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.	)	Cause No.: 4:21-cv-00525-FJG

BLUE KC'S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

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For the reasons stated below and in its Memorandum of Law in Support of its Motion to Dismiss GSL's Counterclaim (Doc. 24), the Court should dismiss GSL's counterclaims.

I. The FFCRA and the CARES Act Do Not Create a Private Cause of Action

GSL admits that the FFCRA and CARES Act do not expressly create a private right of action. Instead, and contrary to every court to have considered the matter, GSL argues the CARES Act establishes an *implied,* freestanding cause. Congress "rarely" creates *implied* private rights of action. *Republic of Iraq v. ABB AG*, 768 F.3d 145, 171 (2d Cir. 2014). "[U]nless Congress speak[s] with a clear voice, and manifests an unambiguous intent to confer individual rights," a court may not infer a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (quotation marks omitted). If Congress is silent or the law ambiguous, courts may not find a cause of action "no matter how desirable that might be as a policy matter." *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286.

GSL relies upon a single provision of § 3202 of the CARES Act, stating health plans "shall reimburse the provider" for certain Covid-19 testing, and suggests that the use of the word "shall" implies a private right of action. Mere use of the word "shall" does not imply a private right of action. *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 709 F.3d 584, 586 (6th Cir. 2013) (statutory language "Amtrak shall [ ] redeem all common stock previously issued" did not imply private action); *Chan v. City of New York*, 1 F.3d 96, 102 (2d Cir. 1993) (statute requiring employer to pay federally mandated prevailing wages did not imply freestanding right of action); *Kogan v. Robinson*, 432 F. Supp. 2d 1075, 1077 (S.D. Cal. 2006) (statutory language "chief executive officer and chief financial officer of the issuer shall reimburse the issuer. . ." did not imply private right of action).

The CARES Act was passed to protect the public health, not the financial interests of for-profit testing operations. The relevant subpart of the CARES Act, entitled "Access to Health Care for

COVID-19 Patients" (Title III, Part II of the CARES Act), evinces a congressional intent to assist ***the public***. Similarly, § 6001(a) of the Families First Coronavirus Relief Act ("FFCRA"), Public Law No: 116-127 (03/18/2020), and § 3202 of the CARES Act focus on regulating certain entities in order to benefit ***the public***. The text, structure, and historical context of the legislation form a clear congressional intent to benefit the public - not for-profit testing operations.

Congress knows how to grant a private right of action when it sees fit. For example, separate portions of the FFCRA provide private redress for denial of emergency paid leave and expressly incorporate the enforcement provisions of the Fair Labor Standards Act and the Family and Medical Leave Act. *See*, FFCRA §§ 5102, 5105 and 29 C.F.R. §§ 826-150(b) and 151(b). *See Universities Rsch Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981) ("when Congress wished to provide a private damages remedy, it knew how to do so, and did so expressly").

The text and structure of the FFCRA, as amended by § 3201 and § 3202 of the CARES Act, creates an express delegation of enforcement of Covid diagnostic testing, coverage, and reimbursement provisions to the federal government, not private parties. Where Congress provides for agency enforcement, there is "a strong presumption against implied private rights of action." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007); *Mills v. Bluecross Blueshield of Tenn., Inc.*, No. 3:15-CV-552, 2017 WL 78488 at * 6 (E.D. Ten. Jan. 9, 2017) (court found no implied right of action under the Affordable Care Act because "enforcement of these requirements [is left] to the states and the Secretary of Health and Human Services, not individuals"). Congress delegated the authority to remedy statutory violations to the Departments of Health and Human Services, Labor, and Treasury, along with implementation of the provisions through sub-regulatory guidance, program instruction or otherwise. CARES Act §§ 6001(b), (c). GSL argues that the express enforcement provisions of §§ 6001(b) and (c) do not apply to the CARES Act but that interpretation would deprive federal

regulators of the authority to implement and enforce the CARES Act. The provisions of the CARES Act at issue are amendments to the FFCRA that must be read in harmony.

Moreover, even without the express regulatory enforcement provisions identified in the Covid legislation, health insurers and a group health plans are heavily regulated and can be subjected to severe penalties for arbitrary claim denials. State laws require insurers be licensed before selling their products or services. Mo. Rev Stat. § 375.014. Insurers who fail to comply with regulatory requirements are subject to license suspension or revocation, and states may exact fines for regulatory violations. *See generally* Mo. Rev Stat. § 374.205 (market conduct examinations); Mo. Rev Stat. § 374.046 (administrative hearings regarding violation of insurance laws); Mo. Rev Stat. § 374.280 (description of penalties up to and including revocation of license). Moreover, the Department of Labor (DOL) routinely investigates ERISA-governed fiduciaries and service providers and may bring enforcement actions. 29 U.S.C. § 1132(a)(2); *New York v. United States Dep't of Lab.*, 363 F. Supp. 3d 109, 128 (D.D.C. 2019) ("Congress tasked DOL with administering ERISA"). In short, insurers and plan administrators are heavily regulated by State and Federal authorities and the arbitrary failure to pay legitimate claims may be met with swift coercive measures from those regulators.

GSL cites *Washington v. Fed. Nat'l Mortg. Ass'n*, Case No. 4:20-00974, 2021 WL 2371506 (W.D. Mo. June 9, 2021), for the proposition that at least one court allowed a claim under the CARES Act to proceed. In *Washington*, the District court expressly held that "any claim Plaintiff makes as to a violation of the [foreclosure moratorium under the] CARES Act goes not to an independent cause of action, but rather to support the justification element of tortious interference." *Id.*, at *5. In the instant case, of course, GSL seeks to create a freestanding cause of action under the CARES Act. *Washington* provides no support to GSL. The only two arguments raised by Defendant in that case hinged on substantive provision of the CARES Act inapplicable to the current litigation. Defendant there did not raise the arguments now raised by Blue KC and, consequently, the district court did not

consider those arguments. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (explaining that courts must "follow the principle of party presentation"). *Washington* is not persuasive for any relevant point in this litigation.

GSL's other authorities also provide no support for its position. *Ctr. for Special Needs Tr. Admin., Inc. v. Olson*, involved a claim to determine if spending power legislation conferred an enforceable "federal right" under § 1983, not implied causes of action. 676 F.3d 688, 699-700 (8th Cir. 2012); *see also Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (declining to find a private right of action to enforce Title VI because the statutory text did not display any Congressional intent to create a private right of action); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1328 (2020) (analyzing a waiver of sovereign immunity under Tucker Act, not implied causes of action).

Further, GSL's claim for declaratory judgment should be dismissed because there is no appreciable difference between the relief requested in Counts I and II. In Count I, GSL alleges that Blue KC is "obligated to pay the provider its posted cash price for providing [testing] services [pursuant to the FFCRA and the CARES Act]," and seeks monetary damages in an amount determined by the Court. (Counterclaim, ¶ 106, Doc. 4 at p. 45). GSL makes the identical allegation in Count II and seeks a declaration that Blue KC is required to pay GSL its posted cash price for testing services. (Counterclaim, ¶ 115, Doc. 4 at p. 47).

Where a federal statute does not imply a right of action, the Declaratory Judgment Act may be not used to evade that congressional intent. *Iolani Islander, LLC v. Stewart Title Guar. Co.*, No. CV 16-00429 ACK-RLP, 2017 WL 11139924, at *8 (D. Haw. Nov. 7, 2017) ("Declaratory Judgment Act may not be used as an end run around claims that would otherwise not be available"); *Adams v. Am. Fam. Mut. Ins. Co.*, No. 4:13-CV-226, 2014 WL 11788532, at *8 (S.D. Iowa July 15, 2014) , amended, No. 4:13-CV-226, 2014 WL 11636150 (S.D. Iowa Oct. 8, 2014), and aff'd, 813 F.3d 1151 (8th Cir. 2016); *Kwiatkowski v. Hartford Fire Ins. Co.,* No. 208CV00730BESLRL, 2009 WL 10679299, at *4 (D.

Nev. Jan. 29, 2009) ("a plaintiff's complaint does not properly state a claim for relief under the Declaratory Judgment Act unless the state statute allegedly violated expressly or impliedly provides a private cause of action to remedy violations.") GSL cites *NTD I, LLC v. Alliant Asset Mgmt Co., LLC*, No. 4:16-CV-1246, 2017 WL 605324 (E.D. Mo. Feb. 15, 2017) in support of its position that Counts I and II are not duplicative. *NTD I* simply stands for the uncontested (and inapplicable) concept that a declaratory judgment may be used to determine rights under a limited partnership agreement. Here, however, GSL seeks to misuse the Declaratory Judgment Act to create an impermissible, stand-alone private damages action.

II. GSL's Counterclaim is Impermissibly Vague

GSL is required to plead facts establishing the individual services at issue were provided, medically necessary, and otherwise payable. Nothing in the CARES Act deprives health plans of the ability to ensure that Covid testing claims involve services actually rendered and all otherwise payable. "[P]lans and issuers may continue to employ programs designed to detect and address fraud and abuse." https://www.cms.gov/files/document/faqs-part-44.pdf, FAQ No. 2. Mandated coverage for covid testing is not automatic; instead, a provider must meet a number of requirements including that the test be "diagnostic and medically appropriate for the individual, as determined by an attending health care provider in accordance with current accepted standards of medical practice." *See, FAQs, Part 43, Q6*.; *FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43*, June 23, 2020, Q3. GSL has not pled facts plausibly inferring each of its claims are payable.

III. The Majority of GSL's Claims are Preempted and Must Be Dismissed

A. ERISA Broadly Preempts State Law Claims

GSL may not use state common law to obtain benefits from ERISA-governed plans. Those claims are preempted. "[A]ny state-law cause of action that duplicates, supplements, or supplants the

ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted." *Aetna Health, Inc. v. Davila,* 542 U.S. 200, 209 (2004); *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 140 (1990) ("a state law cause of action is expressly preempted by ERISA where a plaintiff, in order to prevail, must prove the existence of, or specific terms of, an ERISA plan").

GSL attempts to deflect the well-established preemptive effect of ERISA by arguing that the Counterclaim centers around the "rate of payment" instead of the "right of payment". It is worth noting that GSL admits that "disputes regarding 'right of payment' relate to 'coverage and eligibility under the terms of the welfare plan [and] are pre-empted by ERISA,' such as disputes over whether a service is 'medically necessary.'" Doc. 38, p. 19. Placing aside whether the "right to"/"rate of" payment analysis is even appropriate, GSL, again, misses the mark. The current lawsuit presents a dispute over GSL's ***right to any payment***. *Compare* Doc. 14, p. 37 *with* Doc 4 at p.57-58. The payment of its claims, in total, is at issue for reasons described in prior briefing. *See* Doc. 42, p.5. Blue KC would further deny GSL is entitled to any payment until GSL can demonstrate (1) each service was rendered as billed (2) the services were diagnostic in nature, not merely informational, and (3) the services were ordered by a licensed clinician. Because GSL's counterclaims involve the right to any payment, even according to GSL, its claims are preempted.

B. Claims Relating to the FEP and Medicare Advantage Are Preempted

GSL argues that its claims derive solely from an independent legal duty arising from the FFCRA and the CARES Act and, therefore, the terms and conditions related to coverage and reimbursement under the programs are immaterial. GSL pronounces "FEHBA 'contract terms' are irrelevant to GSL's claims." But program terms such as enrollment, claims processing procedures, and provider rights under that program (if any) are intertwined with GSL's claims. With respect to Medicare Advantage, GSL argues, "GSL is not seeking payment of Medicare benefits; it is seeking

payment of its 'cash price' of services." Doc. 38 p. 22. But again, its logic is deeply flawed, GSL attempts to play semantics to avoid the obvious result – it seeks payment from the Medicare Advantage and FEHBA enrollees. Even if these programs were subject to the FFCRA 6001(a) mandate, which GSL has not even attempted to argue, the state law claims seeking benefits under these programs and are preempted. *See* FFCRA § 6003.

IV. GSL's State-law Courts Fail to State Viable Claims

A. GSL Fails to State a Claim for Quasi-Contract, Promissory Estoppel, Unjust Enrichment, Quantum Meruit, and Breach of Implied Contract (Counts III – VI)

GSL's premise that "Blue KC 'promised' through identifiable conduct" to pay claims in full does not provide an actionable claim for promissory estoppel. A claim of promissory requires an explicit, definite promise. *Zipper v. Health Midwest,* 978 S.W.2d 398, 411 (Mo. Ct. App. 1998). ***"The promise giving rise to the cause of action must be definite, and the promise must be made in a contractual sense***." *Id.* (emphasis added). GSL cannot identify ***any promise*** that Blue KC made to it because Blue KC never promised GSL anything. *See Steven T. Huff LLC v. Monarch Cement Co.*, No. 15-03214-CV-S-BP, 2017 WL 10506793, at *7 (W.D. Mo. June 19, 2017) (summary judgment granted where Plaintiff could identify no specific promise made and no conversations between the parties); *Tension Envelope Corp. v. JBM Envelope Co.*, No. 14-567-CV-W-FJG, 2014 WL 3375503, at *3 (W.D. Mo. July 7, 2014) (statement on website expressing company policy without definite promise was not a definite promise.)

GSL's citation to *Air Evac EMS, Inc. v. USAble Mutual Ins. Co.*, does not redeem its claims. In that matter the Eighth Circuit ***affirmed the district court's dismissal of the unjust enrichment*** and implied contract claims. In *Air Evac EMS, Inc.*, the Eighth Circuit affirmed because, under the facts of that case, the reimbursement the insurer provided was expressly described by the relevant contract. 931 F.3d 647, 655 (8th Cir. 2019). Those circumstances have little bearing on the current

case where there is no express agreement or explicit promises. GSL commits logical fallacy of assuming that because the Court discussed one sufficient reason to dismiss the claim, the suit must have been sufficient in every other respect. This, of course, is faulty reasoning and contrary to many other authorities holding a medical provider is unable to state a claim against an insurer for unjust enrichment because the insurer has received nothing of value from the provider. Doc 24 at p. 24-25; *See, e.g., Hialeah Physicians Care, LLC v. Conn. Gen. Life Ins. Co.*, No. 13-21895, 2013 WL 3810617, at *4 (S.D. Fla. July 22, 2013) (dismissing provider's unjust-enrichment claim against an insurer because provider "can hardly be said to have conferred any benefit, even an attenuated one, upon the Plan's insurer by providing Plan beneficiaries with health care services"); *Encompass Off. Sols., Inc. v. Ingenix, Inc.*, 775 F. Supp. 2d 938, 966 (E.D. Tex. 2011) (same); *Broad St. Surgical Ctr.*, 2012 WL 762498, at *8 (D.N.J. Mar. 6, 2012) (same). The great weight of authority holds there can be no unjust enrichment where the provider conferred no benefit on the insurer.

B. GSL Fails to State a Claim for Breach of Covenant of Good Faith and Fair Dealing (Count VII)

As noted above, there was no contract or other promises made by Blue KC. Nevertheless, GSL now claims its Count VII arises from its status as assignee as a result of language in its consent form stating, "I assign to GSL all rights and claims for the medical benefits to which I am entitled for the services provided." Doc. 38. P. 26 The term "assignment" appears nowhere in GSL's pleading and should not be considered in the motion to dismiss. GSL's Count VII speaks in terms of duties of good faith and fair dealing *owed to GSL*, not duties owed to insureds and then assigned to GSL. *See* Doc 54. ¶ 171. Count VII should be dismissed for that reason alone.

However, even if the Court were to examine GSL's purported status as assignee, the claims should still be dismissed. The purported assignment language is narrow and does not extend to the services GSL provided. *See Air Evac*, 931 F3d at 652 (interpreting narrow assignment). The purported assignments here only extend to "claims for ***medical benefits*** to which [the patient is] entitled for

the services provided." But GSL disclaims it provides any ***medical*** services. *See* Doc. 14-6, 14-7 ("The lab is not acting as my medical provider and does not replace treatment by my primary medical provider"; the tests are provided "for informational purposes only."). Thus, even if GSL had intended to take assignments of medical benefits claims, the plain language of the assignments would not reach here because GSL did not provide medical services.

Finally, GSL has neither stated facts nor explained how Blue KC breached a duty of good faith ***owed to its insureds.*** The tort of bad faith is inapplicable to a first party insurance context and the contractual covenant of good faith is not implicated because GSL has not plausibly explained how GSL exercised ***discretion*** in a manner adverse to the insureds. *See Duncan v. Andrew Cty. Mut. Ins. Co.*, 665 S.W.2d 13, 19 (Mo. Ct. App. 1983) (bad faith tort claim unavailable in first party context); *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 369 (Mo. Ct. App. 2008) (describing duty of good faith as limiting how contractual discretion may be exercised); *Magruder Constr. Co. v. Gali*, No. 4:18-CV-00286 JAR, 2020 WL 1512478, at *5 (E.D. Mo. Mar. 30, 2020) ("Ordinary contract principles require that, where one party is granted discretion under the terms of the contract, that discretion must be exercised in good faith – a requirement that includes the duty to exercise the discretion reasonably."); *Cordry v. Vanderbilt Mort. & Finance, Inc.*, 445 F3d 1006, 1112 (8th Cir. 2006). The parties present a binary dispute – Blue KC had an obligation to pay (according to GSL) or it did not (according to Blue KC). Good faith and fair dealing are immaterial. GSL neither pled facts plausibly asserting a tort of "bad faith" nor an improper exercise of contractual discretion violating the duty of good faith. Count VII should be dismissed.

C. GSL Fails to State a Claim Under the MPPA (Count VIII)

GSL cannot run from its own consent forms. These forms, and all other documents submitted by Blue KC may be considered without converting the motion into a motion for summary judgment.

> [C]ourts additionally consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record

> of the case, and exhibits attached to the complaint whose authenticity is unquestioned;" without converting the motion into one for summary judgment.

Miller v. Redwood Toxicology Lab'y, Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012). The consent forms are integral to GSL's claims. *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (consent form properly considered in evaluating motion to dismiss). Further, GSL has not disputed the authenticity of the documents (Doc 4. ¶ 85) and even relies upon those same forms (Doc. 38. P.26).

These forms make it very clear that GSL was not providing medical or diagnostic services. The forms state the testing was provided "for informational purposes only" and without creating a "patient relationship with GSL"; GSL was not "acting as [the patient's] medical provider[]." Doc.14-6, 14-7. While, the forms offer patients with the option to forward the results to a physician this does not elevate GSL's status from "informational only" test to a diagnostic health care provider. GSL was not "diagnosing" or providing "health care services" and cannot assert a claim under the MPPA.

Further, GSL has not pled facts plausibly alleging that its claims were "clean." It has baldly pleaded a legal conclusion. Doc. 4, ¶ 178. This legal conclusion is entitled to no weight. *Glick v. W. Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019). GSL has failed to plead facts demonstrating its claims had no defects or improprieties, included all substantiating documentation, and there were no circumstances requiring special treatment. In light of the public records detailing serious concerns with GSL's testing, safety, and pricing, GSL cannot satisfy with this pleading requirement.

CONCLUSION

Blue KC respectfully requests that this Court dismiss GSL's Counterclaim ***with prejudice***.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically using the Court's ECF filing system the 5th day of October 2021, with the Clerk of the Court to be served by operation of the Court's electronic filing system upon counsel of record below:

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