The Honorable Lauren King

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PREMERA BLUE CROSS,

Plaintiff,

v.

GS LABS, LLC, a Delaware limited liability company,

Defendant.

Case No. 2:21-cv-01399-LK

DEFENDANT GS LABS, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

NOTE ON MOTION CALENDAR: JUNE 10, 2022

ORAL ARGUMENT REQUESTED

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

TABLE OF CONTENTS

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

State Cases

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

I. INTRODUCTION

Premera's opposition confirms why this action must be dismissed with prejudice: in the third year of this global pandemic, with the BA.2 Omicron variant again surging, Premera has asked this Court to judicially determine that it does not owe GS Labs tens of millions of dollars for COVID-19 tests performed for thousands of Washingtonians, knowing full well that (1) federal law requires Premera to pay GS Labs's posted cash prices; and (2) federal law immunizes GS Labs from suit because Premera's action is causally connected to GS Labs' provision of COVID-19 diagnostic testing—a "Recommended Action" for COVID-19 Covered Countermeasures.

Because the PREP Act provides broad immunity against claims that are causally related to the administration and management of Covered Countermeasures, like COVID-19 diagnostic testing, GS Labs is entitled to complete immunity from all of Premera's claims. Further, because Premera's claims directly conflict with the CARES Act and the FFCRA's reimbursement requirements for diagnostic COVID-19 testing, Premera's claims fail under federal conflict preemption principles as well. As to the CPA claim, Premera's opposition all but concedes that its CPA claim cannot stand under Washington law because neither Washington courts nor federal courts interpreting the FTC Act have ever recognized such theories—and, in fact, the Washington legislature in 2021 ***considered, but failed to pass,*** legislation that would ***add*** price gouging as a basis for a CPA claim. Lastly, Premera's ERISA claim fails because Premera has not alleged the factual basis necessary to establish standing or concrete harm to the Plan or its participants (who have never been balanced billed or otherwise billed for coverage).

Because Premera's complaint—and each and every claim—fails on multiple independent grounds, GS Labs respectfully requests that this Court dismiss the entire action with prejudice.

II. THE COURT SHOULD DISMISS THE ENTIRE COMPLAINT WITH PREJUDICE

A. Premera's Claims Are Barred by the PREP Act.

In its opening brief, GS Labs showed that Premera's claims are barred as a matter of federal law under the PREP Act because they are causally connected with GS Labs's administration of COVID-19 diagnostic testing, which is a "covered countermeasure" under the PREP Act. GS Labs is a "covered person" pursuant to 42 U.S.C. § 247d-6d(i)(2),(5), as a laboratory administering COVID-19 testing;

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Premera's claims—even if styled as declaratory relief—are for the administration of covered countermeasures (i.e., COVID-19 diagnostic testing) and would result in monetary loss from the same; and Premera's claims arise from and relate to GS Labs' administration of COVID-19 testing and management of the billing of such testing to Premera. (Compl. ¶¶ 9–10.) Premera's lawsuit has a direct causal relationship with GS Labs' administration of COVID-19 testing, i.e., a "covered countermeasure." And because Premera seeks both damages and monetary declaratory relief caused by GS Labs' the administration and provision of those countermeasures (including Premera's required coverage thereof), Premera's claims are precluded as "claims for loss" under the PREP Act.

PREP Act immunity here makes sense because the federal government has continued to prioritize the expanded ***administration*** of covered countermeasures, over other considerations such as litigation risk during this period of extreme public health crisis. 42 U.S.C. §§ 247d-6d, 247d-6e, 247d-6d(i)(2),(5) (2020); *see also* 85 Fed. Reg. 15198, 15202 (2020) (defining "covered countermeasures" as including "***any biologic, any diagnostic, any other device***, . . . ***used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom***."). (Emphasis added.) In so declaring, the Secretary directed that the PREP Act immunizes "covered persons" from claims related to "the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, ***sale, purchase,*** donation, ***dispensing,*** prescribing, ***administration***, licensing, and ***use of the Covered Countermeasures***." *Id.* (emphasis added); *Maney v. Brown*, 2022 WL 377900, at *2 (D. Or. Feb. 8, 2022) ("Courts analyzing the scope of the PREP Act have consistently held that the PREP Act's immunity provision applies to those who administer or use covered countermeasures[.]").

In its opposition, Premera objects to the "novel" application of the PREP Act but fails to cite a single case supporting its position which is juxtaposed to Congress's intent and is in the face of the sweeping immunity set forth under the plain language of the PREP Act statute. Instead, Premera quibbles that (1) the PREP Act's "claim for loss" requirement is not met under the PREP Act because Premera's "declaratory relief" claims ***for declarations of monies owed to GS Labs*** under the DJA and ERISA are not, in fact, "claims for loss" under the PREP Act—while also asking this Court to ignore its

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

express damages claim under the Consumer Protection Act ("CPA") (*see* Opp. at 10:1–11:23); and (2) that Premera's claims are not causally related to the "administration to or use by an individual of a covered countermeasure" because "there is no causal connection to the actual administration of COVID-19 tests sufficient to invoke the PREP Act (*id* at 11:26–15:2.) Neither argument passes muster because (1) Premera admits that it seeks both damages and declarations of monies owed, which federal courts have long recognized as claims for loss; and (2) Premera's complaint contests the adequacy of GS Labs' administration of the covered countermeasures as the basis to deny coverage under the CARES Act and the FFCRA. Because the PREP Act bars Premera's claims, this action must be dismissed.

1. Premera's Claims For Damages and for Declarations of Monies Owed Constitute "Claims for Loss" within the Scope of the PREP Act.

As shown in GS Labs's opening brief, GS Labs is entitled to PREP Act immunity because Premera's claims for damages, declarations of monies owed (or not owed), and attorneys' fees under the Washington State Consumer Protection Act ("CPA"), ERISA, and the Federal Declaratory Judgment Act constitute "claims for loss" related to the administration of COVID-19 testing by GS Labs.

The PREP Act provides immunity for "all claims for loss," which means "***any type of loss***" relating to the administration of a covered countermeasure, which expressly include ***but are not limited to*** "loss of or damage to property" and "business interruption loss." 42 U.S.C. §§ 247d-6d(a)(1) & (a)(2)(A). To GS Labs' knowledge, no court has ever interpreted the PREP Act to hold that claims seeking declaratory judgments as to monies owed are not "claims for loss" under the PREP Act; nor would such a holding make sense here because Premera's disguising of its claims as declaratory judgment actions do not change the fundamental nature of its claims—Premera cannot get around the fact that its lawsuit seeks "claims for loss" solely from GS Labs' administration of COVID tests.

Federal courts have recognized that declaratory relief claims may constitute claims for monetary loss, particularly where, as here, the relief sought seeks a declaration as to the amount owed under a contract or at law (or to impose a loss on an opposing party based on the judgment sought). *See, e.g.*, *Sekhon v. BAC Home Loans Servicing LP*, 519 Fed. App'x 971 (9th Cir. 2013) (recognizing monetary value of declaratory judgment action where defendant stood to lose face value of promissory note if

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

court accepted plaintiff's interpretation for purpose of establishing amount in controversy); *54-40 Brewing Co. LLC v. Truck Ins. Exch.*, 2021 WL 6124788, at *1 (W.D. Wash. Dec. 28, 2021) (recognizing value of "aggregate losses" at issue in declaratory judgment action that certain claims are covered under Defendant Truck Insurance Exchange to well-exceed $5 million amount in controversy requirement); *Biotronik, Inc. v. Medtronic USA, Inc.*, 840 F. Supp. 2d 1251, 1257 (D. Or. 2012) ("Where, as here, the lawsuit seeks a declaration of no liability, the value of the relief sought is measured by the value of the liability that would follow if liability were found to exist.") (citing *Matsuda v. Wada*, 128 F. Supp. 2d 659, 663–64 (D. Hawaii 2000); *see also* 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3708 (2011) ("with regard to actions seeking declaratory relief, the amount in controversy is the value of the right or the liability of the legal claim to be declared")). Indeed, the United States Supreme Court has long recognized that the very value of a declaratory judgment action may be measured by the "losses that will follow" from entry of the sought-after judgment:

> In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. . . . Here, that object is the right of the individual Washington apple growers and dealers to conduct their business affairs in the North Carolina market free from the interference of the challenged statute. ***The value of that right is measured by the losses that will follow from the statute's enforcement.***

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 347 (1977) (emphasis added). So too here, the declaration Premera seeks is a judgment that GS Labs' billed claims are "null and void," and thus is properly measured as a "claim for loss" for the purposes of PREP Act immunity. *Id.* To hold otherwise would incentivize mischievous pleading to evade PREP Act immunity.

Here, there is no reasonable dispute that GS Labs faces significant claims for loss if Premera succeeds in obtaining declaratory judgment and injunctive relief declaring GS Labs' bills for COVID-19 testing void. Premera asserts claims for declaratory judgment that the claims submitted by GS Labs to Premera "are not payable and void" ***plus*** the recovery of fees and costs under ERISA (Compl. ¶ 137), and for various declaratory judgments that that "[n]either Premera, nor its members, need pay claims submitted by GS Labs . . . ." under a variety of circumstances (*id.* ¶ 150(a)–(d)), as well as claims for

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

actual damages, including the $10,000 it had submitted (on the $57 million in claims billed by GS Labs to Premera) (*id.* ¶ 128). Further, such an interpretation of the meaning of "claims for loss" is consistent with judicial applications of the PREP Act, which have interpreted the scope of immunity broadly, including to reach "all claims" that "relate to use of a Covered Countermeasure." *See, e.g.*, *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 401 (3d Cir. 2021) ("A covered person enjoys immunity from ***all claims arising under federal or state law that relate to the use of a covered countermeasure***.") (citing 42 U.S.C. § 247d-6d(a)(1)) (emphasis added); *Parker v. St. Lawrence Cnty. Pub. Health Dep't*, 102 A.D.3d 140, 143-44 (N.Y. App. 2012) ("Congress intended to preempt ***all state law tort claims*** arising from the administration of covered countermeasures by a qualified person pursuant to a declaration by the Secretary . . . .") (emphasis added).[1]

2. Premera's Claims are Causally Connected to GS Labs's Administration of Covered Countermeasures.

Premera argues that its claims are "not causally related" to administration of covered countermeasures because GS Labs allegedly submitted "false and misleading insurance claims" and engaged in other purported misconduct. (Opp. at 11:24–15:2.) Aside from being demonstrably false, Premera's position defies common sense and federal law.

The PREP Act provides broadly defines the "Administration of Covered Countermeasures" as including "physical provision of the countermeasures to recipients, or ***activities and decisions directly relating to public and private delivery, distribution, and dispensing of the countermeasures to recipients***; ***management and operation of countermeasure programs***; or ***management and operation of locations for purpose of distributing and dispensing countermeasures***." 85 Fed. Reg. 15198, 15200

[1] Premera argues that PREP Act immunity does not apply based solely on Premera's unverified allegations that "GS Labs deliberately did not comply with applicable guidance," citing the HHS General Counsel, Advisory Opinion 20-04 at 4 (Oct. 22, 2020, as modified Oct. 23, 2020). (Opp. at 11:22-23.) But this violates the plain text of the PREP Act, which provides for very narrow exceptions to immunity based on actions for wrongful death or serious physical injury caused by serious misconduct. 42 U.S.C. §247d-6d(d). This exception does not apply because Premera does not assert claims either for death or serious physical injury. Further, the guidance relied upon by Premera discussed that interpretation in the context of providing more guidance as to which agency is the acting "Authority Having Jurisdiction," where there are conflicts between local, state, and CDC guidance—and it does not support the proposition that Premera can avoid the broad immunity of the PREP Act merely by alleging in the Complaint that GS Labs did not comply with unspecified "applicable law."

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

(2020).[2] Actions related to the billing of insurers—as provided under the CARES Act and FFCRA—fall within the definition of the "management and operation of covered countermeasure programs" because they directly relate to the public and private delivery, distribution and dispensing of those countermeasures. *Id.* And such a result is sensible, given Congress's express recognition that "in the context of a public health emergency, ***immunizing certain persons and entities from liability was necessary to ensure that potentially life-saving countermeasures will be efficiently developed, deployed, and administered***." Kevin J. Hickey (Legislative Attorney), Congressional Research Service, "The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures," *available at* https://crsreports.congress.gov/ product/pdf/LSB/LSB10443 (emphasis added).

The main case on which Premera relies—*Haro v. Kaiser Found. Hosps.*, WL 5291014, at *2 (C.D. Cal. Sept. 3, 2020)—is inapposite because that case involved wage and hour claims related to requiring employees to come to work 15 minutes early for COVID-19 screening, not the actual administration of COVID-19 testing to individuals.[3] The gravamen of the *Haro* dispute was not the requirement for COVID-19 screening, but rather, the requirement that employees show up before their shifts start (and before they begin being paid). In contrast here, Premera's claims strike at the heart of GS Labs' ability to provide (and continue providing) COVID-19 countermeasures at all because Premera's conduct (and ongoing refusal to pay for tens of millions of dollars of COVID-19 tests) threatens the orderly administration of COVID-19 diagnostic testing. At its core, Premera's lawsuit reflects Premera's fundamental disagreement with the federal government's requirement that well-funded insurers, like Premera, pay the posted cash prices for COVID-19 diagnostic testing where they have failed to pre-negotiate rates with out-of-network providers. This is precisely the type of litigation

[2] The "Recommended Activities" requirement merely requires that one is engaged in "Recommended Activities," in order to be eligible for PREP Act immunity under the Secretary's declaration. According to the Secretary's declaration, "Recommended Activities" include the manufacture, testing, development, distribution, *administration, or use* of one or more Covered Countermeasures." *See* 85 Fed. Reg. at 15201 (emphasis added). There is no dispute that GS Labs was engaged in the administration of COVID-19 diagnostic testing, so the "Recommended Activities" requirement is satisfied.

[3] The other cases on which Premera relies are similarly distinguishable and are largely limited to the removability of wrongful death lawsuits against senior care centers who were alleged to have ***failed*** to implement covered countermeasures. (*See, e.g.*, Opp. at 12:1–8, 13:2–3, citing *Jackson v. Big Blue Healthcare, Inc.*, 2020 WL 4815099, at *6 (D. Kan. Aug. 19, 2020) (wrongful death action against residential care facility), *Saunders v. Big Blue Healthcare, Inc.*, 522 F. Supp. 3d 946 (D. Kan. 2021) (wrongful death action against residential care facility), *Gwilt v. Harvard Square Ret. & Assisted Living*, 537 F. Supp. 3d 1231, 1241 (D. Colo. 2021) (wrongful death action against residential care facility); *see also* Opp. at n.13.)

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

that threatens the availability of such testing while lining insurers' pockets—and the very type of lawsuit the PREP Act was intended to combat. The Complaint thus should be dismissed with prejudice.

B. The CARES Act and the FFCRA Require Premera to Cover GS Labs' "Cash Price" for Diagnostic COVID-19 Testing.

GS Labs demonstrated in its opening brief that Premera's claims are preempted because the CARES Act expressly authorizes GS Labs to charge Premera its "cash prices" for testing, and HHS has provided express guidance on what types of "cash prices" may be billed to insurers, like Premera, even where the provider offers discounts to patients—and each of Premera's claims conflict with Congress's requirement that Premera pay GS Labs' posted cash prices. (Mot. at 5:1-23.)

The FFCRA mandates that group health plans and health insurance issuers, like Premera "shall provide coverage, and shall not impose any cost sharing…requirements or prior authorization or other medical requirements" for claims for "***In vitro diagnostic products . . . for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19.***" Pub. L. No. 116-127 § 6001(a)(1)–(2) (2020) (emphasis added). The CARES Act further expanded the scope of that coverage by providing that plans may either have a "negotiated rate" with a provider in effect before the public health emergency for the payment of "diagnostic testing." Pub. L. No. 116–136 § 3202 (2020). In the absence of a negotiated rate, "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." *Id.* Thus, both the CARES Act and the FFCRA mandate that Premera cover claims submitted by GS Labs for diagnostic COVID-19 testing.

Premera argues in opposition that GS Labs "ignores the other misconduct alleged in Premera's complaint" but it is Premera that is missing the point. (Opp. at 15:15–17:8.) The issue here is that Premera beseeches this Court to create judicially-manufactured exceptions to the CARES Act and to the FFCRA payment requirements for COVID-19 diagnostic testing performed in compliance with federal guidelines—including for confirmatory PCR testing, antibody testing, and respiratory panel testing—simply because Premera and other well-funded insurers unilaterally object to such testing as "medically inappropriate" or disagree with a provider's cash price. (Compl. ¶¶ 100–105; 106.) Thus the entire

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

gravamen of Premera's lawsuit violates the CARES Act and FFCRA's requirement that Premera render payment because federal law simply does not recognize such exceptions to the coverage requirements for insurers at law or in any of the applicable regulations. Given that Premera does not allege (or have) any negotiated rates with GS Labs, (1) Premera was required under federal law to cover diagnostic COVID-19 testing, as set forth in Pub. L. No. 116-127 section 6001(a)(1)–(2); and (2) Premera is required to pay GS Labs its "cash price" for COVID-19 diagnostic testing, as defined under federal regulations. The Federal Register defines "cash price" as "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 Fed. Reg. 71142, 71152 (2020).

Curiously, Premera's opposition appears to shift its "cash price" objection away from its original allegations regarding GS Labs's offering of need-based discounts based (as alleged in Paragraphs 76–89 of the Complaint–and debunked at length in GS Labs' opening motion at 15:12–16:5), and instead pivots to the threadbare allegation in Paragraph 94 that GS Labs' "COVID-19 Pricing Transparency Page" fails to indicate the "cash price" at all. (Opp. at 2:7–22.) This is demonstrably false based on Premera's own pleadings—and Premera fails to allege any facts showing that GS Labs charged alternative "cash prices" based on anything other than qualifying hardship. Rather, Premera appears again to conflate GS Labs' offering of these hardship discounts with the provision of "alternative cash prices." (Opp. at 2:3–3:4.) Without any facts to support these allegations, Premera fails to allege any actionable claim that GS Labs did not post cash prices at all (which is also confirmed in Premera's operative allegations in its causes of action). (Compl. ¶¶ 120(b), 124, 125, 129, 145, 150(d).)

Likewise, Premera's opposition—which is largely silent as to the legal basis for its objections to payment of COVID-19 diagnostic testing on the basis of medical necessity—confirms that Premera's refusals to pay GS Labs conflict with applicable law, which does ***not*** permit insurers to unilaterally refuse coverage on the basis of an independent determination of medical necessity. Indeed, Premera offers no rebuttal to the fact that HHS has specifically advised that COVID-19 diagnostic testing is ***presumed*** to be medically appropriate: "When an individual seeks and receives a COVID-19 diagnostic test from a licensed or authorized health care provider, or when a licensed or authorized health care provider refers an individual for a COVID-19 diagnostic test, plans and issuers generally must assume

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

that the receipt of the test reflects an 'individualized clinical assessment' and ***the test should be covered without cost sharing, prior authorization, or other medical management requirements***." *See* FAQs About FFCRA and CARES Act Implementation Part 44 (Feb. 26, 2021), *available at* https://www.cms.gov/files/document/faqs-part-44.pdf (emphasis added). Similarly, Premera offers no rebuttal to the fact that the CDC itself has "strongly encourage[s] clinicians to test for other causes of respiratory illness." *See* FAQs About FFCRA and CARES Act Implementation Part 42 at Q5. (Apr. 11, 2020), *available at* https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf.

Because Premera's state law claims conflict with the plain language of the CARES Act and the FFCRA's requirements for coverage of COVID-19 diagnostic and related testing at "cash prices," Premera's claims must be dismissed under federal conflict preemption principles. *See, e.g., Whistler Investments, Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1167 (9th Cir. 2008) (affirming finding of preemption where claims would conflict with program authorized under federal law).

C. Premera Fails to State a Claim Under the CPA Based on Alleged Price Gouging.

In its opening brief, GS Labs showed that Premera's CPA claim for alleged price gouging fails on the independent basis that Washington does not recognize "price gouging" as an unfair or deceptive trade practice under the CPA. (Mot. at 18:13–21:10.) In opposition, Premera concedes the briefing does not "cite a single case holding that price gouging is acceptable under the CPA," because "to Premera's knowledge, no such case exists."[4] (Opp. at 17:13–17:15.) Despite this, Premera urges this Court to adopt the position of the Washington Attorney General, usurp the role of the legislature, and create a new ground for relief under the CPA, despite the fact as recently as ***2021*** bills attempting to add price gouging to the CPA failed in the state legislature. Wash. S.B. 5191 (2021). This is verboten.

"Federal courts should 'hesitate prematurely to extend [state] law . . . in the absence of an indication from the [state] courts or the [state] legislature that such an extension would be desirable.'" *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1154 (9th Cir. 2011) (citing *Torres*, 867

[4] Neither of the Washington cases cited by Premera involved "price gouging" CPA claims. (Opp. at 18:6–16.) *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wash. 2d 298, 553 P.2d 423 (1976) alleged violations of Consumer Protection Act, Retail Sales Installment Act and Unfair Motor Vehicles Practices Act in the operation of automobile sales business based on a bait-and-switch false advertising scheme, not price-gouging. *Yaron v. Conley*, 17 Wash. App. 2d 815, 488 P.3d 855 (2021) did not involve CPA claims at all, but rather the policy behind a specific cannabis regulation.

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

F.2d at 1238); *see Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986) (federal courts apply "existing" state law "and do not predict possible changes in that law"); *accord Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 & n.1 (9th Cir. 1989). The Washington State legislature's consideration (and rejection) of a bill adding an express price gouging provision to the CPA confirms that such a violation does not currently exist under the statute. *E.g., W. Plaza, LLC v. Tison*, 184 Wn.2d 702, 707 (2015) ("The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole."). Such a statutory change falls squarely within the purview of the state legislature, not the Attorney General, or the judiciary. *E.g., Martin v. Tollefson*, 24 Wn.2d 211, 223, 599 (1945) (rejecting request to construe statute with substituted phrase and explaining "[t]he request amounts to asking the court to reverse the legislative choice and *enact* the Senate Bill. Although courts have frequently been accused of legislating, and no doubt sometimes justly, we venture to say that no court has ever gone to that length, or even approached it."); *State v. Pac. Health Ctr., Inc.*, 135 Wn. App. 149, 156 (2006) (rejecting Attorney General's request to declare unlicensed alternative medicine "unfair," holding that to do so would create a new category of *per se* unfair conduct absent legislative action).

Similarly, Premera's *ipse dixit* rebuttal to the federal decision, *FTC v. Lundbeck*, 2010 WL 3810015 (D. Minn. Aug. 31, 2010) is unavailing because Premera fails to cite any authority under the FTC that has ever recognized price gouging as a valid claim. Because Washington Courts look to the FTC Act and the FTC as interpreted by the federal courts to determine whether an act or practice is nonetheless an "unfair" act or otherwise a violation of public interest," the weight of federal authority—and the Washington State legislature's ***ongoing consideration*** of bills that would specifically add price gouging as a claim under the CPA—impels the dismissal of Premera's price gouging CPA claim as simply not viable under Washington law.[5] *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013); *see*

[5] Significantly, no other state imposes blanket price-gouging liability judicially or through generic CPA-type statutes. Instead, states that have chosen to regulate prices in an emergency uniformly have done so through duly enacted legislation directed to that specific topic. *See, e.g.*, Cal. Penal Code § 396(b); Ark. Code Ann. § 4-88-303(a). And courts have rejected attempts to stretch general consumer protection acts to cover excessive pricing. *See, e.g., Sullivan v. Lab'y Corp. of Am. Holdings*, 2018 WL 1586471, at *4 (M.D.N.C. Mar. 28, 2018) (excessive price alone could not state claim under North

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

also RCW 19.86.920; *see also Gutierrez v. Bean*, 2006 WL 4117064, at *3 (D.N.M. Dec. 13, 2006) (court "unable to find any evidence of a claim for price 'gauging' or 'gouging' under federal law"); *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57 (1983) (declining to treat due on-sale clauses as unfair where they did not offend any independent statute and have previously been upheld) (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n.5 (1972)); *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007) (affirming dismissal of CPA claim where plaintiff failed to show duty).

D. Premera Fails to State a Claim under ERISA Section 502(a)(3).

Lastly, Premera's ERISA claim fails because: (1) Premera's ERISA 502(a)(3) claim is brought in Premera's capacity as a claims administrator, but not as a Named Fiduciary of the Plans, and in any event, Premera claim for the reimbursement of services and the right to receive reimbursement for similar services in the future must be brought under ERISA 502(a)(1) (which must be made only by plan participants or beneficiaries, which Premera is not) and, not ERISA 502(a)(3), as alleged by Premera, (*see* Mot. at 21:12-24:7); and (2) Premera fails to allege any right or benefit under ERISA impacted by GS Labs or otherwise allege a concrete harm to the plan because the gravamen of Premera's claim is a limitation on monetary reimbursement.

Section 502(a)(3) of ERISA allows an action for injunctive relief to redress harms to the plan or violations of the ERISA statute to be filed by a fiduciary. *Bd. of Tr. of Cali. Winery Workers Pension Tr. Fund v. Union Bank N.A.*, 2011 WL 1321602, at *5. In contrast, ERISA § 502(a)(1)(b) provides for a cause of action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or ***to clarify his rights to future benefits under the terms of the plan***" by plan beneficiaries or participants. Emphasis added. Here, Premera's opposition concedes (1) Premera seeks a declaration as to rights to reimbursement and for reimbursement for future services, and (2) that GS

Carolina consumer protection statute); *Se. Penn. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 707 (E.D. Pa. 2015) ("exorbitant" pricing alone not "unfair" under California consumer protection statute); *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010) ("[C]harging an unconscionably high price generally is insufficient to establish a claim for unfairness [under Illinois statute]"); *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 196–97 (S.D. 2007) (dismissing differential pricing claim, holding "this type of allegation does not fall within the deceptive practices prohibited by the [Consumer Protection] Act"); *Scavio v. Smart Corp.*, 2001 WL 631326, at *5 (N.D. Ohio Apr. 26, 2001) ("price gouging" for medical copies not an "unfair or deceptive practice" under Ohio statute). That every other state addresses price gouging through specific legislation, not general consumer protection laws, strongly counsels the same approach here. *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir. 1996) (federal courts look to "decisions from other jurisdictions" when state's highest court has not addressed issue).

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Labs (not Premera) is an assignee of the Participants rights to reimbursement under the Plan. (Opp. at 19:8–17.) As such, Premera's claim is really a 502(a)(1)(B) claim for reimbursement or clarification of future reimbursement, which must be brough by a ***plan participant or beneficiaries***, not as a 502(a)(3) claim. *See, e.g.*, *Christine S. v. Blue Cross Blue Shield of New Mexico*, 428 F. Supp. 3d. 1209, 1226–27 (D. Utah 2019) (where (a)(3) claims are duplicative of the (a)(1)(B) claims, suit must proceed against under 502(a)(1)(B)). Premera's ERISA 502(a)(3) claim must be dismissed.

Premera's section 502(a)(3) claim fails for the additional reason that Premera has not and cannot to allege any concrete harm to the plan participants, let alone tailor its requested relief to the alleged harm. While Premera alleges statutory standing as a fiduciary, to state a claim under ERISA a claimant must demonstrate constitutional standing as well as statutory standing. *Thole v. US Bank*, 140 S. Ct. 1615 (2020). Under *Thole, id.* at 1619–20, it is not sufficient to show that the ERISA plans were overcharged; Premera must show that the plan participants were actually damaged by the alleged excessive payments. Here, Premera has not and cannot allege that plan participants were actually damaged because, to GS Labs' knowledge, the participants paid no part of the claims remitted to Premera and the GS Labs claims did not prevent from the plan paying any benefits otherwise due to the plan participants. *Ryan S v. UnitedHealth Grp., Inc.*, 2020 WL 103517, at *4 (C.D. Cal. Jan. 6, 2020).

In opposition, Premera contends that it sufficiently pleaded a concrete harm to the Plans based on its allegations in Paragraph 134–136 of the Complaint, which allege only generally that "GS Labs' practices are deceptive, unfair, and unlawful" and that "GS Labs has systematically submitted false and misleading insurance claims to Premera's ERISA plans seeking reimbursement for medically unnecessary, inappropriate, and unauthorized testing, at exorbitant prices." (Compl. ¶¶ 134–35.) Such threadbare allegations fail to adequately put GS Labs on notice of what, if any, duties and plan terms were actually violated, let alone allege a concrete harm to a Participant. *E.g.*, *Ryan* at at *4 (dismissing ERISA § 502(a)(3) action where "allegations that connect any of the seven allegedly violative practices of Defendants with his own treatment, in a manner that states a cognizable injury under Article III").

III. CONCLUSION

GS Labs respectfully asks this Court to dismiss Premera's Complaint with prejudice.

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

DATED this 10th day of June, 2022.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP
Attorneys for GS Labs, LLC

By */s/ Jaime Drozd Allen*

Jaime Drozd Allen, WSBA # 35742
Rose McCarty, WSBA # 54282
Rose Siler, WSBA # 46486
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
Telephone: (206) 757-8039
Fax: (206) 757-7039
E-mail: jaimeallen@dwt.com
rosemccarty@dwt.com
ross.siler@dwt.com

Nicole S. Phillis (*Pro Hac Vice*)
Davis Wright Tremaine LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017
Telephone: (213) 633-8657
Fax: (213) 633-6899
Email: nicolephillis@dwt.com