBA's express preemption provision, 5 U.S.C. § 8902(m)(1), preempts all state law claims relating to the FEP. *See id.*

As to the first point, sovereign immunity may apply when the United States is the real party in interest and would bear the financial judgment in the case. However, here, unlike in the nonbinding cases Blue KC cites, Congress has specifically instructed that *insurers* shall reimburse providers the cash price. GS Labs is not looking to the terms of any FEHBA-governed contracts to assert its claim, and Blue KC has not indicated that any such contractual provisions form a defense as to this claim. *See, e.g.*, *Vrijesh S. Tantuwaya MD, Inc. v. Anthem Blue Cross Life & Health Ins. Co.*, 169 F. Supp. 3d 1058, 1070-71 (S.D. Cal. 2016) ("[A]ny obligation that Blue Shield could have to pay Plaintiff *stems directly* from the [individual's] enrollment in the Service Benefit plan.") (emphasis added). Rather, the obligation at issue here is one imposed by different federal statutes: the FFCRA and the CARES Act. Based on the information available to it at this time, GS Labs does not allege that its requested relief would involve payment stemming directly from FEHBA plans that may involve federal treasury funds. As such, sovereign immunity does not bar GS Labs' claim.

As to the second point, FEHBA's express preemption provision, 5 U.S.C. § 8902(m)(1), provides that the "terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." The preemption provision "declares no federal law preemptive, but instead, terms of an OPM-negotiated contract." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S.

677, 698 (2006). The U.S. Supreme Court recently clarified that "FEHBA contract terms have preemptive force only as they . . . fall within the statute's scope," classifying the FEHBA as "the statute that ensures that [FEBHA contract] terms will be uniformly enforceable nationwide, notwithstanding any state law." *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1198 (2017) (internal quotations omitted); *see also Bell v. Blue Cross & Blue Shield of Oklahom*a, No. 5:14-CV-05046, 2014 WL 5597265, at *5-6 (W.D. Ark. Nov. 3, 2014) (explaining that "[f]or preemption to apply under the FEHBA…the *contract's* terms" must relate to payment of benefits) (emphasis added) (internal quotations omitted). However, once again, FEHBA "contract terms" are irrelevant to GS Labs' claims. The FFCRA and the CARES Act require Blue KC to pay GS Labs' claims. Therefore, this preemption provision is inapplicable, and Blue KC's Motion should be denied as to this point.

3. The Medicare Act does not preempt claims relating to Medicare Advantage enrollees.

Blue KC argues that any state law claims at issue in GS Labs' Counterclaim relating to Medicare Advantage enrollees are preempted by the Medicare Act. 42 U.S.C. § 1395w-26(b)(3). Pl.'s Br. Supp. Mot. at 13-14. In support of this argument, Blue KC relies upon two cases wherein Medicare beneficiaries sought state law remedies for the defendants' failure to provide benefits under the Medicare Act. *See Do Sung Uhm v. Humana Inc.*, 620 F.3d 1134 (9th Cir. 2010); *Physicians Home Health Infusion, P.C. v. United Healthcare of the Midwest, Inc.*, 4:18CV01959 PLC, 2019 WL 6115153 at *1 (E.D. Mo. Nov. 18, 2019). These cases are easily distinguishable from the issues at hand. In *Uhm*, the Ninth Circuit found that claims "arising under" the Medicare Act must be exhausted through the Act's administrative remedial scheme. 620 F.3d at 1148. A claim can "arise under" the Medicare Act when the Medicare Act is the substantive basis for the claims and where the claims are "inextricably intertwined" with a claim for Medicare benefits. *Id.*

at 1141. When a claim does not seek to recover benefits and the injury complained of cannot be redressed by the Medicare Act's administrative review process, it does not "arise under" the Medicare Act. *Id*. at 1142; *see Ardary v. Aetna Health Plains of California, Inc.*, 98 F.3d 496, 500 (9th Cir. 1996). GS Labs is not seeking payment of Medicare benefits; it is seeking payment of its "cash price" of services from a plan that did not have a negotiated rate with GS Labs under Section 3202(a) of the CARES Act. None of GS Labs' claims require any determinations under the Medicare Act, and any liability under the state law claims would not affect the standards required by the Medicare Act. GS Labs is not asking for Blue KC to comply with the Medicare Act, and the Medicare Act cannot redress GS Labs' injuries.

Similarly, in *Physicians Home Health*, the plaintiff (a home healthcare agency) brought state law claims against a private health insurance agency for breach of contract, negligent misrepresentation, quantum meruit, and unjust enrichment. *Physicians Home Health*, 2019 WL 6115153, at *1. The case arose from defendant's ongoing refusal to pay for services provided by plaintiff to Medicare beneficiaries. *Id.* at *11. The court found that plaintiff's claims required an "analysis of whether [defendant] properly denied payment for [plaintiff's] medical services to a Medicare enrollee under [defendant's] Medicare Advantage plan." *Id.* Further, the court found that plaintiff's "negligent misrepresentation claim require[d] a determination that the relevant representations were false in light of the Medicare Act." *Id.*at *13. By contrast, GS Labs' claims for a specific amount owed arise from an independent legal duty set forth in Section 3202(a) of the CARES Act—that insurers reimburse providers at the cash price rate. GS Labs' state law claims do not arise under and are not preempted by the Medicare Act, as Blue KC well knows, and rather all arise from the independent legal duty of Blue KC to obey the FFCRA and the CARES Act. Therefore, Blue KC's Motion should be denied.

D. Missouri State Claims Are Sufficiently Pleaded.

1. GS Labs' claims for promissory estoppel, unjust enrichment, quantum meruit, and breach of implied contract (Counts III-VI) are sufficiently pleaded.

Blue KC avers that GS Labs fails to state a claim upon which relief can be granted as to Counts III-VI because GS Labs fails to establish that either (1) Blue KC made a promise to GS Labs; or (2) that Blue KC conferred an appreciated benefit on GS Labs. Pl.'s Br. Supp. Mot. at 14-15. Specifically, first, as to implied contract and promissory estoppel, Blue KC asserts that it "never promised to pay GS Labs," as there was no "contract price" or any other "promise to pay anything." *Id*. at 15. Second, Blue KC asserts that GS Labs fails to "allege with *Twombly*-level detail that Blue KC ever requested or authorized its insureds to obtain treatment" from GS Labs, which is "fatal" to all of GS Labs' "quasi-contract, implied-in-fact contract, and promissory estoppel claims." *Id*. at 16. Third, and finally, Blue KC asserts that the unjust enrichment claim fails because GS Labs "did not confer a benefit on Blue KC." *Id*. GS Labs addresses each broad argument in turn.

First, regarding Blue KC's assertion that it "never promised to pay GS Labs" and that there was "no contract price," such that the promissory estoppel and implied contract claims should be dismissed, Blue KC entirely misses the point by ignoring the gravity of the CARES Act. A claim for "promissory estoppel serves as an equitable remedy where an express contract does not exist," which is precisely the situation here. *See Chesus v. Watts*, 967 S.W.2d 97, 106 (Mo. Ct. App. 1998). Rather, the relevant framework was set by Congress in Section 3202(a) of the CARES Act, which provides that Blue KC "shall reimburse the provider in an amount that equals the cash price for such service" as listed online. GS Labs has no obligation to allege a "contract price" beyond the publicly listed price that it established in accordance with the CARES Act. Blue KC's failure

to adapt its claims adjudication processes to the directives of Congress does not undermine GS Labs' properly pleaded cause of action for promissory estoppel.

Blue KC's assertion that it "never promised to pay GS Labs" likewise flies in the face of . Blue KC "promised" through identifiable conduct—paying certain claims in full—that it would convey to GS Labs that coverage for the COVID-19 testing would be afforded. This promise was further supported by the cash price requirement—which Blue KC does not dispute—that the FFCRA and the CARES Act place upon insurers. *See, e.g.*, Pl.'s Am. Compl. ¶ 2 ("Pursuant to laws Congress enacted . . . health insurers and plans must cover certain COVID-19 diagnostic testing," and if "negotiations do not result in agreed-upon rates, the price would then be the provider's publicly posted 'cash price.'"). It was therefore perfectly reasonable for GS Labs to rely on this representation established through Blue KC's conduct. In turn, GS Labs detrimentally relied on Blue KC's promise by continuing to provide its testing services to Blue KC members, and such reliance caused it to suffer damages in the amount pleaded. Doc. 4, ¶ 127. Because GS Labs has sufficiently pleaded the requisite elements, Blue KC's Motion as to Counts III-VI should be denied.

Second, regarding Blue KC's assertion that GS Labs fails to sufficiently allege that Blue KC "requested or authorized its insureds to obtain treatment," no such requirement exists by law, so GS Labs has no obligation to examine whether Blue KC provided prior authorization. For the reasons already provided, the federal government ordered Blue KC—and all insurers—to cover the cost of the COVID-19 testing services—by federal law, Blue KC does not have the ability to "request" or "accept" as it otherwise may for other types of testing. In at least two subsequent joint FAQs spanning two presidential administrations, the Departments repeated this same explanation, specific to prior authorization: "Under the FFCRA, plans and issuers must provide

this coverage without imposing any . . . prior authorization." *See FAQS* 43 at 2 (June 23, 2020); *FAQs 44* at 1-2 (Feb. 26, 2021). Thus, Blue KC's request to individuals is completely irrelevant, as providers are entitled to their payment under the FFCRA and the CARES Act regardless of Blue KC's correspondence it may have had with members. Blue KC's Motion should be denied as to Counts III-VI on this basis.

Third, as to Blue KC's argument that unjust enrichment claim fails because GS Labs "did not confer a benefit" on Blue KC, this claim also fails. Blue KC was enriched by the receipt of the benefit in the form of COVID-19 tests for its members, as well as the related financial windfall of insurance premiums from members and beneficiaries in exchange for out-of-network coverage. In *Air Evac EMS, Inc. v. USAble Mutual Insurance Company*, the Eighth Circuit explained that Arkansas Blue was not unjustly enriched because it was "acting in accordance with its 'contractual rights'" at issue in that case: namely, an "expressly limited reimbursement." 931 F.3d 647, 655 (8th Cir. 2019). There, the court explained that "as long as Arkansas Blue provided that limited reimbursement," the "premium payments Arkansas Blue received in exchange did not constitute money that it ought not to retain." *Id*. (internal quotation omitted). In other words, if Arkansas Blue had *failed* to provide that reimbursement required, then the premium payments may constitute money it ought not to retain. Here, the "contractual rights" concept is the mandate posed by Section 1202(a)(2) of the CARES Act that insurers "shall reimburse" providers, and Blue KC has failed to provide the cash price reimbursement requirement. As such, Blue KC is being unjustly enriched by the premiums received for its out-of-network coverage, and equity demands that Blue KC not retain such amounts.

In addition, 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."[5] 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.

2. Good faith and fair dealing is sufficiently pleaded, or in any event GS Labs requests leave to replead the issue in an amended pleading.

In Count VII, GS Labs alleged that "Blue KC acted in bad faith with the purpose of depriving GS Labs of the rights and benefits under the contract." (See Def's Counterclaim ¶ 170). In addition, GS Labs alleged that the parties entered into a valid contract through their respective acts. (See Def's Counterclaim ¶ 165). As an insurer, Blue KC is contracted with each beneficiary or member through health plans or policies to provide comprehensive health care coverage, including medical diagnostic services. (First Amended Complaint, ¶ 14). Each Blue KC member who sought and received testing from Blue KC assigned their rights regarding that agreement to GS Labs by signing the consent form for treatment. Specifically, each patient who received a COVID-19 test from GS Labs signed a Consent form which contains a provision stating, "I assign to GS Labs all rights and claims for the medical benefits to which I am entitled for the services provided." (*See* First Amended Complaint, Doc. 14, ¶¶ 118, Exhibits F & G). As such, each

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

patient assigned to GS Labs their interest and right to their insurance benefits from Blue KC. In other words, GS Labs became the insured and the contracting party with Blue KC for the purposes of receiving the patient's insurance benefits and gained the right to act as the insured with respect to the COVID-19 tests provided. As such, GS Labs' claim for Blue KC's failure to act in good faith and fair dealing should survive Blue KC's motion to dismiss. Alternatively, GS Labs requests leave to replead this issue in an amended pleading.

3. MPPA is sufficiently pleaded.

Blue KC alleges that GS Labs' claim brought under the Missouri Prompt Pay Act (Mo. Rev. Stat. § 376.383) fails for the following reasons: (1) GS Labs is not a "claimant"; (2) the COVID-19 testing provided by GS Labs is not "health care services"; and (3) GS Labs' claims should not be considered "clean claims." Pl.'s Br. Supp. Mot. at 19.

In this first argument, Blue KC alleges that GS Labs cannot be a "claimant" because it is not "asserting a right to payment arising out of a contract or a contingency or loss covered under a health benefit plan as defined in section 376.1350." Pl.'s Br. Supp. Mot. at 19 (quoting Mo. Rev. Stat. § 376.383.1(1)). GS Labs properly pled that it had an implied contract with Blue KC and is asserting its right to payment arising out of that implied contract. *See* Def.'s Counterclaim ¶¶ 148-161, Doc. 4. Moreover, the "policy" requiring the "contingency or loss" to be covered is Section 3202(b) of the CARES Act, requiring insurers to reimburse providers of diagnostic tests for COVID-19 at the cash price of the service if there was no negotiated rate between the insurer and provider.

Second, Blue KC alleges that GS Labs does not provide "healthcare services" as defined by MPPA because of a statement in a consent form. Essentially, Blue KC alleges the COVID-19 tests provided by GS Labs are not health care services which is remarkable given the current state of the pandemic and importance of testing. The MMPA defines "health care services" as "*a service*

for the diagnosis, prevention, treatment, cure or relief of a health condition, illness, injury or disease, including but not limited to the provision of drugs or medical equipment." Mo. Rev. Stat. § 376.1350) (emphasis added for the portion not included by Plaintiff).

GS Labs properly pled that it provided COVID-19 testing services, and nothing in GS Labs' consent forms suggests that COVID-19 testing is not a healthcare service.[6] The consent form also states that the patient agrees that "GS Labs will report the results of the testing directly to me, my physician, or any health professional that [the patient] request[s]." In other words, the test results are a "*service for the* prevention, treatment, cure or relief of a health condition, illness, injury or disease" as defined by the Missouri statute. As noted by the Food and Drug Administration ("FDA"), while serological tests for COVID-19 "should not be used as the sole basis for diagnosis," it also "advised the Departments that serological tests for COVID-19 meet the definition of an in vitro diagnostic product for the detection of SARS-CoV-2 or the diagnosis of COVID-19." FAQs dated April 11, 2020, at Q.4, available at https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf. Regardless, whether the COVID-19 testing services provided by GS Labs are "healthcare services" under the MPPA is a question to be determined in this case.

Third, Blue KC alleges that GS Labs fails to allege any claim-specific facts in support of its MPPA Count, which "is telling of the public records that illustrate the fact that GS [Labs'] claims were manifestly not 'clean.'" Pl.'s Br. Supp. Mot. at 20. Blue KC broadly argues that "[p]ublic records identify serious concerns that GS [Labs] failed to accurately conduct tests, ordered unnecessary tests, price gouged . . . , remitted incorrect test results to patients, and failed to meet federal laboratory standards." Id. (citing Ex. 1-1 – 1-5). Blue KC avers it is "undisputed"

[6] Moreover, considering the consent forms would turn Blue KC's Motion to Dismiss into a Motion for Summary Judgment, which is inappropriate at this early stage of the proceedings.

that GS Labs' "practices resulted in claims subject to 'particular circumstance requiring special treatment.'" *Id*. (quoting Mo. Rev. Stat. § 376.383)).

While Blue KC argues that GS Labs' claims were not clean, this is a question of fact to be determined, not a failure of GS Labs' pleadings such that dismissal would be appropriate. Section 376.383.3 of the Missouri Revised Statutes required Blue KC to respond within thirty processing days to GS Labs as to whether each claim was clean or whether the claim required additional information. If the claim were clean, Blue KC had to pay or deny the claim; if additional information was needed, then Blue KC had to respond to that additional information within ten days of receipt, including specific reasons for denial if the claim was denied. Mo. Rev. Stat. § 376.383.4. Thus, under the MPPA, Blue KC had a duty to tell GS Labs *within thirty days of receipt of the claim* whether a claim submitted was clean or whether additional information was needed. Instead, as alleged in GS Labs' Counterclaim, Blue KC has simply not paid the claims. *See* Def.'s Counterclaim ¶¶ 173-190, Doc. 4.

The CARES Act requires Blue KC to reimburse GS Labs for the COVID-19 testing services, but Blue KC has refused to pay, instead inappropriately requesting additional medical records for Blue KC's beneficiaries. Moreover, as alleged in the Counterclaim, Blue KC has not provided appropriate or timely responses to GS Labs claims submittals, as required under the MPPA. Accordingly, GS Labs has stated a claim for violation of the MPPA against Blue KC, and Blue KC's Motion should be denied.

V. CONCLUSION

Based on the foregoing, the Court should deny Plaintiff's Motion to Dismiss.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 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 P. DIEHR