UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

GS LABS, LLC,

Plaintiff,

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

MEDICA INSURANCE COMPANY,

Defendant.

REPLY IN SUPPORT OF MOTION TO DISMISS

GS Labs urges the Court to adopt a construction of the CARES Act under which, should it choose to do so, it may charge $1 million for a single COVID-19 test, perform many thousands of such tests, and extract those astronomical sums in full from insurers through the courts. *See* Opp. at 24. To accept this argument requires the Court to hold that, while Congress did not say so explicitly in the CARES Act, or mention the topic at all in passing the law, Congress nonetheless intended to *imply* an unprecedented cause of action that could easily bankrupt the United States' health insurance system in the midst of a pandemic. GS Labs cannot square this extraordinary proposition with the statute's text or purpose, nor can it distinguish the binding precedent that forecloses its argument. Moreover, GS Labs fails to show that Minnesota state law supplies the private right of action that Congress omitted from the CARES Act. The Court should dismiss GS Labs' complaint in its entirety.

ARGUMENT

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

A. The CARES Act does not "especially" benefit GS Labs.

GS Labs first contends that the CARES Act includes "rights creating" language evincing congressional intent to imply a private right of action. But the examples of "rights creating" language GS Labs cites demonstrate the opposite to be true. GS Labs points to Titles VI and IX, which state: "*No person in the United States shall* . . . be subjected to discrimination." 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a) (emphasis added). The wording of these statutes supports an implied right of action because it "focuses on" "the individuals protected" rather than "the person regulated." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). These examples would support GS Labs' argument had Congress written the CARES Act to mirror Titles VI and IX: "*No diagnostic lab shall* be reimbursed at an amount less than its cash price."

Instead, Congress wrote "*A group health plan or a health insurance issuer* . . . *shall* reimburse the provider of the diagnostic testing." CARES Act, § 3202(a) (emphasis added). Phrasing such as this—*e.g.*, "'*the head of the displacing agency shall* provide for the payment to the displaced person'"—"does not contain 'rights-creating' language" because it "'focus[es] on the person regulated rather than the individuals protected.'" *Osher v. City of St. Louis*, 903 F.3d 698, 702 (8th Cir. 2018) (quoting *Sandoval*, 532 U.S. at 289); *see also* ECF 36 at 18-19. GS Labs makes no effort to distinguish controlling authority holding that virtually identical language to that at issue here forecloses rather than creates an implied right of action.

GS Labs further concedes that the primary goal of the law is to "benefit patients," but argues that it also benefits "testing providers" as necessary to "effectuate" that goal. *See* Opp. at 14-15. In making this argument, GS Labs relies upon a recent decision by a Texas district court that (erroneously) held the CARES Act to include an implied private right of action for labs. *See Diagnostic Affiliates of Ne. Hou. v. United Healthcare Servs.*, No. 2:21-CV-00131, 2022 U.S. Dist. LEXIS 14132, at *20 (S.D. Tex. Jan. 18, 2022). But under Eighth Circuit precedent, this admission is fatal to GS Labs' CARES Act claim.

To imply a private right of action, it is not enough that a party benefit from a statute; the statute must be meant "*especially* to benefit" the plaintiff. *Cedar-Riverside Assocs., Inc. v. Minneapolis*, 606 F.2d 254, 257 (8th Cir. 1979) (emphasis added). Thus, for example, although the Housing Act benefited "private housing developers" and evinced a "congressional purpose to encourage private entrepreneurs in local home building industries," the Eighth Circuit held that private developers had no implied private cause of action. *Id.* It reasoned that "Congress intended such assistance to private developers to serve as a means of achieving the underlying goal of the Housing Act," which was "additional well-planned housing for the benefit of the public," and thus the law was "not intended especially to benefit private developers." *Id.* The Eighth Circuit held the same regarding borrowers under the National Flood Insurance Act (NFIA), despite the fact that they were "members of a class for whose benefit the statute was enacted." *Hofbauer v. Nw. Nat'l Bank*, 700 F.2d 1197, 1200 (8th Cir. 1983). It did so because "in order to satisfy the first of the *Cort v. Ash* criteria[,] [plaintiffs] must show more"—specifically that they are "members of a 'special class' for whose benefit the

statute was enacted." *Id.* Because "Congress enacted the NFIA to protect not only borrowers but lenders and the federal government as well," it lacked the necessary focus on the plaintiff class. *See id.* So too here.

The authority GS Labs cites in connection with the first *Cort* factor undercuts its arguments or is plainly inapposite. *See* ECF 36 at 19-20. It concerns statutory language distinguishable from that at issue here, or in the case of *Maine Community Health Options v. United States*, does not address the issue of implied causes of action at all. 140 S. Ct. 1308, 1320-21 (2020). Indeed, *Maine Community Health Options*, which concerns the federal government's waiver of sovereign immunity under the Tucker Act, does not cite *Cort v. Ash*, much less opine on its first factor.

B. The existence of a government enforcement mechanism precludes implying a private right of action.

FFCRA § 6001(b) confers broad enforcement powers on federal agencies to police the FFCRA's mandate that insurers "shall provide coverage" for COVID-19 testing under FFCRA § 6001(a).[1] 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." CARES Act § 3202(a). The CARES Act thus makes the "cash price" requirement a component of "providing coverage" under the FFCRA.

[1] Among other things, FFCRA § 6001(b) authorizes CMS to bring a civil action "(A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title." ERISA § 502(a)(5).

GS Labs asserts that FFCRA § 6001(b) only concerns "who is responsible for payment, not how payment is to be made." *see* Opp. at 20. But GS Labs cannot explain how federal agencies can enforce the requirement that an insurer "provide coverage" without policing *what* coverage (*i.e.* what payment) is required. Indeed, because the CARES Act's "cash price" provisions are intertwined with the coverage mandate of FFCRA Section 6001(a), GS Labs relies upon the latter in bringing this action, and thus intrudes upon statutory provisions that Congress has dictated "shall be applied by" federal agencies. *See* ECF 36 at 21-22. Moreover, federal agencies have issued guidance about the CARES Act's "cash price" provisions that presupposes their authority to enforce the law—guidance GS Labs has repeatedly cited and relied upon here. *See id.* at 22.[2] "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290.

GS Labs concludes its discussion by defending its reliance *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), for the proposition that courts should freely imply private causes of action when "there is no mode of enforcement other than resort to the courts," claiming the Supreme Court has "reaffirmed . . . several times" the analysis of *Steele*. *See* Opp. at 20-21. But none of the modern precedent GS Labs cites "reaffirms" the principle

[2] GS Labs suggests in its reply in support of its motion for partial summary judgment that these agencies have "disclaim[ed]" the authority to enforce the "cash price" provisions of the CARES Act. *See* ECF 40 at 8-9. But these agencies have done no such thing. GS Labs merely points to regulations implementing Section 3202(b)(1) of the CARES Act. *See id*. These regulations say nothing about the express grant of enforcement authority set out in FFCRA Section 6001(b), much less "disclaim" this statutory authority.

for which GS Labs cites *Steele*. *See id*. The cases merely cite *Steele* for some other proposition. *See id*.

GS Labs' reliance on *Steele* is telling. *Steele* is characteristic of the "'*ancien regime*'" during which "the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citations omitted). But when it decided *Steele*, "the Court followed a different approach to recognizing implied causes of action than it follows now." *Id*. It has long since "abandoned th[e] understanding" that "'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Sandoval*, 532 U.S. at 287 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). Under modern precedent, a statute must "display[ ] an intent to create not just a private right *but also a private remedy*." *Sandoval*, 532 U.S. at 286 (emphasis added). 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; *see also, e.g.*, *Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 773 F.3d 58, 63 (8th Cir. 2014) (declining to imply a private right of action for statutory violations with no apparent enforcement mechanism, and holding that the Court "need not look further" after "[f]inding no indication in either the text . . . or the structure of the [statute] that Congress intended to imply a private cause of action").[3]

[3] GS Labs argues in its reply in support of summary judgment that the structure of the law supports an implied cause of action, because otherwise a contracted lab could enforce its negotiated price through a breach-of-contract action, whereas a non-contracted provider could not enforce payment of its statutory "cash price." ECF 40 at 11 n.1. But

C. Legislative history confirms Congress did not intend to imply the extraordinary cause of action GS Labs advances here.

GS Labs admits that, under its construction of the CARES Act, it may choose to charge $1 million (or more) per COVID-19 test and recover that astronomical sum through the courts without limitation. Opp. at 24. GS Labs nonetheless contends that, because Congress never discussed creating a cause of action that threatens to destabilize the nation's health care system in the CARES Act's legislative history, "the lack of any discussion . . . demonstrates that Congress did not intend to foreclose this form of relief." *See* Opp. at 22-25. This defies both common sense and the law. "The conclusion that no private right of action is implicit in [the statute] is reinforced by the fact that [it]s legislative history is entirely silent on whether or not such a right of action should be available." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 561 (1979). "'[I]mplying a private right on the basis of congressional silence is [ ] hazardous [ ] at best.'" *Gonzalez v. U.S. I.N.S.*, 867 F.2d 1108, 1109-10 (8th Cir. 1989). Nor is GS Labs' interpretation consistent with the law's purpose; it threatens to destroy the insurance infrastructure upon which the nation depends to combat COVID-19.

Moreover, the legislative history GS Labs cites repeatedly emphasizes the need for "the Federal Government . . . to take a much more active role" in fighting the pandemic. *See* Compl. ¶¶ 67-68. This underscores that Congress entrusted the enforcement of the

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this makes perfect sense; insurers have already agreed to negotiated prices, whereas statutory "cash prices" are limited only by a provider's imagination. Moreover, the FFCRA's "provide coverage" mandate and its enforcement mechanisms make no distinction between contracted and non-contracted providers. FFCRA § 6001(b).

CARES Act's "cash price" provisions to federal agencies. The moderation of government enforcement saves the statute from producing absurd results.

D. The fourth *Cort* factor neither favors GS Labs, nor is relevant here.

GS Labs disputes that the regulation of insurance is traditionally a state function. But courts have long recognized "[t]he control of all types of insurance companies and contracts has been primarily a state function since the States came into being." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1955). Regardless, "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action," and "the first three factors discussed in *Cort* . . . are ones traditionally relied upon in determining legislative intent." *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 23 (1979). Because the first three *Cort* factors weigh against implying a private cause of action here, the fourth factor is of little moment.

II. GS Labs' declaratory judgment claim fails as a matter of law.

GS Labs does not dispute that, if the CARES Act does not include a private right of action, its declaratory judgment claim fails as a matter of law. *See* Opp. at 31 n.5. Moreover, because GS Labs seemingly concedes that this claim is entirely redundant of its CARES Act claim, *see id*., the Court may dismiss it even should GS Labs' CARES Act claim survive. *See SYT Sols., LLC v. Burger*, No. 20-794 (JRT/KMM), 2021 U.S. Dist. LEXIS 5230, at *28-29 (D. Minn. Jan. 12, 2021).

III. GS Labs' unjust enrichment claim fails as a matter of law.

GS Labs contends "[w]hether *Congress* intended an implied cause of action is simply irrelevant to whether *Minnesota* law recognizes an unjust enrichment claim in GS

Labs' favor." Opp. at at 32. But a long line of authority precludes plaintiffs from basing Minnesota common law claims on statutes that do not provide for a private right of action, including unjust enrichment claims. *See Nelson v. American Family Mut. Ins. Co.*, 2013 WL 5745384, at *19 (D. Minn. Oct. 23, 2013) (Nelson, J.) (collecting cases).

Moreover, GS Labs has not conferred a benefit on Medica. GS Labs states that it performed services for Medica's insureds while giving Medica "a prepayment credit." Opp. at 33. But this is just another way of saying that what GS Labs has given Medica is nothing more than a "ripened obligation to pay," which (as explained in Medica's opening brief) is not a "benefit" at all. *Travelers Indemnity Co. of Conn. v. Losco Group., Inc.*, 150 F. Supp. 2d 556, 563 (S.D.N.Y. 2001); *see also* Mem. at 14-15. Indeed the *Diagnostic Associates* case GS Labs cites heavily came to this conclusion in dismissing a similar claim, stating that "any benefit of the COVID-19 testing was received by the insured," and "[t]he insurance company only incurs a liability to pay for the service." *Diagnostic Affiliates*, No. 2:21-CV-00131, 2022 U.S. Dist. LEXIS 14132, at *39. And GS Labs does not (and cannot allege) that other insurers "prepay" for COVID testing. GS Labs further asserts that its testing also saved Medica money, as it "improve[d] patient health outcomes" in the community. *See* Opp. at 33. But this is not pled in GS Labs' complaint. Regardless, GS Labs' contribution to community well-being is precisely the sort of "remote benefit" that is not "sufficient to demonstrate a prima facie case for the equitable claim of unjust enrichment." *Gen. Mktg. Servs. v. Am. Motorsports, Inc.*, 393 F. Supp. 2d 901, 909 (D. Minn. 2005).

GS Labs further concedes that it did not confer any benefit unknowingly or unwillingly. *See* Opp. at 34-35. It nonetheless argues that this requirement applies only to unjust enrichment cases involving a "bad bargain." *See id.* But none of the cases GS Labs cites set out any such limiting principle, or decline to apply the requirement at issue to any unjust enrichment claim. Indeed, the Eighth Circuit has treated the question of whether a party merely entered into a "bad bargain" and whether a party conferred benefits unknowingly or unwillingly as separate limitations on an unjust enrichment claim. *See Ringier Am. v. Land O'Lakes*, 106 F.3d 825, 829 (8th Cir. 1997).

Finally, GS Labs does not dispute that the subject matter of its unjust enrichment claim is governed by express contracts—both Medica's contracts with its insureds and GS Labs' contracts with its patients. *See* ECF 31 at 16-18. Unjust enrichment claims will not lie where the party's "claim for payment [is] governed by an express contract," even where the defendant "was not a party." *Ringier Am. v. Land O'Lakes*, 106 F.3d at 827, 829. GS Labs makes no effort to distinguish controlling and other authority. *See* ECF 31 at 17 n.8. The sole case GS Labs cites, *Fire Insurance Co. v. Minnesota State Zoological Bd.*, *U.S.*, does not address the issue at all. *See* 307 N.W.2d 490, 497 (Minn. 1981).

GS Labs complains that its contracts with its patients are "outside the pleadings," but does not deny that they are part of its website, or that its complaint cites and relies upon its website, including the relevant portion. *See* ECF 31 at 17 n.5. The contracts are therefore "materials embraced by the complaint," *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1154 (D. Minn. 2010), or are at least subject to judicial notice. *Langer v. HV Glob. Grp., Inc.*, No. 2:21-cv-00328, 2021 U.S. Dist. LEXIS 197769, at *4 (E.D. Cal. Oct. 12,

2021). And GS Labs does not dispute the authenticity of the contract or that all of the Medica insureds at issue in this case agreed to it.

Finally, GS Labs contends that, because its contracts with patients may violate the CARES Act, its unjust enrichment claim can proceed. *See* Opp. at 36. But Courts have "dismissed unjust enrichment claims even when a legal remedy was no longer available." *City Ctr. Realty Partner, LLC v. Macy's Retail Holdings, Inc.*, No. 17-CV-528, 2017 U.S. Dist. LEXIS 148482, at *33 (D. Minn. Sep. 13, 2017) (Nelson, J.). The *existence* of a contract forecloses equitable relief, regardless of any defenses to its enforcement. *See id.*

IV. GS Labs' negligence per se claim fails as a matter of law.

Minnesota law holds that "no duty of care exists between parties to an 'arm's-length commercial transaction.'" *Blue Cross & Blue Shield of N. Carolina v. Rite Aid Corp.*, 519 F. Supp. 3d 522, 543 (D. Minn. 2021) (listing cases).[4] GS Labs does not, and cannot, cite any contrary authority. It claims that, despite this general principle, there exists a common law duty that specifically requires insurers to pay diagnostic labs at acceptable rates during a pandemic. Opp. at 38-39. Unsurprisingly, GS Labs fails to point to any case suggesting the existence of such a duty. Nor does GS Labs explain the legal grounds upon which this Court can invent it, instead gesturing vaguely at "the essence of Minnesota law." Opp. at 38. GS Labs has failed to "show[ ] . . . [an] underlying common

[4] GS Labs suggests that this principle only applies to the duty to "supply information." Opp. at 38. But no Minnesota authority so limits that principle, and Minnesota courts have applied it outside of the context of supplying information. *See, e.g.*, *Ascente Bus. Consulting, LLC v. DR myCommerce*, No. 18-cv-138, 2018 U.S. Dist. LEXIS 125228, at *17 (D. Minn. July 26, 2018). GS Labs cites no case recognizing a duty of care concerning the amount one party pays another in a commercial transaction.

law duty" to support its negligence per se claim. *Elder v. Allstate Ins. Co.*, 341 F. Supp. 2d 1095, 1102 (D. Minn. 2004).

GS Labs also asserts in passing that Medica and GS Labs "are not parties to an arms' length transaction." Opp. at 38. The only support it offers is its allegation that the parties' price negotiations "have broken down and are at an impasse." *See* Compl. ¶ 56. But this serves only to underscore the "arms' length" nature of the parties' relationship. *See B. Riley FBR, Inc. v. Clarke*, No. 18-CV-2318, 2019 WL 4242537, at *5 (D. Minn. Sept. 6, 2019) (explaining the "arm's length" relationship as "adversarial parties" that are "sophisticated equals negotiating a business transaction").

Moreover, GS Labs does not dispute that the CARES Act bears no resemblance to the types of statutes that typically support a claim for negligence per se. It argues that the lack of similar comparators stems from the rare circumstances of "a 100-year pandemic." Opp. at 39. But regardless of this context, the law pertains to *the amounts of payments in commercial transactions*, not safety measures intended to prevent physical harm. Statutes not intended "to protect a class of persons from dangerous situations or activities" cannot support a claim for negligence per se. *See Fed. Home Loan Mortg. Corp.*, 184 F. Supp. 3d 726, 738 (D. Minn. 2016) (Nelson, J.) (citation omitted).

Finally, GS Labs concedes that it alleges Medica engaged only in intentional conduct with intended results. *See* Opp. at 39-40. It is hornbook law that negligence by definition does not encompass *intentional* conduct. *See, e.g.*, Restatement (Second) of Torts § 282. This principle is firmly embedded in Minnesota law. *See, e.g.*, *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 530-31 (1939).

Incredibly, GS Labs contends otherwise. GS Labs cites *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011), for the principle that "negligence only requires showing breach of a duty, regardless of whether that breach is intentional or accidental." Opp. at 39-40. But that case merely discusses the difference in tort liability as between "misfeasance or nonfeasance," or negligent acts and omissions. 805 N.W.2d at 22-23. GS Labs further notes that Minnesota law recognizes the concept of "willful negligence." Opp. at 40. But the authority GS Labs cites explains that "it is not an accurate term" insofar as it implies intentional conduct, as "ordinary negligence is not an intentional tort." *Murphy*, 206 Minn. at 530-31; *see also Am. Litho, Inc. v. Imation Corp.*, No. 08-CV-5892, 2010 U.S. Dist. LEXIS 15712, at *14 (D. Minn. Jan. 19, 2010) (Nelson, J.) (noting that "willful negligence" refers to reckless rather than intentional conduct).

Finally, GS Labs claims that the Restatement's definition of negligence as excluding intentional conduct is somehow limited by the language "[t]he definition of negligence *given in this Section*." Opp. at 40. But the "section" is "Negligence Defined," the definition used throughout that treatise. Restatement (Second) of Torts § 282. And while GS Labs points out that negligence under the Restatement may consist of "either of an *act* . . . or an omission," Opp. at 40, this does not change the black-letter law that "[a]ny given *act* may be intentional or it may be negligent, but it cannot be both." Dobbs' Law of Torts § 31 (2d ed. 2020) (emphasis added).

V. Punitive damages cannot be pled at the outset of a case.

This Court has uniformly held that parties may not plead statutory punitive damages under Minnesota Statutes § 549.191 at the outset of a case. *See Bergman v.*

Johnson & Johnson, No. CV 20-2693, 2021 WL 3604305, at *6 (D. Minn. Aug. 13, 2021). The authority GS Labs cites holds only that, on *a motion to amend to add punitive damages*, courts apply Federal Rules of Civil Procedure 8 and 15(a). *See Coleman v. Lakeville Loan Servicing, LLC*, No. 19-CV-1168, 2020 WL 1922569, at *2-3 (D. Minn. Apr. 21, 2020). Where a party "never filed a motion to amend," but instead "improperly included punitive damages from the outset," this Court regularly dismisses such claims. *Bergman*, 2021 WL 3604305, at *6.

VI. ERISA preempts GS Labs' state law claims.

GS Labs does not seriously dispute that its state-law claims are preempted to the extent that they involve ERISA plans. It contends that because "COVID-19 did not exist when many of Medica's plans were written," there is "no reason to reference the plan terms with respect to the obligation to pay for COVID-19 testing that is imposed by the FFCRA." Opp. at 42. But GS Labs seeks to recover plan benefits for services rendered, the coverage of which requires reference the plan terms.

Rather than dispute the substance of Medica's argument, GS Labs contends that dismissing its claims to the extent they pertain to ERISA plans would be "premature." But courts regularly dismiss such claims at the Rule 12 stage. *See* Mem. at 36 n.7, n.8, n.9. Should any of GS Labs' claims survive outright dismissal, the Court should dismiss them to the extent they pertain to Medica's ERISA plans.

CONCLUSION

The Court should dismiss GS Labs' Complaint in its entirety.

Dated: February 28, 2022

Respectfully submitted,

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L.R. 7.1(f) CERTIFICATE OF COMPLIANCE

I, Jamie R. Kurtz, certify that Defendant's Reply in Support of Motion to Dismiss 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 4,101 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: February 28, 2022

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