**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

GS LABS, LLC,

Plaintiff,

v.

MEDICA INSURANCE COMPANY,

Defendant.

Case No.: 21-cv-2400 (SRN/TNL)

**MEDICA INSURANCE COMPANY'S MOTION TO DISMISS**

Medica Insurance Company hereby moves the Court for an Order dismissing the complaint filed by GS Labs, LLC in its entirety for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The grounds for this motion are set forth in the accompanying Memorandum of Law and Declaration of Charlie C. Gokey.

December 23, 2021

Respectfully submitted,

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v. Case No.: 21-cv-2400 (SRN/TNL)

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Defendant.

**MEDICA INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS GS LABS, LLC'S COMPLAINT**

Defendant Medica Insurance Company submits this memorandum of law in support of its Motion to Dismiss GS Labs, LLC's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and further states as follows.

## INTRODUCTION

GS Labs asks this Court to do what other courts throughout the United States have uniformly refused to do: imply a private cause of action under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020). Each of its claims depends on the Court supplying the cause of action Congress omitted from the CARES Act, whether directly or by contorting the common law of Minnesota to that end. Because GS Labs cannot offer any plausible legal basis for this extraordinary relief, all of its claims fail.

GS Labs is a COVID-19 testing laboratory that has exploited the pandemic for its own financial benefit. It has gained nationwide notoriety for charging prices far higher

than other labs. *See, e.g.*, Sarah Kliff, *This Lab Charges $380 for a Covid Test. Is That What Congress Had in Mind?*, New York Times (Sept. 26, 2021) ("Health policy experts who reviewed the GS Labs prices said that, even with the company's investment in its service, it was hard to understand why their tests should cost eight times the Medicare rate of $41."). Indeed, GS Labs has charged prices so extreme it received a cease and desist letter from the Kansas Attorney General's Office accusing it of "profiteering from a disaster" and price gouging, after which GS Labs ultimately closed down its operations in that state. *See* Schwartz Decl. Ex. G (ECF 16-2), *Blue Cross and Blue Shield of Kansas City v. GS Labs, LLC*, No. 8:21-cv-00466 (D. Neb. Dec. 9, 2021). Beyond price gouging, GS Labs stands accused in multiple lawsuits of deceiving patients into undergoing medically unnecessary testing, billing insurers for tests it did not perform, regularly failing to maintain minimum quality standards in its testing and reporting of results, and falsifying information in its claims to insurers.[1] GS Labs thus demands insurers, including Medica, pay an incredible premium for testing of dubious legality and quality.

Through this action, GS Labs seeks to compel Medica to pay its unconscionable prices, asking this Court to be the first in the nation to imply a private right of action under the CARES Act. GS Labs seeks this extraordinary relief because the CARES Act provides the only possible legal grounds for its demands that insurers pay its extortionate prices in full. But the CARES Act includes no express private right of action, and binding precedent forecloses GS Labs' attempt to imply one. Indeed, in an unbroken string of

[1] *See Blue Cross and Blue Shield of Kansas City v. GS Labs, LLC*, No. 4:21-cv-00525 (W.D. Mo.); P*remera Blue Cross v. GS Labs, LLC*, 2:21-cv-01399 (W.D. Wash.).

opinions from courts throughout the United States, "every court to address whether the CARES Act created an implied private right of action has held that it does not." *Am. Video Duplicating, Inc. v. City Nat'l Bank*, No. 2:20-CV-04036, 2020 WL 6882735, at *5 (C.D. Cal. Nov. 20, 2020).

GS Labs' efforts to stretch the common law of Minnesota to create a private right of action under the CARES Act similarly fail as a matter of law. GS Labs cannot plead an unjust enrichment claim because (1) it conferred no benefit on Medica (as opposed to Medica's members); (2) it conferred any benefit knowingly and willingly; and (3) there exist express contracts governing the relevant subject matter that foreclose equitable relief. Moreover, the CARES Act cannot support a claim for negligence per se, nor does that doctrine apply where (as here) the plaintiff alleges only *intentional* conduct. GS Labs' request for punitive damages fails without a freestanding claim to support it, and is procedurally improper for its inclusion in the initial complaint. And to the extent that GS Labs' state law claims seek payment from Medica's ERISA plans, these claims are preempted by ERISA. The Court should dismiss GS Labs' complaint in its entirety.

## BACKGROUND

### A. The FFCRA and the CARES Act

Congress passed the Families First Coronavirus Response Act ("FFCRA") on March 18, 2020. *See* Pub. L. No. 116-127, 134 Stat. 178 (2020). The FFCRA requires, among other things, that health insurers cover approved forms of COVID-19 testing at no cost to patients. *See* FFCRA § 6001(a). Congress supplemented the FFCRA with the CARES Act on March 27, 2020. As relevant here, the CARES Act requires that, in the

absence of an agreement to other rates, health insurers must reimburse providers for COVID-19 testing at the "cash price" posted to the provider's website. CARES Act § 3202(a); *see also* Compl. ¶¶ 46-48. Federal regulations implementing the CARES Act define "cash price" as "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 FR 71142, 71152 (Nov. 6, 2020).

The text of the CARES Act does not include a private right of action to enforce the "cash price" requirement of section 3202(a). Rather, the statute entrusts enforcement to the federal government. Section 6001(b) of the FFCRA (titled "ENFORCEMENT") states that the provisions of that law requiring coverage for COVID-19 testing "shall be applied by the Secretary of Health and Human Services, Secretary of Labor, and Secretary of the Treasury to group health plans and health insurance issuers." FFCRA § 6001(b). The provisions of the CARES Act creating the "cash price" requirement apply to "[a] group health plan or a health insurance issuer providing coverage of items and services described in section 6001(a) of division F of the Families First Coronavirus Response Act," which is thus subject to the enforcement powers of the agencies listed above. CARES Act § 3202(a). CMS guidance has likewise indicated "[t]he Departments will enforce the applicable provisions of the FFCRA (*and the related provisions of the CARES Act*)" against insurers. *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43*, at 3 (June 23, 2020) (emphasis added). This is consistent with the statutory

scheme as a whole, which relies on enforcement by federal agencies.[2] For example, section 3202(b) of the CARES Act states that "[t]he Secretary of Health and Human Services may impose a civil monetary penalty on any provider of a diagnostic test for COVID-19" who fails to "make public the cash price for [its diagnostic tests] on [its] public internet website." CARES Act § 3202(b).

Notably, CMS has raised concerns that the "cash price" requirement may encourage "price gouging," and has requested comment on "authorities and safeguards that could be used to mitigate concerns for price gouging both for group health plans and issuers and for consumers receiving a COVID-19 diagnostic test." 85 FR at 71153. According to CMS, "while most providers have been pricing COVID-19 tests at reasonable levels, generally consistent with reimbursement rates set by the Medicare program, . . . some providers have not done so and are using the public health emergency as an opportunity to impose extraordinarily high charges." *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44* (Feb. 26, 2021), https://tinyurl.com/2cyd56xc.

[2] There is one exception to the statutory scheme's reliance on government enforcement: the FFCRA expressly created a right of action for termination in violation of its terms under the Fair Labor Standards Act. *See Kofler v. Sayde Steeves Cleaning Serv., Inc.*, No. 8:20-CV-1460-T-33AEP, 2020 WL 5016902, at *2 (M.D. Fla. Aug. 25, 2020).

**B. The Allegations of GS Labs' Complaint**

Medica takes the following facts as true for purposes of this motion. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1154 (D. Minn. 2010).

"Medica is a Minnesota insurance corporation." Compl. ¶ 8. GS Labs is a clinical laboratory system that has performed COVID-19 testing on "16,000 . . . Medica insureds." *Id*. ¶¶ 12-14, 25. It "submitted requests for reimbursement to Medica and billed for the relevant testing services" at the rates posted to its website. *Id.* ¶ 37. Medica "withheld full reimbursement"—*i.e.*, it paid for testing at rates lower than the prices GS Labs demanded. *Id.* ¶¶ 39, 41-42. The parties engaged in "several months of discussions," but could not agree on an "appropriate price." *Id.* ¶¶ 41-42; *see also id.* ¶¶ 53-56. Because GS Labs and Medica could "not agree[ ] upon a different negotiated cash price . . . their discussions have broken down and are at an impasse." *Id.* ¶ 56. Based on the foregoing, GS Labs brings claims for (1) violations of the CARES Act; (2) a declaratory judgment regarding Medica's obligations under the CARES Act; (3) unjust enrichment; (4) negligence per se; and (5) punitive damages.

As will be explained further in Medica's forthcoming opposition to GS Labs' motion for summary judgment, the foregoing allegations are misleading at best. GS Labs has posted extremely high prices for COVID-19 testing to its website, contending that they are its "cash price" for purposes of the CARES Act. *See* Compl. ¶ 37. But the prices GS Labs has posted to its website are not its "cash price" under the CARES Act—*i.e.*, not "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 FR at 71152. GS Labs maintains separate prices that it

charges patients who pay in cash, which are a small fraction of its purported "cash price." It has obscured that fact in an effort to mislead insurers like Medica into overpaying for COVID-19 testing. Moreover, GS Labs has violated numerous regulations promulgated by CMS regarding the manner in which providers must post their "cash price" in its efforts to deceive insurers. But, for the reasons discussed below, the Court need not reach this issue to dismiss all of GS Labs' claims.

## LEGAL STANDARD

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In deciding a motion to dismiss under Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the complainant," but "need not accept as true wholly conclusory allegations" or "legal conclusions drawn by the pleader from the facts alleged." *Clinton*, 689 F. Supp. 2d at 1154. In assessing plausibility, Courts may "draw on . . . experience and common sense." *Iqbal*, 556 U.S. at 664.

## ARGUMENT

### I. There is no private right of action under the CARES Act.

GS Labs first attempts to assert a claim against Medica directly under the CARES Act. But GS Labs "face[s] a threshold obstacle: the CARES Act does not expressly provide a private right of action." *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 748 (D. Md. 2020). GS Labs apparently concedes as much. *See, e.g.*, Compl. ¶¶ 90,

94 (requesting that the Court find an "implied private cause of action under the CARES Act"). Accordingly, GS Labs can only succeed on its claim under the CARES Act if the Court finds that, despite Congress declining to provide a private cause of action in the text of the statute, and despite Congress entrusting enforcement of the statute to various federal agencies, Congress nonetheless intended to *imply* a private right of action here.

"Unsurprisingly, every court to address whether the CARES Act created an implied private right of action has held that it does not." *Am. Video Duplicating, Inc. v. City Nat'l Bank*, No. 2:20-CV-04036, 2020 WL 6882735, at *5 (C.D. Cal. Nov. 20, 2020).[3] This is because "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Courts may not infer a private right of action arising from a federal statute "unless Congress speak[s] with a clear voice, and manifests an unambiguous intent to confer individual rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (cleaned up). Moreover, a statute must "display[ ]

[3] *See also, e.g.*, *Lamar v. Hutchinson*, No. 4:21-CV-00529, 2021 WL 4047158, at *5 (E.D. Ark. Sept. 3, 2021) (finding no private right of action under the CARES Act); *Adeleye v. Ducey*, No. CV-21-00679, 2021 U.S. Dist. LEXIS 122057, at *1-2 (D. Ariz. June 29, 2021) ("Any claim for violations of the CARES Act, however, must necessarily fail as the CARES Act does not create a private right of action."); *Autumn Ct. Operating Co. LLC v. Healthcare Ventures of Ohio*, No. 2:20-CV-4901, 2021 WL 325887, at *6 (S.D. Ohio Feb. 1, 2021) (noting that the court was "aware of no decision finding that the CARES Act creates an implied private right of action" and "conclude[ing] that the CARES Act creates no implied private right of action"); *Profiles, Inc.*, 453 F. Supp. 3d at 751 (holding the court was "not persuaded that the language of the CARES Act evidences the requisite congressional intent to create a private right of action"); *Matava v. CTPPS, LLC*, No. 3:20-CV-01709 (KAD), 2020 WL 6784263, at *1 (D. Conn. Nov. 18, 2020) (declining to imply a private right of action under the CARES Act); *Shehan v. U.S. Dep't of Justice*, No. 1:20-CV-00500, 2020 WL 7711635, at *11 (S.D. Ohio Dec. 29, 2020) ("[T]his Court is aware of no decision finding that the CARES Act creates any implied private right of action").

an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. If it is silent or ambiguous, courts may not imply a cause of action "no matter how desirable that might be as a policy matter." *Id*. at 286-87. Recent precedent makes "clear that the proper focus is on congressional intent, and 'nothing short of an unambiguously conferred right' will support an implied right of action," and that "[i]t is insufficient to show merely that a particular statute 'intend[ed] to benefit the putative plaintiff.'" *Osher v. City of St. Louis, Missouri*, 903 F.3d 698, 702 (8th Cir. 2018) (quoting *Does v. Gillespie*, 867 F.3d 1034, 1039-1040 (8th Cir.2017)).

GS Labs first posits in its complaint that the language of CARES Act section 3202(a) creates a private right of action because it states "a health insurance issuer . . . ***shall*** *reimburse the provider* of the diagnostic testing . . . in an amount that equals the cash price for such service as listed by the provider on a public internet website." *Id.* ¶¶ 60-63. But binding precedent dictates the opposite conclusion. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Section 3202(a) of the CARES Act, as well as the subpart of the statute in which it appears ("Coverage of Testing and Preventive Services"), focus on the regulated party, the insurer, and do not include "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga Univ.*, 536 U.S. at 287. Thus, for example, the Eighth Circuit has held that statutory language stating "the head of the displacing agency *shall provide for the payment*," and "the head of the displacing agency

*shall make an additional payment*," demonstrated Congress *did not* intend to create an implied private right of action, as the statute was "phrased as a directive to the regulated agency." *Osher*, 903 F.3d at 703 (emphasis added); *see also Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 709 F.3d 584, 590 (6th Cir. 2013) (declining to imply a private right of action based on "the use of the word 'shall'" as "the existence of an explicit obligation does not expressly create a right of action").

GS Labs next contends that "[t]here are no enforcement provisions in the CARES Act regarding reimbursement to providers of diagnostic testing." Compl. ¶ 64. But as discussed above, the CARES Act directs various federal agencies to enforce the relevant provisions of the statute. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290. Here, the delegation of enforcement power to federal agencies creates "a strong presumption against [an] implied private right[ ] of action." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007).

Because the text of the CARES Act demonstrates that Congress did not intend to imply a private right of action, the analysis can and should end there. *See Sandoval*, 532 U.S. at 291 (declining to imply a private right of action where there was "no evidence anywhere in the text [of the statute] to suggest that Congress intended to create a private right" to sue). But even if the Court looks beyond the text of the relevant provisions, there is no indication that Congress enacted the CARES Act "to benefit 'provider[s] of . . . diagnostic testing,'" as GS Labs claims. Compl. ¶ 64. Rather, Congress plainly intended the statute to benefit individual members of the public faced with the health risks of a

global pandemic. The provisions of the CARES Act at issue in this case appear in a portion of the statute title "PART II—ACCESS TO HEALTH CARE FOR COVID–19 PATIENTS." The legislative history GS Labs itself cites makes no reference to the rate of payment to diagnostic labs, but instead focuses on the need "to test every American who needs it for COVID-19 as soon as possible." Compl. ¶ 67. Indeed, not only does this legislative history omit any mention of a private right of action for diagnostic labs to enforce the "cash price" provisions, it indicates that "*the Federal Government* needs to take a much more active role in establishing that infrastructure." *Id.* ¶ 67 (emphasis omitted in part). This is consistent with the CARES Act's reliance on enforcement by federal agencies rather than private parties.

Much of the balance of GS Labs' proffered basis for implying a private right of action is that it would advance the policy goals of the CARES Act, and the purportedly dire consequences of failing to do so. *See id.* ¶¶ 70-81. But courts may not imply a cause of action in the absence of clear congressional intent "no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286-87. In any event, this case demonstrates why implying a private right of action under the CARES Act would disserve Congress' purpose and produce absurd results. GS Labs contends that, because it has a private right of action under the CARES Act, it may take insurers to court and demand that they pay whatever it chooses. *See, e.g.*, Compl. ¶ 71. There is no limiting principle. GS Labs currently demands as much as eight times the rates set by Medicare for COVID-19 testing. If GS Labs has a private right of action under the CARES Act, it can charge 1,000 times Medicare rates, or 1,000,000 times those rates, and recover this "cash price"

in full through litigation. Congress surely did not mean to permit diagnostic labs to recover millions of dollars per test through private enforcement of the statute. Without the moderating force of government enforcement, the statutory scheme is unworkable.

## II. GS Labs cannot state a claim for declaratory relief without a right of action under the CARES Act.

Because GS Labs has no private right of action under the CARES Act, its request for a declaratory judgment regarding Medica's obligations under the CARES Act fails as a matter of law. Where "there is no private right of action, the Declaratory Judgment Act cannot be used as an independent cause of action" *Vanegas v. Carleton College*, No. 19-cv-1878 (MJD/LIB), 2020 WL 4511821, at *6 (D. Minn. Feb. 10, 2020); *see also Wolfchild v. Redwood Cty.*, 91 F. Supp. 3d 1093, 1102 (D. Minn. 2015) (where a statute does not "provide for a private right of action, the Declaratory Judgment Act does not operate to transform such a non-existent right into a claim that may be remedied"). "To entertain, under the auspices of the Declaratory Judgment Act, a cause of action brought by private parties seeking a declaration that" a statute with no private cause of action "has been violated would, in effect, evade the intent of Congress not to create private rights of action under th[at] statute[ ] and would circumvent the discretion entrusted to the executive branch in deciding how and when to enforce th[at] statute[ ]." *Jones v. Hobbs*, 745 F. Supp. 2d 886, 893 (E.D. Ark. 2010).

## III. GS Labs cannot stretch Minnesota common law to create the cause of action Congress omitted from the CARES Act.

Apparently recognizing that it stands little chance of success in creating an implied cause of action under the CARES Act, GS Labs asks the Court to reach the same result

through contortions of Minnesota common law. But each of GS Labs' state law claims fails as a matter of law.

**A. GS Labs fails to state a claim for unjust enrichment.**

As an initial matter, GS Labs' unjust enrichment claim is merely a reformulation of its claim under the CARES Act. It is premised on Medica's refusal to pay the "federally-established statutory value of the COVID-19 diagnostic testing" under the CARES Act. *See* Compl. ¶ 102. "Allowing private litigants to claim their insurer was unjustly enriched because it violated" a statute lacking a private cause of action "would be tantamount to recognizing a private right of action . . . where Congress has not provided one; this would thus circumvent congressional intent." *York v. Wellmark, Inc.*, No. 4:16-cv-00627, 2017 U.S. Dist. LEXIS 199888, at *59 (S.D. Iowa Sep. 6, 2017). The Court should not permit GS Labs to use the common law as an end-run around Congress' decision not to include a private right of action under the CARES Act.

In any event, GS Labs' unjust enrichment claim fails for at least three reasons: first, GS Labs does not (and cannot) allege that Medica, as opposed to its members, received anything of value from GS Labs; second, GS Labs does not (and cannot) allege that it provided any such benefits unknowingly or unwillingly; and third, the claim is foreclosed by express contracts governing the relevant subject matter.

**i. GS Labs did not confer anything of value on Medica, as opposed to Medica's members.**

Under Minnesota law, to state a claim for unjust enrichment, "the claimant must show that the defendant has knowingly received or obtained something of value for

which the defendant 'in equity and good conscience' should pay." *Luckey v. Alside, Inc.*, 245 F. Supp. 3d 1080, 1098-99 (D. Minn. 2017). "[A] plaintiff must rely on more than 'conclusions and labels,' and must plausibly allege facts showing the 'something of value' that the defendant received." *CH Bus Sales, Inc. v. Geiger*, No. 18-cv-2444, 2019 U.S. Dist. LEXIS 46093, at *36 (D. Minn. Mar. 20, 2019) (Nelson, J.); *see also id.* (dismissing an unjust enrichment claim where the plaintiff failed to plausibly allege that the defendant received something of value); *City Ctr. Realty Partner, LLC v. Macy's Retail Holdings, Inc.*, No. 17-CV-528, 2017 U.S. Dist. LEXIS 148482, at *35 (D. Minn. Sep. 13, 2017) (Nelson, J.) (dismissing an unjust enrichment claim where the plaintiff failed to plausibly allege the defendant received something of value).

GS Labs does not plausibly allege that Medica, as opposed to its members, received anything of value from GS Labs. "It is counterintuitive to say that services provided to an insured are also provided to its insurer," as "[t]he insurance company derives no benefit from those services; indeed, what the insurer gets is a ripened obligation to pay money to the insured—which hardly can be called a benefit." *Travelers Indemnity Co. of Conn. v. Losco Group, Inc.*, 150 F. Supp. 2d 556, 563 (S.D.N.Y. 2001).[4]

[4] *See also Mt. View Surgical Ctr. v. Cigna Health Corp.*, No. CV 13-08083 DDP (AGRx), 2015 U.S. Dist. LEXIS 15320, at *9 (C.D. Cal. Feb. 9, 2015) (dismissing an unjust enrichment claim because plaintiff failed to plead "how provision of medical services to [an insurer's] insureds conferred an economic benefit on [the insurer] itself"); *Valley Health Sys. LLC v. Aetna Health, Inc.*, No. 2:15-CV-1457 JCM (NJK), 2016 U.S. Dist. LEXIS 83710, at *10 (D. Nev. June 28, 2016) (dismissing an unjust enrichment claim where the plaintiff "failed to identify any way in which [an insurer] ha[d] been enriched independently of the benefit its members received"); *GVB MD v. Aetna Health, Inc.*, No. 19-22357-CIV, 2019 U.S. Dist. LEXIS 200604, at *15 (S.D. Fla. Nov. 19, 2019) (same).

Here, GS Labs alleges that Medica received "value and benefits through the diagnostic testing GS Labs has provided *to Medica's insureds*." Compl. ¶ 97. While Medica's members received COVID-19 testing, Medica itself received only an inflated bill from GS Labs. *See id*. ¶¶ 51, 57-58, 97. This financial liability is the *opposite* of "something of value." *Luckey*, 245 F. Supp. 3d at 1098-99. Accordingly, GS Labs' unjust enrichment claim fails as a matter of law. *See also Gen. Mktg. Servs. v. Am. Motorsports, Inc.*, 393 F. Supp. 2d 901, 909 (D. Minn. 2005) (holding that where the plaintiff conferred a benefit on the defendant's employer that allegedly "continu[ed] [the defendant's] employment," an unjust enrichment claim failed because "this remote benefit" was not "sufficient to demonstrate a prima facie case for the equitable claim of unjust enrichment").

**ii. GS Labs did not confer any benefit unknowingly or unwillingly.**

"[A] claim of unjust enrichment requires proof that Plaintiff conferred . . . benefits 'unknowingly or unwillingly.'" *Gen. Mktg. Servs.*, 393 F. Supp. 2d at 909 (quoting *Holmes v. Torguson*, 41 F.3d 1251, 1256 (8th Cir. 1994)). Here, GS Labs not only fails to plead this essential aspect of an unjust enrichment claim, its own allegations show that it cannot do so. GS Labs alleges that, from the outset, Medica has openly refused to pay GS Labs' inflated "cash price." *See, e.g.*, Compl. ¶¶ 38-39, 52. Indeed, GS Labs alleges that it engaged in substantial negotiations with Medica during the relevant period, during which Medica made clear that it "refused to pay the full publicly-posted cash price for GS Labs' tests, preferring instead to attempt to negotiate a lower price." *Id.* ¶¶ 52-56; *see*

*also id.* ¶¶ 41-42. GS Labs characterizes Medica's refusal to pay in full as "brazen." *Id.* ¶ 58. But GS Labs nonetheless willingly continued to test Medica insureds.

In sum, GS Labs willingly performed testing on Medica insureds despite its knowledge that Medica refused to pay its purported "cash price." GS Labs has no remedy in equity now that Medica has, to no one's surprise, refused to pay the amounts GS Labs demands, as GS Labs was "fully aware of the benefits and services that it provided." *Gen. Mktg. Servs.*, 393 F. Supp. 2d at 909; *see also City Ctr. Realty Partner*, 2017 U.S. Dist. LEXIS 148482, at *35 (holding that there could be no unjust enrichment claim where the plaintiff's "own allegations establish that it provided" services and materials to the defendant "knowingly and willingly," despite the fact that the plaintiff never realized its hoped return).

**iii. The existence of express contracts governing GS Labs' right to payment foreclose GS Labs' unjust enrichment claim.**

"A claim for unjust enrichment fails . . . when there is 'no dispute that a written contract governs the at-issue conduct.'" *Cleveland v. Whirlpool Corp.*, No. 20-cv-1906, 2021 U.S. Dist. LEXIS 139677, at *11-13 (D. Minn. July 27, 2021) (quoting *HomeStar Prop. Sols., LLC v. Safeguard Props., LLC*, 370 F. Supp. 3d 1020, 1029-30 (D. Minn. 2019) (Nelson, J.)). Here, any entitlement to payment GS Labs may have from Medica is a function of Medica's contracts with its insureds. These contracts foreclose equitable relief here. *See Excel Roofing, Inc. v. State Farm Fire & Cas. Co.*, No. 10-299 DWF/JJK, 2010 WL 5211554, at *7 (D. Minn. Dec. 16, 2010) (holding equitable relief to be foreclosed where the parties' respective rights and obligations were governed by a third

party's insurance policy with the defendant); *see also Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 839 (Minn. 2012) (holding that a party may not use an unjust enrichment claim to enforce the terms of a contract to which it is not a party).

Moreover, GS Labs enters into express contracts with its patients governing its right to payment. *See* Gokey Decl. Ex. A.[5] According to GS Labs' website, GS Labs requires all insured patients to agree to the following when booking appointments:

> I agree that I am personally financially responsible for payment of fees for all tests ordered and collected by GS Labs or its representatives or contractors at my request. . . . I understand that if my insurance company denies coverage or payment for the services provided to me, or fails to remit timely payment on my claim (within thirty (30) days), I assume full financial responsibility and will pay all charges in full.

*Id.* at 4. This contract likewise forecloses GS Labs from seeking equitable relief here. *See, e.g.*, *Ringier Am. v. Land O'Lakes*, 106 F.3d 825, 829 (8th Cir. 1997) (affirming the district court's dismissal of an unjust enrichment claim where any "claim for payment was governed by an express contract" between the plaintiff and a third party).[6]

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[5] GS Labs' complaint repeatedly references GS Labs' website, including the ability of patients to rapidly "book appointments" through it, and relies upon the website's contents (and particularly its "publicly-posted cash price") for its claims. *See, e.g.*, Compl. ¶¶ 20, 37, 86, 90, 109. "A court may consider . . . materials embraced by the complaint" in evaluating a motion to dismiss. *Sierra Club*, 689 F. Supp. 2d at 1154. To the extent the Court finds that GS Labs' website is not embraced by its complaint, Medica requests that the Court take judicial notice of the relevant portions of the website, as their existence is readily verifiable from a source of unquestionable accuracy (GS Labs itself). *See, e.g.*, *Langer v. HV Glob. Grp., Inc.*, No. 2:21-cv-00328-JAM-KJN, 2021 U.S. Dist. LEXIS 197769, at *4 (E.D. Cal. Oct. 12, 2021) (finding a party's website to be a "proper subject[ ] for judicial notice").

[6] *See also United States v. Bollinger Shipyards, Inc.*, No. 12-920, 2013 U.S. Dist. LEXIS 108278, at *14 (E.D. La. Aug. 1, 2013) (noting that the existence of a contract forecloses a claim for unjust enrichment "even when the contractual remedy is against a third party"

To be sure, should GS Lab attempt to enforce this contract, it would likely violate the CARES Act. *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43* (June 23, 2020), available at https://tinyurl.com/yc57v9vn (noting the CARES Act "generally precludes balance billing for COVID-19 testing"). But the likelihood of GS Labs' success is irrelevant; "[c]ourts have . . . dismissed unjust enrichment claims even when a legal remedy was no longer available" or inadequately pled. *City Ctr. Realty Partner*, 2017 U.S. Dist. LEXIS 148482, at *32-33 (Nelson, J.); *see also id*. at *34 (dismissing an unjust enrichment claim based on the existence of a written contract, despite also dismissing the plaintiff's breach-of-contract claim). Having chosen to require its patients to enter into contracts concerning payment of the amounts it seeks in this lawsuit, GS Labs has no available remedy in equity. *See also id.* (noting "it is the *existence* of a legal remedy that precludes an equitable remedy, not whether a plaintiff pursues the legal remedy or not").

**B. GS Labs' attempt to stretch the doctrine of negligence per se to create a private right of action under the CARES Act fails as a matter of law.**

GS Labs brings a claim for negligence per se, contending that "[t]he CARES Act established a statutory standard of care for the ordinary prudent insurer in these circumstances," and Medica breached that standard of care by refusing to reimburse GS Labs at its extravagant "cash price." Compl. ¶ 107. This claim fails for at least two

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and listing cases); *AMA v. United Healthcare Corp.*, 2007 U.S. Dist. LEXIS 18729, at *34 (S.D.N.Y. Mar. 5, 2007) (noting that "claims for unjust enrichment may be precluded by the existence of a contract governing the subject matter of the dispute even if one of the parties to the lawsuit is not a party to the contract" and listing cases).

reason: first, the CARES Act cannot support a claim for negligence per se; and second, GS Labs alleges only intentional conduct, not negligence.

**i. The CARES Act cannot create a new duty or standard of care.**

GS Labs alleges that Medica acted negligently "by refusing to fully reimburse at the full publicly-posted cash price for GS Labs' COVID-19 diagnostic tests provided to Medica's insureds." Compl. ¶ 111. To the extent there exists a duty to pay GS Labs its claimed "cash price," the CARES Act created that duty in the first instance—as GS Labs itself acknowledges. *See, e.g.*, *id.* ¶ 46. Medica has no preexisting common law duty of care to pay GS Labs any particular amount for testing, much less the exorbitant "cash price" GS Labs demands. At common law, "parties in an arm's length transaction do not owe each other a duty of care beyond honesty." *Penn v. Wexler*, No. A12-0030, 2012 Minn. App. Unpub. LEXIS 890, at *6 (Sep. 10, 2012).

"[T]he negligence per se doctrine does not create new causes of action, but only recognizes a legislatively created standard of care to be exercised where there is an underlying common law duty." *Elder v. Allstate Ins. Co.*, 341 F. Supp. 2d 1095, 1102 (D. Minn. 2004). Accordingly, "where no common-law duty existed before the statute was enacted," courts "must limit [themselves] to the explicit language and clear implication of the statute" to determine whether the legislature intended to create a private right action, as "[t]he principles of judicial restraint forbid [courts] from creating new causes of action which the legislature has not expressed or implied." *Valtakis v. Putnam*, 504 N.W.2d 264, 266 (Minn. Ct. App. 1993); *see also id*. (dismissing a negligence per se claim where no common law duty existed prior to the statute, and thus "a civil action [could not] lie

outside the express or clearly implied language of the statute"); *Bruegger v. Faribault Cty. Sheriff's Dep't*, 497 N.W.2d 260, 262 (Minn. 1993) (dismissing a negligence per se claim because the duty allegedly breached "did not arise until the enactment" of the predicate statute). The doctrine of negligence per se thus cannot provide GS Labs with the cause of action Congress declined to supply.

This Court's decision in *Elder* is instructive. In that case, a man's car fell through the ice on a lake, and his auto insurer incorrectly advised him that his policy did not cover its removal from the water. 341 F. Supp. 2d at 1098. The man then died attempting to remove the car himself. *Id.* His estate sued the insurer, bringing a claim for negligence per se based on the premise that the erroneous processing of the man's insurance claim violated provisions of Minnesota's Unfair Claims Practices Act ("UCPA"), a statute under which there is no private cause of action. *Id.* at 1100. This Court found (in relevant part) that there was "no underlying common law duty" violated by the insurer, and that the relevant claim processing "requirements did not arise until the enactment of the UCPA." *Id. at* 1102. Accordingly, because "the negligence per se doctrine does not create new causes of action," the Court dismissed the claim. *Id.* As in *Elder*, the CARES Act created new requirements that have no analog in the common law. Accordingly, the CARES Act cannot support GS Labs' negligence per se claim, which must be dismissed.

Even if there were some underlying common law duty of care to pay GS Labs at particular rates, the CARES Act would not support a claim for negligence per se. For a statute to supply the standard of care in a negligence per se action, "'the person harmed by the violation must be among those the legislature intended to protect,'" and "'the harm

must be of the type the legislature intended to prevent by enacting the statute.'" *Dunnigan v. Fed. Home Loan Mortg. Corp.*, 184 F. Supp. 3d 726, 738 (D. Minn. 2016) (Richard Nelson, J.) (quoting *Anderson v. State, Dep't of Natural Resources*, 693 N.W.2d 181, 190 (Minn. 2005)). "Negligence per se statutes are usually, if not always, meant to protect a class of persons from dangerous situations or activities." *Id.*

As discussed above, Congress plainly did not enact the CARES Act to protect *diagnostic laboratories*. Rather, the goal of the CARES Act was to protect *individual members of the public* from the COVID-19 pandemic, in part by "test[ing] every American who needs it for COVID-19 as soon as possible." 166 Cong. Rec. S1895-03, 166 Cong. Rec. S1895-03, S1895 (Sen. Alexander, R-Tenn.). To the extent Congress intended to ameliorate a particular danger, it was the spread of a deadly virus, not the underpayment of diagnostic labs by insurers. *See id*.

Moreover, the relevant provisions of the CARES Act are not meant "to protect a class of persons from dangerous situations or activities." *Dunnigan*, 184 F. Supp. 3d at 738; *see also id.* (dismissing a claim for negligence per se based on a statute as to which "there [was] no indication that Congress intended to protect a particular class of persons from a dangerous activity"). The relevant provisions of the CARES Act bear little resemblance to the statutes that traditionally support a claim for negligence per se, such as those "requiring protective eye glasses when operating machinery," "requiring owners of refrigerators to detach door[s] before abandoning" their appliance, or "outlawing the sale of fireworks." *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981). For this reason as well, GS Labs' negligence per se claim must be dismissed.

**ii. GS Labs alleges only intentional conduct, not negligence.**

GS Labs alleges that Medica "willfully, and in deliberate disregard of the law and the rights and safety of others and the public health, refused to fully reimburse GS Labs the statutorily-required price advanced by GS Labs." Compl. ¶ 2. In other words, it accuses Medica of *intentional* conduct—deliberately "refusing to fully reimburse at the full publicly-posted cash price for GS Labs' COVID-19 diagnostic tests." *Id.* ¶ 111; *See also id.* ¶¶ 39, 58, 97, 116-27. Indeed, GS Labs acknowledges that the parties engaged in substantial price negotiations prior to GS Labs filing suit, but could "not agree[ ] upon a different negotiated cash price." *See id.* ¶¶ 51-58. It is plain on the face of GS Labs' complaint that Medica intended both its allegedly tortious action (refusal to pay) and the consequences of that action (GS Labs' "loss of substantial revenue" from the payments Medica refused to make). *See id.* ¶ 112.

"Obviously ordinary negligence is not an intentional tort," and thus "it can only result from conduct uncontrolled by intent." *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 530-31 (1939); *see also Pierson v. Minneapolis Police Dep't*, No. 10-1960 (JNE/FLN), 2012 U.S. Dist. LEXIS 34163, at *10 (D. Minn. Jan. 6, 2012) ("Gross negligence is not, by definition, intentional conduct."); Restatement (Second) of Torts § 282 ("The definition of negligence . . . excludes conduct which creates liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person"); *id.* § 8A (distinguishing negligence from intentional torts in which the defendant "knows that the consequences are certain, or substantially certain, to result

from his act."). "Any given act may be intentional or it may be negligent, but it cannot be both." Dobbs' Law of Torts § 31 (2d ed. 2020).

GS Labs repeatedly alleges that Medica's refusal to pay its exorbitant "cash price" was deliberate, and omits any allegation that Medica's actions or their consequences were unintentional or negligent. Indeed, the word "negligence" appears only twice in GS Labs' complaint: once in the heading of Count IV of the complaint and again in the statement that "GS Labs alleges this claim for negligence per se in the alternative to Counts I and II." Compl. ¶ 105. "Though the Federal Rules permit litigants to allege alternate, or inconsistent, claims, 'when the conduct alleged, if true, may only give rise to liability for an intentional act, a claim of negligence may be dismissed.'" *Semencic v. Cty. of Nassau*, No. 18-CV-5244, 2020 U.S. Dist. LEXIS 14066, at *29 (E.D.N.Y. Jan. 28, 2020) (quoting *Bah v. City of New York*, No. 13 Civ. 6690, 2014 U.S. Dist. LEXIS 60856, 2014 WL 1760063, at *13 (S.D.N.Y. May 1, 2014)); *see also The Choice is Yours, Inc. v. The Choice is Yours*, No. 2:14-cv-01804, 2015 WL 5584302, at *7-8 (E.D. Pa. Sept. 22, 2015) ("The allegations in Plaintiffs' Amended Complaint refer repeatedly and exclusively to intentional conduct, which prevents these allegations from being read to support liability under any theory of negligence.").

In sum, GS Labs has not alleged negligent conduct. Nor could it. This case concerns two sophisticated corporate entities that, despite engaging in negotiations, could not agree as to the price one would pay the other for its services. *See* Compl. ¶¶ 51-58. GS Labs makes no effort to fit this business dispute into the rubric of negligence. The Court should thus dismiss Count IV of GS Labs' complaint.

### C. GS Labs' claim for punitive damages fails along with the balance of its state law claims and is procedurally improper.

As an initial matter, "[p]unitive damages rely on the existence of an underlying cause of action." *Streambend Properties III, LLC v. Sexton Lofts*, LLC, 297 F.R.D. 349, 361 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014). Because all of GS Labs' freestanding claims fail as a matter of law, its claim for punitive damages fails as well.

Even were this not the case, GS Labs' request for punitive damages in its initial complaint is procedurally improper. "Under Minnesota law, a plaintiff may not seek punitive damages in an initial complaint but must do so by making a motion to amend the pleadings." *Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 491 n.10 (8th Cir. 2004); *see also* Minn. Stat. Ann. § 549.191 ("Upon commencement of a civil action, the complaint must not seek punitive damages."). Where a plaintiff has "improperly included punitive damages from the outset," the request for punitive damages should be dismissed. *Bergman v. Johnson & Johnson*, No. CV 20-2693 (JRT/HB), 2021 WL 3604305, at *6 (D. Minn. Aug. 13, 2021).

## IV. ERISA preempts GS Labs' state law claims of unjust enrichment, negligence, and punitive damages.

Many of the health insurance plans at issue in this litigation are governed by ERISA. To the extent this is so, GS Labs cannot sidestep ERISA's exclusive enforcement scheme meant to "provide a uniform regulatory regime over employee benefit plans" and "eliminate the threat of conflicting and inconsistent State and local regulation." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

ERISA contains "expansive pre-emption provisions." *Aetna Health Inc.*, 542 U.S. at 208. ERISA's express preemption provisions preempt "any and all State laws insofar as they . . . relate to any employee benefit plan" covered under the statute. 29 U.S.C. § 1144(a). If a state law claim "relates to" an ERISA plan, then the claim falls within the scope of preemption. *See Moore v. Apple Cent., LLC*, 893 F.3d 573, 576 (8th Cir. 2018); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (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").

A state law "relate[s] to" an ERISA plan for purposes of preemption if the law "has a connection with or reference to [an ERISA] plan." *Doe v. Cemstone Prods. Co.*, No. 11-CV-2561 (MJD/SER), 2011 WL 6964049, at *2 (D. Minn. Dec. 2, 2011) (alteration in original) (citation omitted). "[T]he phrase 'relate[s] to' is deliberately broad and expansive, and establishes that regulation of employee benefit plans is exclusively a federal concern." *Engfer v. Gen. Dynamics Advanced Info. Sys, Inc.*, 869 N.W.2d 295, 303 (Minn. 2015) (citations omitted); *see also Travelers Cas. And Sur. Co. of Am. v. IADA Servs.,* 497 F.3d 862, 867-8 (8th Cir. 2007). The phrase "relates to" is "construed extremely broadly." *Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc.*, 999 F.2d 298, 302 (8th Cir. 1993). "[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 pre-empted." *Aetna,* 542 U.S. at 209.

Courts in this Circuit and elsewhere have found preempted unjust enrichment claims for benefits payable under an ERISA-governed plan.[7] Similarly, courts have found preempted negligence claims for benefits payable under an ERISA-governed plan.[8] And state law punitive damages claims for benefits payable under an ERISA-governed plan are also preempted.[9] Accordingly, in addition to the above, these claims fail as a matter of law to the extent they pertain to Medica's ERISA plans.

**CONCLUSION**

For the foregoing reasons, the Court should dismiss GS Labs' Complaint in its entirety.

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[7] *See, e.g.*, *Luebbert v. Blue Cross Blue Shield of Tenn.*, No. 11-04347-CV-FJG, 2012 WL 1606195, at *2 (W.D. Mo. May 8, 2012); *BH Servs. Inc. v. FCE Benefit Administrators Inc.*, No. 5:16-CV-5045-KES, 2017 WL 4325786, at *11 (D.S.D. Sept. 27, 2017) (dismissing unjust enrichment claim as preempted under ERISA); *Neurological Surgery, P.C. v. Aetna Health Inc*., 511 F. Supp. 3d 267, 289 (E.D.N.Y. 2021) (dismissing unjust enrichment claims where disputed claims derived from the ERISA plans themselves); *Norem v. Aetna Health Inc.*, 06-1007-CV-W-GAF, 2007 WL 9718362, at *4 (W.D. Mo. Mar. 8, 2007) (dismissing unjust enrichment claim because such a claim referenced an ERISA plan where plaintiff sought to recover monies paid for excessive copayments under the color of state law).

[8] *See Ibson v. United Healthcare Servs., Inc.*, 776 F.3d 941, 945 (8th Cir. 2014) (dismissing unjust enrichment claim, finding that "the focus of the dispute is the improper processing of claim benefits and the failure of [the health insurer] to pay eligible claims. Because [claimant's] proposed state law claims could have been brought under ERISA's civil enforcement mechanism, her claims are completely preempted."); *Keokuk Area Hosp., Inc. v. Two Rivers Ins. Co.*, 228 F. Supp. 3d 892, 897-98 (S.D. Iowa 2017).

[9] *See Ibson*, 776 F.3d at 945 (dismissing punitive damages claim because it "could have been brought under ERISA's civil enforcement mechanism"); *see also Bach v. Prudential Ins.*, 83 F. Supp. 3d 840, 842-43 (S.D. Iowa 2015) ("As both parties recognize, ERISA bars Plaintiff's state-law claims and his request for compensatory and punitive damages").

Dated: December 23, 2021

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

GS LABS, LLC,

Plaintiff,

v.

MEDICA INSURANCE COMPANY,

Defendant.

Case No.: 21-cv-2400 (SRN/TNL)

**L.R. 7.1(f) CERTIFICATE OF COMPLIANCE**

I, Jamie R. Kurtz, certify that Defendant's Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint complies with Local Rule 7.1(f).

I further certify that in preparation of the above document, I used Microsoft Office Word 2016, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the foregoing memorandum contains 7,872 words.

I further certify that the foregoing memorandum complies with Local Rule 7.1(h) in that it is typewritten in size 13 font, double-spaced (except for headings, footnotes and quotations that exceed two lines), and utilizes 8 ½ x 11 inch margins.

Dated: December 23, 2021

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