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 REPLY SUGGESTIONS IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT

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I. INTRODUCTION

From the outset of the pandemic, Congress recognized the fundamental role that testing would play in saving American lives and avoiding a pandemic-fueled economic collapse. Congress worked with extraordinary speed and near unanimity to pass two of the most ambitious pieces of legislation in history: the Families First Coronavirus Response Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Those wide-ranging bills both placed particular emphasis on helping to scale up America's testing capacity. The FFCRA mandated that health-insurance companies cover COVID testing and prohibited them from imposing cost-sharing requirements and other restrictions on testing. The CARES Act set forth specific and carefully crafted rules for how insurance companies must reimburse COVID testing providers. In particular, Congress recognized that the rapid creation of an entirely new testing system likely would result in many tests being performed by providers who had no pre-existing relationship with insurers. Thus, Congress provided a specific rule in Section 3202(a) of the CARES Act that would govern if the testing provider and the insurer had not previously negotiated rates: the insurer "***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."

GS Labs has conducted hundreds of thousands of COVID tests since the start of the pandemic. As contemplated by the CARES Act, GS Labs posted the cash price for its tests on the company's website. Many insurers have reimbursed GS Labs at that price for COVID testing as required by the CARES Act—including the very third parties for whom Blue KC administers or manages claims (hereinafter, the "Third Party Payors") and purports to sue on behalf of here. Critically, over 1,500 individuals have purchased tests at the publicly listed cash price as well.

Blue KC appears to realize the gravity of its attempt to pay absolutely nothing for COVID testing that so greatly benefited its members, and so it continues to craft an untrue narrative that

GS Labs' cash price was applied to insurers, but another lower price was applied to individuals. Blue KC knows that if over 1,500 individuals made the judgment that GS Labs' reliable and convenient service was worth paying GS Labs' publicly listed cash price, its efforts to portray GS Labs as disaster profiteers suffers significant setback. Blue KC knows that if plans that Blue KC itself administers paid GS Labs' publicly listed cash price, there is no reason why it should be excused from doing so. And so Blue KC here has purported to sue on behalf of the Third-Party Payors to shift the narrative, alleging a fanciful claim for unjust enrichment and seeking restitution for an amount rightfully paid to GS Labs.

But Blue KC's claim for unjust enrichment suffers significant maladies, most notably an inability to appropriately plead the elements of this cause of action and a failure to allege fraudulent conduct with sufficient particularity. This last failure on Blue KC's part warrants particular scrutiny—Blue KC newly opines in its Response that GS Labs committed a "criminal scheme," but does not allege such misconduct in its First Amended Complaint. For dramatic flair, Blue KC opens its Response with a quote from the FBI concerning "unchecked fraud," warning against scenarios that are neither alleged in the pleadings nor tangentially relevant in this case. *See* No. 42 at 1. And even while Blue KC refuses to concede that Rule 9(b) applies, *See id*. at 1, it lodges increasingly sensational claims at Blue KC that can serve only to obfuscate from the issues truly before the Court, it continues to attach items outside the pleadings for the Court's consideration at the motion to dismiss stage, and it continues to wage a campaign of commercial disparagement against GS Labs in the hope that it wins a broader victory that might allow it to escape paying millions owed to out-of-network providers. This approach must fail, and the claims raised in the First Amended Complaint should be dismissed.

II. COUNT III SHOULD BE DISMISSED IN ITS ENTIRETY.

A. Blue KC Should be Held to the Pleading Standard of Rule 9(b) and Falls Woefully Short.

Blue KC claims that it "does not concede" that it must satisfy Rule 9(b)'s heightened pleading standard for fraud claims. This statement comes in a brief that repeatedly describes GS Labs's business model as fraudulent, expressly uses variations of "fraud" dozens of times, directly accuses GS Labs of violating the federal healthcare-fraud statute, and argues that ERISA does not apply to claims sounding in fraud. Eighth Circuit precedent makes clear that 9(b) applies to claims like Blue KC's that are "grounded in fraud" and whose "core allegations effectively charge fraud." *See, e.g., Streambend Property II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1010-11 (8th Cir. 2015); *Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1010 (D. Minn. 2012) (in case including an unjust enrichment claim, instructing that the "claims alleged in this case sound in fraud and are thus subject to the heightened pleading standard"); *id*. at n. 5 (citing *United States v. Henderson*, No. 03-5060, 2004 WL 540278, at *2 (D. Minn. Mar. 16, 2004) ("The Court will apply the heightened pleading standard of Rule 9(b) to the unjust enrichment claim, because allegations of fraud underlie the unjust enrichment claim.")).

Recognizing the weakness of its contention that a fraud-based unjust-enrichment claim need not satisfy Rule 9(b), Blue KC also asserts that it has pled that claim with particularity. It has not. For one thing, many of the most fundamental allegations underlying Blue KC's fraud-based claims are made "on information and belief": the alleged dates of the relevant reimbursement claims, ECF No. 14, ¶ 94; the allegations that GS Labs submitted claims without appropriate physician involvement, *id.* ¶¶ 101-102; the allegations that GS Labs had coerced or otherwise wrongfully induced patients to undergo multiple kinds of tests, *id.* ¶ 111 (making clear that the allegations in ¶¶ 109-110 were made on information and belief); and, perhaps most importantly,

the allegation that GS Labs charged individuals without financial hardship a lower cash price than the one billed to Blue KC, *id.* ¶ 152. "Allegations pleaded on information and belief usually do not meet Rule 9(b)'s particularity requirement." *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009). Blue KC has not even argued—let alone demonstrated—that information regarding such matters is solely within the control of GS Labs. Moreover, with the possible exception of ¶¶ 109-110, Blue KC has provided no explanation as to the evidence supporting its information and belief. "If the plaintiff's allegations of fraud are explicitly based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief." *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 590 (8th Cir. 2018) (quotation and ellipsis omitted). Blue KC has plainly failed to satisfy this standard, perhaps because actual evidence directly refutes the false narrative on which its claims rest. This is particularly important here, where Blue KC's entire argument hinges on its information-and-belief allegation that GS Labs had a secret, lower price that it allowed individuals to pay. ECF No. 14, ¶ 152. The Court should dismiss Count III for failure to allege with the requisite particularity.

B. Count III Should Be Dismissed Because Blue KC Fails to Plead Circumstances That Are Unjust.

Leaving aside the failure to plead its fraud-based unjust enrichment claim with the requisite particularity, Blue KC likewise cannot plead circumstances that are unjust—the most significant showing it must make to adequately plead a claim of unjust enrichment. *Assoc. Eng'g Co. v. Webbe*, 795 S.W.2d 606, 608 (Mo. App. E.D.1990) ("This last requirement—that the enrichment of the defendant be unjust—is the most significant and, indeed, is the most difficult of all the elements to apply."); *S&J, Inc. v. McLoud & Co.*, 108 S.W.3d 765, 768 (Mo. App. S.D. 2008) ("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."). To prop up its claim, Blue

KC launches into meritless accusations that GS Labs has violated the federal healthcare-fraud statute and state deceptive practice statutes.

GS Labs has been as transparent as possible about its pricing. GS Labs charged a cash price, posted on its public website, that applied equally to insurers and individuals paying out of pocket. Numerous insurers and more than 1,500 individuals paid that cash price. When justified by patients' financial limitations, GS Labs provided need-based discounts to individuals paying out of pocket. Those are the facts underlying Blue KC's unjust-enrichment claim. There is nothing unjust about expecting an insurer to abide by the plain terms of the CARES Act. There is nothing unjust about expecting Blue KC to pay the same prices as competing insurers and individual patients. And there is certainly nothing unjust about providing need-based discounts to uninsured individuals to ensure that every member of the Kansas City community could access critical COVID testing regardless of their wealth or employment. Quite simply, there is nothing unjust about the transactions at issue here other than Blue KC's refusal to pay the amounts it owes.

Turning to Blue KC's remaining arguments, Blue KC simply assumes what it is trying to prove—that GS Labs' cash price is too high—and reasons onward from that jumping off point. The CARES Act was unprecedented in its sweep, requiring insurance carriers like Blue KC to adjust their claims adjudication processes and to engage in meaningful dialogue with providers like GS Labs. Rather than adapt to this landscape, Blue KC launches spurious allegations specifically to undo the regime that the CARES Act ushered into existence, determined to malign GS Labs and examine every alleged misstep it made in entering a high-pressure industry during a global pandemic. But GS Labs stands behind its product—focusing only on the *availability* that GS Labs offered to Blue KC's members, how many Blue KC members would have been hospitalized, or how many of their close contacts would they have infected, had GS Labs not

provided COVID testing to thousands of its members? Blue KC's hyperbolic claim GS Labs could charge $4 million dollars per test under its rationale misses the mark—GS Labs has made no such ridiculous assertion but rather seeks only the cash price that it set in accordance with §3202 of the CARES Act. Blue KC's position taken to its logical conclusion is likewise absurd, that it owes nothing, not a single penny for the critical COVID testing provided by GS Labs. The difference here is that Blue KC actually urges this result in this litigation.

The Court should dismiss Count III for failure to allege unjust circumstances.

C. Count III Should Be Dismissed As a Matter of Law for Money GS Labs Did Not Directly Receive.

Blue KC acknowledges in its Response that GS Labs may not have even received certain funds by which it was allegedly "enriched," but shrugs this off and assumes GS Labs did. *See* ECF No. 42, pg. 16 (explaining Blue KC "paid the claims to FEP enrollees, who then, according to GS Labs' consent forms, were obligated to pay those monies over to GS Labs"). Blue KC then cites *Pharmacia Corp Supplemental Pension Plan ex rel. Pfizer Inc. v. Weldon* for the proposition that "the location of the specific funds" does not matter in an unjust enrichment claim at this stage. 126 F. Supp. 3d 1061, 1069 (E.D. Mo. 2015). However, the court there was analyzing an ERISA claim, not an unjust enrichment claim. Eighth Circuit and Missouri courts are clear that an unjust enrichment claim requires facts showing that the plaintiff directly paid the defendant. *See, e.g.*, *Stockdall v. TG Investments, Inc.*, 129 F. Supp. 3d 871, 880 (E.D. Mo. 2015) (dismissing an unjust enrichment counterclaim where the defendant failed to allege that the benefit "conferred upon [Stockdall et al.] was conferred by TGI"); *Am. Civil Liberties Union/E. Mo. Fund v. Miller*, 803 S.W.2d 592, 595 (Mo. 1991) (an "essential element" is a "benefit conferred upon the defendant by the plaintiff"). Because Blue KC does not allege that it directly conferred any benefit to GS Labs, Count III should be dismissed as to the FEP claims.

D. Blue KC Lacks Standing to Claim Unjust Enrichment On Behalf of Third Parties.

For the first time in its Response, Blue KC specifies it is seeking restitution as to "approximately 379 claims" paid by third parties for whom it allegedly administers or manages claims. ECF No. 42 at 12. Yet, Blue KC still does not attempt to explain how Blue KC suffered an injury when these plans paid the posted cash price, let alone the amount of this injury. To the extent that Blue KC is attempting to appropriate the Third Party Payors' particularized injury as a workaround for Article III standing for each such plan, Blue KC cannot avoid its failure to allege how it was personally and individually harmed in a concrete way by these payments being made. *See* Mot. at 9; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To the extent that Blue KC's funds were used to make such payments at the cash price, including as to fully insured plans, an injury "must actually exist" as to Blue KC. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Blue KC has failed to allege an injury that is concrete and particularized, such that it fails to satisfy its basic Article III threshold for standing.

E. Count III Fails to the Extent ERISA Governs the Payment Mechanism at Issue.

Blue KC argues that Count III claims are "common law claims, not ERISA claims"—but Blue KC cannot use ERISA as both a sword and a shield. GS Labs maintains the same position it took nearly a month ago: this is not an ERISA case at all. Mot. at 16. GS Labs maintains that ERISA does not apply, because the payment provision at issue is set forth in Section 3202(a) of the CARES Act, not ERISA. But Blue KC has asserted claims under ERISA and, to the extent ERISA does apply, as GS Labs asserts, then Blue KC's state law claim disputing GS Lab's *right* to payment for benefits under ERISA plans is preempted. The parties *agree* that claims contesting the "right of payment" are generally preempted by ERISA, while "rate" of payment claims are not.

See ECF No. 45 at 6; *Cardinal Neurosugery & 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). Blue KC's claims and request for relief implicate the right to payment. The claims do not turn on whether Blue KC should pay a particular "rate," but rather clearly assert that "all amounts paid to GS Labs . . . be returned" and that Blue KC has "no obligation to pay the claims."[1] ECF No. 14 ¶ 199. Further, by seeking the full amount of money the Third-Party Payors paid, Blue KC is not bringing a claim for "equitable" relief; it is simply seeking a return of what was paid at the cash price and thus is akin to "compensatory damages," which is preempted under ERISA. *See Dakotas & W. Minn. Elec. Indus. Health & Welfare Fund v. First Agency, Inc.*, 865 F.3d 1098, 1102 (2017) (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (dismissing claim for equitable restitution because a suit "to compel the defendant to pay a sum or money" were sufficiently suits for "money damages")). Framed as such, Blue KC's claim is preempted to the extent ERISA applies. *See Cardinal Neurosurgery*, 2011 WL 13254420, at *3.

III. COUNT I SHOULD BE DISMISSED TO THE EXTENT BLUE KC SEEKS DECLARATORY RELIEF UNDER ERISA.

Blue KC acknowledges that Section 502(a)(3) is limited to remedies that provide equitable relief, but ignores the threshold question of whether it may seek declaratory relief under ERISA in this instance, when the payment provision in dispute originates in Section 3202(a) of the CARES Act. Section 1132(a)(3) of ERISA explicitly states that a civil action may be brought by a plan participant or beneficiary for equitable relief to "redress such violations" of "this subchapter [of ERISA] or the terms of the plan," or "to enforce any provisions of this subchapter or the terms of

[1] Blue KC's claims and request for relief differ from that of GS Labs' in an important respect. Instead of Blue KC seeking "all amounts" and that it has "no obligation" to pay GS Labs' claims, GS Labs' counterclaims are seeking a specific amount owed that arises under Section 3202(a) of the CARES Act. As GS Labs explained in more detail in prior briefing, GS Labs' claims "are not preempted because its basis for seeking relief is about the *rate* of payment owed: the cash price." ECF No. 38 at 8 (emphasis added).

the plan." 29 U.S.C. § 1132(a)(3). The equitable relief Blue KC seeks addresses neither, ignoring this crucial threshold inquiry and instead devoting pages to the history of ERISA policy considerations. *See* ECF No. 42 at 21-24. Blue KC ultimately emphasizes a wildly untrue accusation—that GS Labs has "threat[ened] to balance bill" Blue KC's members—to assert its "need" and "right" to bring an ERISA claim under 502(a)(3). *Id*. at 23. To date, GS Labs has not sought payment from any Blue KC member.

The obligation for Blue KC to pay GS Labs' posted cash price originates in Section 3202(a) of the CARES Act, and this requirement applies regardless of whether the individual tested is covered by an ERISA plan.[2] GS Labs does not identify any term of any plan that is actually at issue here. As such, this is simply not a claim for equitable relief *under ERISA*. While notably, GS Labs is not seeking to dismiss Blue KC's request for declaratory relief in Count I more generally at this time, Blue KC may not seek declaratory relief (and fees) specifically under ERISA. Count I should be dismissed on this limited basis.

IV. CONCLUSION

Based on the foregoing, the Court should grant GS Labs' Partial Motion to Dismiss, and dismiss Count III in its entirety and Count I for any declaratory relief Blue KC seeks under ERISA.

[2] Blue KC cannot rely on *Washington v. Federal National Mortgage Association*, Case No. 4:20-cv-974, 2021 WL 2371506 (W.D. Mo. June 9, 2021). In that case, the court allowed a plaintiff to proceed on a state-law tortious interference claim and a declaratory-judgment count. In *Washington*, the declaratory-judgment count alleged a potential violation of the CARES Act. Here, Blue KC misunderstands the relevant federal law, invoking ERISA rather than the CARES Act. And Blue KC fails to allege a potential violation of the CARES Act; indeed, it all but admits to violating the CARES Act through its persistent refusal to pay GS Labs's cash price.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 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
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