UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

GS LABS, LLC, *a Nebraska limited liability company*, Plaintiff, v. MEDICA INSURANCE COMPANY, *a Minnesota insurance corporation*, Defendant.	Case No.: 21-cv-2400 (SRN/TNL) **PLAINTIFF GS LABS' REPLY TO DEFENDANT MEDICA'S OPPOSITION TO GS LABS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff GS Labs, LLC ("GS Labs") has conclusively established all four of the *Cort* factors compel finding that providers of diagnostic testing have an implied private cause of action under the CARES Act in § 3202(a), for the reasons GS Labs has stated previously in its opening memorandum in support of its motion for partial summary judgment (Dkt.No.10 at 8-21), and its opposition to Medica's motion to dismiss (Dkt.No.39 at 9-31); and for the same reasons set forth in *Diagnostic Affiliates of Northeast Hou, LLC v. United Healthcare Services, Inc.*, No. 2:21-CV-00131, 2022 WL 214101 (S.D. Tex. Jan. 19, 2022), decided by the only court that has squarely addressed and ruled on this issue.

In opposition to GS Labs' motion for partial summary judgment, Medica Insurance Company ("Medica") needlessly obfuscates and improperly dissembles by citing one-sided and ill-informed newspaper articles and adversarial allegations from partisan pleadings in other cases that are patently inadmissible and wholly irrelevant to the issues raised by this motion. When the Court looks past Medica's inappropriate attempts to manufacture

scandal and angst, the Court will see that Medica does not (and cannot) actually dispute the following three essential material facts that enable the Court to grant GS Labs' motion as a matter of law:

(1) GS Labs provided Medica insureds with COVID-19 diagnostic testing approved by the FDA, as defined in § 3201 of the CARES Act;

(2) Medica has not negotiated a rate with GS Labs for the diagnostic testing that GS Labs provided to Medica's insureds; and

(3) Medica has refused to fully reimburse GS Labs for any of the diagnostic testing that GS Labs provided to Medica's insureds.

These three undisputed facts conclusively establish GS Labs has standing to assert an implied cause of action under the CARES Act in § 3202(a) and seek a declaration to that effect from the Court in Count II.

Medica's efforts to cast uncertainty on the exact *number* of diagnostic tests GS Labs has provided to Medica's insureds that qualify for reimbursement, or the *amount* of the "cash price" Medica is obligated to pay GS Labs for each of these diagnostic tests that GS Labs has provided to Medica's insureds, are disputes that may be relevant to determination of the amount of *damages* that should eventually be awarded to GS Labs against Medica—but these disputes have no bearing on whether providers like GS Labs have an implied private cause of action under § 3202(a) of the CARES Act and whether Medica must comply with the statutory mandate to reimburse GS Labs at its publicly-posted cash prices.

Medica has failed to establish a genuine dispute of material fact precluding summary judgment on whether there is an implied private cause of action in § 3202(a) of

the CARES Act and whether Medica is required to comply with the plain terms of § 3202(a)(2) as to GS Labs. Therefore, the Court should grant GS Labs' motion for partial summary judgment as to these two issues.

STANDARD FOR REVIEW

To defend a motion for summary judgment, the non-movant must come forward with "admissible evidence" to establish a genuine dispute as to a material fact. Fed. R. Civ. P. 56(c)(2). Accordingly, the movant "may object that the material cited [by the non-moving party] . . . cannot be presented in a form that would be admissible in evidence." *Id.*

Thus, for instance, "*inadmissible hearsay evidence* cannot be used to defeat summary judgment." *Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 817 (8th Cir. 2010) (emphasis added). Newspaper articles are but one example of what the Eighth Circuit has termed "rank hearsay." *Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir. 2010); *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 147 (8th Cir. 1991).

Moreover, the non-moving party may not rest on mere *allegations*, but instead must submit "sufficient probative *evidence* [that] would permit a finding in [the non-movant's] favor on more than mere speculation, conjecture, or fantasy." *Moody v. St. Charles Cty.*, 23 F.3d 1410, 1412 (8th Cir. 1994) (emphasis added) (citation omitted).

ARGUMENT

In its motion for partial summary judgment, GS Labs requests the Court apply the undisputed material facts to hold as a matter of law that: (1) GS Labs has an implied private cause of action under the CARES Act § 3202(a) to recover reimbursement from Medica for diagnostic testing that GS Labs has provided to Medica's insureds; and (2) GS Labs is

entitled to assert its private cause under the CARES Act to require Medica to fully reimburse GS Labs at the publicly-posted cash price for the COVID-19 diagnostic testing that GS Labs has provided to Medica's insureds. (Dkt.No.10 at 1.) Medica has failed to proffer admissible evidence to establish a genuine dispute of material fact or any legal basis to refute GS Labs' right as a matter of law to these declarations. Accordingly, the Court should grant GS Labs' motion for partial summary judgment in all respects.

I. GS Labs Has an Implied Private Cause of Action Under the CARES Act to Recover Reimbursement for Diagnostic Testing from Insures Like Medica.

GS Labs is entitled to judgment as a matter of law that it has an implied private cause of action under the CARES Act as a provider of diagnostic testing for COVID-19. "Medica agrees that [this issue] is 'a pure question of law.'" (Dkt.No.36 at 1.) Medica makes three primary arguments in opposition: (1) § 3202(a) does not contain rights-creating language; (2) every court that has considered implied private causes of action under the CARES Act has declined to find one; and (3) federal agencies have been delegated the authority to enforce § 3202(a). (*See* Dkt.No.36 at 16-26.) All of these arguments fail.

A. Section 3202(a) Contains the Same Statutory Structure and Rights-Creating Language that the Supreme Court Has Held Shows an Intent to Create an Implied Private Cause of Action.

First, the text of § 3202(a) is structured in a way that is similar to other statutes the Supreme Court has determined contain rights-creating language. In *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the Supreme Court identified two prime examples of statutes that embody the same rights-creating structure:

- Title VI provides: "**No person** in the United States *shall* . . . be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin. 78 Stat. 252, 42 U.S.C. § 2000d (1994 ed.) (emphasis added).

- Title IX provides: "**No person** in the United States *shall*, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 86 Stat. 373, 20 U.S.C. § 1681(a) (emphasis added).

Id. at 287 n.3. In both Title VI and Title IX, Congress identifies rights and obligations by mandating that **no person** *shall* be subjected to discrimination by educational programs or activities receiving federal financial assistance. The statutes speak to both the parties who have rights and the parties who have responsibilities, rather than focus solely on the party whose conduct is to be regulated or on a regulating agency.

Section 3202(a) states: "A group health plan or a health insurance issuer . . . *shall* reimburse **the provider of the diagnostic testing**." CARES Act § 3202(a) (emphasis added). Accordingly, § 3202(a) contains the same basic structure and elements as Titles VI and IX: mandatory language that identifies the parties who have rights and responsibilities, respectively, without identifying (much less *focusing on*) a regulating federal agency.

Moreover, the Supreme Court has long held that when Congress enacts statutory provisions "stated in the form of commands," but for which "there is no mode of enforcement other than resort to the courts"—such as Section 3202(a) of the CARES Act—courts have the "jurisdiction and duty to afford a remedy for a breach of statutory duty." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 207 (1944). Otherwise, the "right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation." *Id.* Here, the congressionally-intended right created in § 3202(a)

for the benefit of diagnostic testing providers "would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation." *Id.*

Medica erroneously argues that the Supreme Court has "abandoned" this directive imposed by the Supreme Court in *Steele*. (Dkt.No.36 at 22-23.) But there has been no such repudiation of *Steele*. Indeed, the Supreme Court has never rejected this precedent, and instead the *Steele* mandate has been reaffirmed several times. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2468 (2018); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 693 n.13 (1979); *Graham v. Bhd. of Locomotive Firemen & Enginemen*, 338 U.S. 232, 239 (1949). Thus, Medica's argument fails because it is contrary to the edict in *Steele*, which applies when the statute at issue contains a command (e.g., "shall reimburse"), but provides no enforcement mechanism (as is the case with § 3202(a), *see infra* Part I.C).

B. Medica's Arguments are Contrary to the Only Decision That Has Squarely Addressed Whether § 3202(a) Supports an Implied Private Cause of Action.

None of the cases Medica has cited is actually on point; and, in fact, the only court that has squarely considered § 3202(a) of the CARES Act has held that this statute supports an implied private cause of action for the benefit of providers like GS Labs. *Diagnostic Affiliates*, 2022 WL 214101, at *6. GS Labs has previously established that all of the CARES Act cases relied upon by Medica involve interpretation of materially different portions of the 335+ page CARES Act that contain different statutory language and different statutory structures. (*See* Dkt.No.39 at 27-31.) In *Diagnostic Affiliates*, the court likewise reached the same conclusion that these same cases cited by Medica are inapposite

and inapplicable to the interpretation of whether § 3202(a) of the CARES Act supports an implied private cause of action by providers. 2022 WL 214101, at *6.

Further, all of the non-CARES Act cases cited by Medica are likewise inapposite because these cases involve the interpretation and application of statutory provisions that are materially different from § 3202(a). In those cases, the courts analyzed statutes in which Congress expressly directed an agency (not a private party) to act, expressly provided for alternative enforcement mechanisms, and/or did not identify the individuals to be protected. (*See* Dkt.No.39 at 16-18.) For example, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the statute at issue authorized federal agencies "to effectuate the provisions of [another law] . . . by issuing rules, regulations, or orders of general applicability." *Id.* at 278 (quoting 42 U.S.C. § 2000d–1). The Supreme Court held that this law was "twice removed from the individuals who will ultimately benefit" by the law because the statute (1) did not focus on the individuals protected or the person regulated and (2) instead focused on an agency to do the regulating. *Id.* at 289. In contrast, § 3202(a) *does* identify the individuals protected ("provider of the diagnostic testing"), the person regulated ("health plan or issuer," i.e., insurer), and states a command ("shall reimburse"); and § 3202(a) *does not* identify an agency to regulate and enforce § 3202(a)'s provisions.

As has been established above, the Supreme Court has long held that when Congress enacts statutory provisions "stated in the form of commands," but for which "there is no mode of enforcement other than resort to the courts," courts have the "jurisdiction and duty to afford a remedy for a breach of statutory duty." *Steele*, 323 U.S. at 207. The Supreme Court's directive in *Steele* certainly applies here as to § 3202(a), because Congress has

commanded insurers to reimburse providers of diagnostic testing without providing a mode of enforcement other than resort to the courts. Accordingly, pursuant to *Steele* and *Cort*, the Court has a duty to afford a remedy under § 3202(a) of the CARES Act.

C. Congress Did Not Delegate Enforcement Authority for § 3202(a).

All of the cases cited by Medica are further distinguishable and inapposite because these cases involved situations in which there is an alternative remedy available. (*See* Dkt.No.39 at 22, 28-31.) These cases are have no bearing to this case because Congress did *not* delegate enforcement to any agency or provide for any enforcement mechanisms.

Congress chose to narrowly grant enforcement powers for a very specific provision of § 3202(b) to the Secretary of Health and Human Services. Under § 3202(b), the Secretary may only impose civil monetary penalties on a provider of diagnostic testing if the provider (1) does not "make public the cash price for [diagnostic testing] on a public internet website of such provider" and (2) "has not completed a corrective action plan." Congress' circumscribed administrative enforcement of this portion of the CARES Act, and Congress' decision *not* to otherwise delegate enforcement of § 3202(a)'s reimbursement right, both further support the determination that providers of diagnostic testing have an implied private cause of action.

Medica nonetheless seeks to paint with an excessively broad brush to argue that, because certain agencies have implemented guidance pursuant to § 3202(b), these agencies must also have authority to enforce all other surrounding provisions, such as § 3202(a). (*See* Dkt.No.36 at 2-3, 5-9, 21-23.) However, even these agencies disclaim such breadth as to their supposed authority by carefully specifying the narrow guidance they provide is

strictly limited to their authority to enforce the public posting of cash prices on websites under § 3202(b). (*See, e.g.*, 85 FR 71142, 71144 (Nov. 6, 2020) ("*For purposes of implementing section 3202(b) of the CARES Act*, this [interim final rule with requests for comments ("IFC")] adds a new 45 CFR part 182, including (1) definitions of 'provider of a diagnostic test for COVID–19' (or 'provider'), 'COVID–19 diagnostic test,' and 'cash price,' and (2) requirements for posting cash price information on the internet, or upon request and through signage (if applicable) if the provider does not have its own website." (emphasis added)); 45 C.F.R. § 182.10 ("This part implements section 3202(b)(1) . . . [and] 3202(b)(2) . . . .").

The Secretary of Health and Human Services has thus defined, for the limited purpose of enforcing the public-posting requirements of § 3202(b), the "cash price" as "the charge that applies to an individual who pays cash (or cash equivalent) for a COVID–19 diagnostic test." 45 C.F.R. § 182.20. No agency has concluded that GS Labs has failed to post its cash prices for diagnostic testing on its publicly-accessible websites. And no agency has required GS Labs to comply with a corrective action plan. Put simply, the public-posting enforcement provisions of § 3202(b) are irrelevant to this case.

As the court in *Diagnostic Affiliates* aptly reasoned:

> The direct requirement for reimbursement to COVID-19 testing providers is . . . in the CARES Act § 3202(a). The only enforcement provision related to that requirement is for a civil fine against providers who do not publish their cash price—the premise on which their payment is to be calculated. CARES Act § 3202(b). There is no dispute that Diagnostic Affiliates properly published its cash price. Thus, *the CARES Act has no express enforcement provision—administrative or otherwise—that is relevant here for claims against insurance companies responsible for reimbursements.*

2022 WL 214101, at *8 (emphasis added).

For all of these reasons, as well as those stated previously in GS Labs' opening memorandum in support of partial summary judgment and its memorandum in opposition to Medica's motion to dismiss, the Court should grant partial summary judgment on this second issue raised in Count II and declare there is an implied private cause of action to enforce § 3202(a). Again, the extent of reimbursement to which GS Labs will ultimately be entitled under Count I is a matter of calculating and awarding damages, which is a matter for future decision.

II. The CARES Act's Plain Terms Require Medica to Fully Reimburse GS Labs at the Publicly-Posted Cash Price for COVID-19 Diagnostic Testing.

GS Labs alleged in Count II, and established in its motion papers, there is an actual controversy between the parties regarding "whether the CARES Act requires Medica to fully reimburse GS Labs at the publicly-posted cash price for COVID-19 diagnostic testing." (Dkt.No.1, ¶ 90.) The CARES Act provides in § 3202(a):

> —A group health plan or a health insurance issuer . . . **shall reimburse the provider of the diagnostic testing as follows**:
>
> . . .
>
> (2) *If the health plan or issuer does not have a negotiated rate with such provider*, such plan or issuer **shall reimburse the provider in an amount that equals the cash price for such service as listed by the provider on a public internet website**, or such plan or issuer may negotiate a rate with such provider for less than such cash price.

CARES Act § 3202(a) (emphasis added). These plain terms of the CARES Act require Medica to fully reimburse GS Labs at the publicly-posted cash price for the COVID-19

diagnostic testing that GS Labs provides to Medica's insureds because Medica and GS Labs have not agreed to an alternative negotiated rate for testing.

GS Labs has submitted a declaration establishing that Medica and GS Labs have not agreed to a negotiated rate for diagnostic testing (Thompson Decl. ¶¶ 4, 13)—which, in turn, imposed the statutory requirement that Medica must reimburse GS Labs at the "amount that equals the cash price for such service as listed by the provider on a public internet website." CARES Act § 3202(a)(2). GS Labs seeks a declaration from the Court based on this straightforward application of § 3202(a) to the undisputed facts in the present case, in which there is no negotiated rate between the parties.[1] (Dkt.No.1, ¶ 94.)

[1] The fact that Congress structured the rate of reimbursement under § 3202(a) is either (1) the negotiated rate, or (2) the publicly-posted cash price, further supports finding an implied private cause of action. In essence, Congress intended that the parties agree to a contractually negotiated rate, and, if they failed to do so, Congress statutorily imputed the rate that the providers could seek to enforce via what is essentially a breach of contract claim. Both the "text *and structure* of a statute" are relevant to a finding of congressional intent to imply a private cause of action. *Gonzaga*, 536 U.S. at 286; *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 91 (1981) ("Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying *purpose and structure of the statutory scheme*, and the likelihood that Congress intended to *supersede or to supplement* existing state remedies." (emphasis added)); *Ball v. Rodgers*, 492 F.3d 1094, 1107-12 (9th Cir. 2007) (relying on both text and structure to find an implied private cause of action). If an insurer and provider agree to a negotiated rate, such would necessarily be memorialized in writings constituting a contract, and any breach of the reimbursement provisions under such a contract would be enforceable through private litigation for breach of contract. Congress did not need to create a private cause of action for breach of contract; that body of law exists under both state and federal common law. However, where the parties did not negotiate a rate, Congress intended to provide a statutory gap-filler to facilitate the enforcement of a right to reimbursement by providers. Because Congress envisioned and intended private enforcement under § 3202(a)(1) when there is a negotiated rate, it would be both absurd and illogical to reason Congress did not also intend private enforcement under § 3202(a)(2) in the absence of a negotiated rate.

Medica does not deny that there is an actual controversy between the parties regarding the obligations Medica owes as a group health plan or health insurance issuer under § 3202(a) of the CARES Act. Moreover, it is undisputed Medica has not negotiated a rate for diagnostic testing with GS Labs. (*See, e.g.*, Dkt.No.36 at 2 (not disputing this fact, but alleging other disputes).) Therefore, GS Labs has standing to seek a declaration, and there is no genuine dispute, that GS Labs is entitled to judgment as a matter of law that § 3202(a)(2) of the CARES Act requires Medica to fully reimburse GS Labs at the publicly-posted cash price for the COVID-19 diagnostic testing that GS Labs has provided to Medica's insureds. That is the standard upon which Medica's *liability* is established here.

Rather than confine itself to the narrow question before the Court for a legal ruling, however, Medica seeks to sidestep the relevant issue by falsely alleging that GS Labs is engaging in "price gouging" for "medically unnecessary testing" and that not "all" tests (but admittedly some) are reimbursable. (*E.g.*, Dkt.No.31 at 2, 6; Dkt.No.36 at 8, 11-14.) These accusations are not only scandalous and impertinent, *see* Fed. R. Civ. P. 12(f), but also legally irrelevant to the particular question of law before the Court. At most, Medica's accusations relate to the amount of *damages* that may ultimately be awarded for the diagnostic testing GS Labs has provided to Medica's insureds—and not Medica's standard of *liability*, as a matter of law, under § 3202(a)(2) of the CARES Act to reimburse GS Labs at the statutorily-prescribed, publicly-posted cash price rate for the diagnostic testing that GS Labs has provided to Medica's insureds. GS Labs' motion presently before the Court seeks *partial* summary judgment to establish the applicable standard of Medica's *liability* under § 3202(a) of the CARES Act; disputes related to *damages* may be adjudicated later

in these proceedings. *See, e.g.*, *Diagnostic Affiliates*, 2022 WL 214101, at *6 n.11 ("The Court is aware that Defendants complain that the price Diagnostic Affiliates has charged is unreasonably high. . . . *That issue is not presently before the Court.*" (emphasis added)).

Medica's arguments purporting to question the medical necessity of the diagnostic testing GS Labs has provided to Medica's insureds are also irrelevant to GS Labs' motion presently before the Court to establish the standard of Medica's *liability* under § 3202(a)(2) of the CARES Act. As GS Labs has explained, and Medica does not dispute, Congress expressly prohibited insurers from denying payment based on challenges to medical necessity. Specifically, FFCRA § 6001(a) states: "A group health plan and health insurance issuer offering group or individual health insurance coverage . . . **shall provide coverage**, **and shall not impose** any cost sharing (including deductibles, copayments, and coinsurance) requirements or **prior authorization or other medical management requirements**, for the following items and services [(diagnostic testing)]."[2] As previously explained, federal agencies tasked with enforcing the *coverage* provisions of FFCRA § 6001(a) have concluded that insurers may not "use medical screening criteria to deny a claim for COVID-19 diagnostic testing," or "require the presence of symptoms of a recent known or suspected exposure, or otherwise impose medical screening criteria on coverage

[2] Pub. L. No. 116-127, 134 Stat. 177 (2020); *available at*: https://www.govinfo.gov/app/details/PLAW-116publ127.

of tests."[3] Put simply, Congress and federal agencies have prohibited Medica from imposing conditions precedent to its *liability* to reimburse GS Labs by asserting that the testing was "medically unnecessary." The only relevant issue is whether the tests GS Labs provides are approved diagnostic tests. Here, Medica does not dispute that the three types of tests GS Labs provides—antigen, PCR, and antibody—are "diagnostic testing" under CARES Act § 3201 that have been approved for detection of SARS-CoV-2 by the FDA (and state officials and the CDC).[4]

Thus, Medica's contrived "disputes" regarding pricing and medical necessity are irrelevant to the question before the Court—i.e., the standard of Medica's *liability*, as a matter of law, under § 3202(a)(2) of the CARES Act to reimburse GS Labs at the statutorily-prescribed, publicly-posted cash price rate for the diagnostic testing that GS Labs has provided to Medica's insureds.

---

[3] FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44, at 1-3 (Feb. 26, 2021), https://www.cms.gov/files/document/faqs-part-44.pdf.

[4] *See, e.g.*, *In Vitro Diagnostics EUAs - Serology and Other Adaptive Immune Response Tests for SARS-CoV-2*, FDA (Jan. 24, 2022), https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-serology-and-other-adaptive-immune-response-tests-sars-cov-2#individual-serological; *In Vitro Diagnostics EUAs - Antigen Diagnostic Tests for SARS-CoV-2*, FDA (Jan. 24, 2022), https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-antigen-diagnostic-tests-sars-cov-2; *In Vitro Diagnostics EUAs - Molecular Diagnostic Tests for SARS-CoV-2*, FDA (Jan. 24, 2022), https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/in-vitro-diagnostics-euas-molecular-diagnostic-tests-sars-cov-2. The Court may, but need not, take judicial notice of these government sources.

In any event, the supposed "disputes" on these irrelevant allegations are based on inadmissible hearsay evidence, such as third parties' pleadings containing partisan allegations (not evidence) in other cases by other recalcitrant insurance companies who refuse to reimburse GS Labs in accordance with § 3202(a)(2); newspaper articles considered "rank hearsay" in the Eighth Circuit, *S. Wine & Spirits*¸ 731 F.3d at 808; a single disputed complaint filed in *Washington* (not Minnesota); and one Indeed.com review from an anonymous "nurse" who questions the use of certain diagnostic tests approved by GS Labs' doctors and the FDA, CDC, and state officials. This scattering of inadmissible hearsay "evidence" offered by Medica does not raise a *genuine dispute* as to any matter, let alone create a *genuine dispute* as to material facts that bear upon the focused legal issues actually and currently before the Court on GS Labs' motion for partial summary judgment.

Medica's thematic insistence on making assertions that are irrelevant to the pending motion continues with its attacks on GS Labs for offering discounts and payment relief to uninsured individuals in certain circumstances, and for not "generally" charging customers who lack health insurance in Washington state. (Dkt.No.36 at 9-11 (quoting Kurtz Decl., Ex. C).) These assertions merely serve to further illuminate the irresponsible way by which Medica has shirked its congressionally-imposed responsibilities to do its part to support the fight against COVID-19: by placing concern to avoid its insurance coverage payment obligations over the health and safety of the public and its own insureds.

GS Labs should not be vilified for offering aid to those in need; such actions by providers like GS Labs should be, and have been, encouraged. The Secretary of Health and Human Services, who is tasked with enforcing the public-posting provisions of § 3202(b),

has emphasized that providers who offer discounts or other price relief shall not be prejudiced or disadvantaged by such actions: "We do not believe that posting a 'cash price' should prevent a provider of a diagnostic test for COVID–19 from offering testing for free to individuals as charity care or in an effort to combat the public health crisis, rather, the 'cash price' would be the *maximum charge* that *may apply* to a self-pay individual paying out-of-pocket." 85 FR 71142, 71152 (Nov. 6, 2020) (emphasis added). Thus, while GS Labs offers discounts and other price-relief to those in need in certain circumstances, this does not in any way alter the statutory obligation and responsibility for Medica—a multi-billion dollar insurance company—to pay the publicly-posted cash prices for diagnostic testing that GS Labs provided to thousands of Medica's insureds.

Finally, Medica asserts that on January 9, 2022, after filing this lawsuit and moving for partial summary judgment, GS Labs "radically" altered its "COVID-19 Pricing Transparency" webpage to *reduce prices* and *streamline protocols*. (*See* Dkt.No.36 at 15 (citing Kurtz Decl., Ex. B).) Medica speculates without foundation that GS Labs made these updates "in the face of legal action." (*Id.*) There is no evidence in the record to support this claim. On the contrary, updates to testing protocols and prices are typical and are to be expected, including as a reflection of improving per-patient costs over time. Moreover, the webpages did not change "radically"; these Internet sites currently contain the same or similar conspicuous information relevant to the life-saving testing GS Labs provides. (*Compare id.*, Ex. A, *with* Ex. B.) Regardless, these updates have no relevance to the pure questions of law before the Court: the standard of Medica's *liability*, as a matter of law, under § 3202(a)(2) of the CARES Act. Again, GS Labs is not moving for a determination

and award of *damages* in this motion; and, therefore, Medica's sniping about websites and other irrelevant matters have no bearing on the particular question currently before the Court on GS Labs' motion for partial summary judgment.

In summary, Medica does not deny that there is an actual controversy between the parties regarding Medica's obligations and liability under § 3202(a)(2) of the CARES Act; Medica does not dispute that it has no negotiated rate for diagnostic testing with GS Labs; and Medica has proffered nothing but scandalous and impertinent allegations based on irrelevant and inadmissible evidence to oppose the pending motion for partial summary judgment. Accordingly, the Court should grant summary judgment and declare that § 3202(a)(2) of the CARES Act requires Medica to fully reimburse GS Labs at the publicly-posted cash price for COVID-19 diagnostic testing provided to Medica's insureds. In so ruling, the Court need not now address the amount of damages that may eventually be awarded, and may reserve questions regarding the full extent of damages to be awarded for that reimbursement for future adjudication and resolution in these proceedings.

CONCLUSION

GS Labs' motion for partial summary judgment seeks a declaration on two narrow issues of law that will appropriately streamline and focus this action. Accordingly, GS Labs respectfully asks the Court to hold as a matter of law that GS Labs is entitled to bring a private cause of action for Medica's violation of § 3202(a) under the CARES Act; and to hold that Medica is liable under § 3202(a)(2) of the CARES Act to reimburse GS Labs at the statutorily-prescribed, publicly-posted cash price rate for the diagnostic testing GS Labs has provided to Medica's insureds.

Respectfully submitted,

Dated: February 14, 2022

WINTHROP & WEINSTINE, P.A.

s/ Thomas H. Boyd

Thomas H. Boyd, #200517
David M. Aafedt, #27561X
Christianna Finnern, #310724
Kyle R. Kroll, #398433
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
T: (612) 604-6400
tboyd@winthrop.com
cfinnern@winthrop.com
daafedt@winthrop.com
kkroll@winthrop.com

Attorneys for Plaintiff GS Labs, LLC

23393706v3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

GS LABS, LLC, *a Nebraska limited liability company*, Plaintiff, v. MEDICA INSURANCE COMPANY, *a Minnesota insurance corporation*, Defendant.	Case No.: 21-cv-2400 (SRN/TNL) **LR 7.1(f) CERTIFICATE OF COMPLIANCE**

I, *Thomas H. Boyd*, certify that *Plaintiff GS Labs' Reply to Defendant Medica's Opposition to GS Labs' Motion for Partial Summary Judgment* complies with Local Rule 7.1(f).

I further certify that, in preparation of the above document, I used the following word processing program and version: *Word 2019* 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 above document contains the following number of words: 4,979.

Dated: February 14, 2022

WINTHROP & WEINSTINE, P.A.

s/ Thomas H. Boyd

Thomas H. Boyd, #200517
David M. Aafedt, #27561X
Christianna L. Finnern, #310724
Kyle R. Kroll, #398433
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
(612) 604-6400
tboyd@winthrop.com
cfinnern@winthrop.com
daafedt@winthrop.com
kkroll@winthrop.com

Attorneys for Plaintiff GS Labs, LLC

23429575v1