

THE HONORABLE LAUREN KING

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

PREMERA BLUE CROSS,

Plaintiff,

v.

GS LABS, LLC,

Defendant.

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

**PREMERA BLUE CROSS’S MOTION FOR
AN ORDER TO PRESERVE EVIDENCE**

**NOTE ON MOTION CALENDAR:
OCTOBER 28, 2022**

Premera Blue Cross respectfully requests that the Court enter an order requiring GS Labs to refrain from dismantling any remaining testing sites it maintains in Washington pending their inspection in connection with this litigation, and from moving any equipment it has removed from its Washington testing sites out of the state before Premera has an opportunity to inspect it.

I. INTRODUCTION

GS Labs is in the process of dismantling and destroying some of the most important evidence in this litigation: its Washington testing facilities. Indeed, GS Labs may have already completed that process. GS Labs has repeatedly refused to tell Premera one way or the other.

This evidence bears directly on Premera’s claims and GS Labs’ threatened counterclaims, both of which raise factual disputes concerning the quality and maintenance of GS Labs’ testing facilities. Premera alleges that GS Labs, a COVID-19 testing provider, ran a low-quality testing operation and billed Premera for faulty and unreliable testing, and that Premera need not pay for such testing. GS Labs has threatened counterclaims that will almost

1 certainly rest on the premise that GS Labs ran a uniquely high-quality testing operation with
2 superior testing sites.

3 On September 27, 2022, Premera learned from GS Labs’ website that it had “paused”
4 its testing operations nationwide. Premera promptly reached out to GS Labs’ counsel to
5 confirm that GS Labs would preserve its testing sites long enough for Premera to inspect them
6 given their importance to this case. Having received no response, Premera sent investigators to
7 four of GS Labs’ Washington testing sites. Those investigators found all the sites empty and
8 their contents completely removed.

9 Premera again reached out to GS Labs and asked whether any testing sites remained
10 intact in Washington, and if so, whether GS Labs would agree to preserve them long enough
11 for Premera to conduct an inspection. GS Labs refused to answer either question and
12 demanded Premera explain what it wanted to inspect and why. Premera obliged and asked that
13 GS Labs provide Premera with answers no later than close of business on October 13, 2022.
14 GS Labs ignored Premera’s request and has failed to respond. GS Labs still has not told
15 Premera if it has preserved any of its Washington testing sites, and if so, whether it will
16 continue to do so until Premera can inspect them.

17 Given that GS Labs has begun the process of dismantling and destroying its
18 Washington testing sites, that it may complete that process at any time (assuming it has not
19 already), and that GS Labs has refused to say whether it will agree to preserve this evidence,
20 Premera is forced to seek relief from this Court. Premera respectfully asks that the Court enter
21 an order prohibiting GS Labs from further dismantling its Washington testing sites, or from
22 moving any dismantled equipment out-of-state.

23 II. BACKGROUND

24 A. The relevance of GS Labs’ testing facilities to Premera’s claims and GS Labs’ 25 counterclaims.

26 Premera alleges that “GS Labs . . . frequently fails to maintain acceptable quality levels
27 in its testing and reporting of results.” Compl. ¶ 3; *see also id.* ¶¶ 69-75. It has explained

1 “Premera does not reimburse providers for testing that fails to meet applicable standards for
2 quality and reliability.” *Id.* ¶ 75. Premera has further alleged that GS Labs has charged
3 unreasonably high prices, which far exceed the value of the services rendered, particularly
4 given GS Labs’ “endemic quality problems” in its testing operations. *Id.* ¶¶ 39, 76. Premera
5 seeks a declaratory judgment that it need not pay for testing that GS Labs tainted with
6 deviations “from applicable laboratory standards for testing facilities,” that may have impacted
7 patient results. *Id.* ¶ 144.

8 GS Labs’ testing sites are squarely relevant to these allegations and to this claim.
9 Premera is entitled to inspect conditions at GS Labs’ testing sites to determine whether GS
10 Labs deviated “from applicable laboratory standards for testing facilities.” *Id.* ¶ 144. This
11 includes, for example, deviations in the maintenance of GS Labs’ testing equipment and
12 facilities, sample storage area, and equipment used for analyzing and reporting results.

13 Moreover, GS Labs’ Washington testing sites are virtually certain to be relevant to GS
14 Labs’ threatened counterclaims. As GS Labs has already informed the Court, GS Labs
15 anticipates filing antitrust counterclaims against Premera. *See, e.g.*, Mot. to Dismiss (Dkt. No.
16 22) at 6. Premera already knows the likely content of GS Labs’ threatened antitrust claims
17 because GS Labs has filed (or attempted to file) such claims against two other insurers in
18 parallel litigation. *See* Proposed Am. Counterclaims (Dkt. No. 104-1), *Blue Cross & Blue*
19 *Shield of Kansas City v. GS Labs, LLC*, No. 4:21-cv-00525 (W.D. Mo. Jan. 18, 2022); Am.
20 Counterclaims (Dkt. No. 22), *BCBSM, Inc. v. GS Labs, Inc.*, No. 0:22-cv-00513 (D. Minn. June
21 28, 2022).

22 In both cases, GS Labs alleges that a conspiracy of Blue Cross & Blue Shield
23 Association affiliates (such as Premera) attempted to drive GS Labs out of business due to its
24 premium service offering, which supported higher prices. In GS Labs’ counterclaims against
25 Blue Cross and Blue Shield of Kansas City, GS Labs alleged that it was targeted because it
26 offered “higher quality and higher performing testing sites” than its competitors. Proposed
27 Am. Counterclaims (Dkt. No. 104-1) ¶ 147, *Blue Cross & Blue Shield of Kansas City v. GS*

1 *Labs*, LLC, No. 4:21-cv-00525 (W.D. Mo. Jan. 18, 2022); *see also, e.g., id.*, ¶¶ 146-51, 154-55,
2 169-70. GS Labs filed materially identical antitrust counterclaims against Blue Cross and Blue
3 Shield of Minnesota (BCBSM), arguing that it was targeted based on its status as a “distinctly
4 high-quality COVID-19 diagnostic testing operation,” and specifically touted “premium space
5 and equipment.” Am. Counterclaims (Dkt. No. 22) ¶¶ 21, 251, *BCBSM, Inc. v. GS Labs, Inc.*,
6 No. 0:22-cv-00513 (D. Minn. June 28, 2022); *see also, e.g., id.* ¶¶ 19-23, 58, 113, 120-27, 172-
7 73, 229-33.

8 It seems virtually certain that GS Labs’ threatened counterclaims against Premera will
9 rest on these same allegations. GS Labs is represented in both the *Blue Cross & Blue Shield of*
10 *Kansas City* and *BCBSM* cases, as in this one, by Davis Wright Tremaine. GS Labs’ counsel
11 has indicated in the *BCBSM* litigation that it intends to argue Premera is or was a member of
12 the antitrust conspiracy it has alleged against BCBSM. GS Labs has further stated in discovery
13 correspondence in this case that it is seeking discovery into “Premera’s efforts to organize and
14 consolidate opposition to GS Labs’ claims by insurers” to support forthcoming antitrust claims.
15 *See* Declaration of Charlie C. Gokey (“Gokey Decl.”) Ex. A at 3. Premera has asked GS Labs
16 whether it intends to file counterclaims against Premera that differ in substance from those it
17 filed against other insurers, but has received no response. *See* Gokey Decl. Ex. C at 1.

18 Assuming GS Labs’ threatened counterclaims are anything like those it has filed in
19 parallel litigation, the relevance of GS Labs’ testing sites is plain. They are primary evidence
20 needed to test the premise of GS Labs’ antitrust claims: that GS Labs operated a “distinctly
21 high-quality COVID-19 diagnostic testing operation” with “premium space and equipment.”
22 This is a central and potentially dispositive issue.

23 In connection with both Premera’s claims and GS Labs’ threatened counterclaims,
24 Premera is entitled to inspect the premises and testing equipment of GS Labs’ Washington
25 testing sites, in the condition in which GS Labs maintained them while the sites were
26 operational. This includes equipment used to perform testing, store samples, analyze results,
27 and any other equipment GS Labs utilized in the ordinary course of its business. This also

1 includes the physical space(s) where GS Labs tested and stored samples at these sites. Premera
2 is entitled to determine whether, for example, GS Labs maintained its facilities in appropriate
3 sanitary condition to minimize risk of contamination, whether GS Labs correctly maintained its
4 equipment, and whether GS Labs had adequate climate control for testing and storing samples.
5 Premera is entitled to photograph the conditions at these sites and show those pictures to a jury
6 to inform deliberations about whether GS Labs ran a “distinctly high-quality” testing operation.
7 Premera is also entitled to gather evidence to support potential expert testimony regarding
8 whether GS Labs maintained its testing sites in a manner that would adversely impact the
9 reliability of its testing and reporting of results.

10 Premera has every reason to believe that this inspection will produce evidence
11 supporting its claims and defenses. For example, former GS Labs nurses have filed sworn
12 declarations in parallel litigation stating that they “observed many serious problems with the
13 administration of COVID-19 tests and delivery of results” at GS Labs’ testing sites, including a
14 lack of appropriate climate control for testing and storing samples. *See* Gokey Decl. Exs. D, E.
15 Similarly, according to a report from American Public Media, “[h]ealth officials from three
16 states said that GS Labs’ work was frequently slower and less reliable than other labs,”
17 including one who said “no other company came close,” and one patient interviewed said that
18 the GS Labs testing site he visited “looked really busted down . . . and not in good condition at
19 all.” Tom Scheck, et al., *Testing the Limits: How a Covid-19 testing company accused of*
20 *sloppiness, fraud and profiteering kept expanding*, APM Reports (July 28, 2022),
21 <https://tinyurl.com/4adkjbjk>. This report also noted that the Centers for Medicare & Medicaid
22 Services declared a laboratory GS Labs maintained in Nebraska to be “in a state of ‘immediate
23 jeopardy,’” meaning the “lab has caused or is likely to cause serious injury, harm or death to
24 the general public or to those served by the laboratory,” and its results are not to be trusted. *Id.*

1 **B. GS Labs’ refusal to confirm whether it has preserved its testing sites, and if so,**
2 **whether it will continue to do so pending Premera’s inspection.**

3 Two weeks ago, on September 27, 2022, Premera learned from GS Labs’ website that it
4 was “pausing” its operations nationwide due to “lack of demand.” *See* Gokey Decl. ¶ 2.
5 Recognizing that GS Labs might not simply “pause” its operations but potentially close its
6 testing sites permanently, Premera wrote to GS Labs on September 29, 2022, stating:

7 To the extent there is evidence relevant to this dispute present at the now-
8 defunct testing sites, please confirm that GS Labs is making diligent efforts to
9 preserve it. Please also advise as to the status of GS Labs’ physical facilities in
Washington, and whether GS Labs has taken steps to preserve them for
inspection related to this litigation.

10 *Id.* Ex. B at 3.

11 When Premera did not receive a response to this question, it followed up via email on
12 October 4, 2022, asking that GS Labs “please confirm that GS Labs is preserving any evidence
13 stored at its Washington test sites as it winds down its testing operations, and that the facilities
14 will remain available for inspection in connection with this litigation.” Gokey Decl. Ex. C at 6.
15 When GS Labs did not timely respond, Premera eventually sent two investigators to four
16 nearby GS Labs testing facilities. *See* Declaration of Christine Seifert (“Seifert Decl.”) ¶ 2;
17 Declaration of Amy Wilcox (“Wilcox Decl.”) ¶ 2. The investigators found that it appeared the
18 sites had been dismantled and emptied of their contents, and that nothing of the testing site
19 remained except some signage. Seifert Decl. ¶¶ 3-6; Wilcox Decl. ¶¶ 3-4.

20 Premera’s counsel followed up with GS Labs on October 10, 2022, asking that GS Labs
21 “[p]lease let [Premera] know whether there are any remaining testing sites in Washington that
22 GS Labs has left intact.” Gokey Decl. Ex. C at 5. GS Labs responded that “[i]f Premera
23 contends that there is a basis to preserve information from GS Labs’s [sic] closed test sites, it
24 must identify exactly, with specificity, what information it contends needs to be preserved for
25 this case (including, but not limited to, any specific documents, evidence, or information) and
26 what allegation or claim in Premera’s complaint warrants each such request for preservation.”

27 *Id.* Premera pointed out that “[i]t falls to the preserving party to identify and preserve

1 potentially relevant evidence,” and asked that GS Labs simply “confirm . . . whether there are
2 any GS Labs testing sites that remain intact in Washington,” noting that the parties could have
3 a broader discussion about the relevance of the testing sites after GS Labs confirmed there was
4 something left to preserve. *Id.* at 4. When GS Labs did not respond, Premera followed up
5 again on October 12, 2022, asking “if GS Labs has already dismantled and removed the
6 contents of all of its Washington testing sites,” and if not, “if GS Labs w[ould] preserve” any
7 intact testing sites “for a reasonable time to permit Premera to inspect them in connection with
8 this litigation.” *Id.* at 3-4.

9 GS Labs responded later that evening. It accused Premera of attempting to “set [GS
10 Labs] up” as “a pawn . . . for a potential future spoliation motion,” and again refused to provide
11 a response to Premera’s questions. *Id.* at 3. Instead, GS Labs again demanded that Premera
12 explain specifically what GS Labs needed to preserve and why. *Id.*

13 Although Premera had already provided this information to GS Labs previously,
14 Premera responded on October 13, 2022 with a detailed explanation of why it was entitled to
15 inspect GS Labs’ testing sites and what it intended to inspect. *Id.* at 1-3. Premera asked GS
16 Labs to provide a response to its questions no later than close of business that day, or Premera
17 would understand that it needed to seek exigent relief from the Court. *Id.* at 2. GS Labs
18 ignored that deadline and has not responded as of the filing of this motion. *Id.* ¶ 7. GS Labs
19 continues to refuse to simply tell Premera whether it has already dismantled all its Washington
20 testing sites and, if some remain intact, whether it will preserve whatever remains for a
21 reasonable time to permit Premera to inspect them. Accordingly, Premera is forced to seek the
22 Court’s intervention.

23 III. ARGUMENT

24 A. The Court should issue an order requiring that GS Labs preserve relevant 25 evidence.

26 “Once a party is on notice of a potential claim, it is under a duty to preserve evidence
27 which it knows, or reasonably should know, is relevant to the claim or potential litigation.”

1 *Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298-APG-PAL, 2018 U.S. Dist. LEXIS 134716, at
2 *199 (D. Nev. July 31, 2018). The standard for relevance under the federal rules ““is extremely
3 broad.”” *Smith v. Legacy Partners, Inc.*, No. 2:21-cv-00629-JHC-BAT, 2022 U.S. Dist. LEXIS
4 73365, at *10 (W.D. Wash. Apr. 21, 2022) (quoting *Survivor Media, Inc. v. Survivor Prods.*,
5 406 F.3d 625, 635 (9th Cir. 2005)). The duty to preserve any relevant evidence arises when
6 litigation is ““pending or reasonably foreseeable.”” *Musse v. King Cnty.*, No. C18-1736-JCC,
7 2021 WL 4709875, at *2 (W.D. Wash. Oct. 8, 2021) (quoting *Zubulake v. UBS Warburg LLC*,
8 220 F.R.D. 212, 216 (S.D.N.Y.2003)). This is “an objective standard” that does not depend on
9 a party’s subjective belief. *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132, 1145
10 (N.D. Cal. 2012). This “duty to preserve evidence” arises “even before a discovery request” is
11 served. *Biselli v. Cty. of Ventura*, No. CV 09-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79324,
12 at *4 (C.D. Cal. June 4, 2012).

13 “[E]mergency orders to preserve evidence are necessary in the face of legitimate
14 concern about the continuing existence and maintenance of the integrity of the evidence in
15 question.” *Contour Data Sols. LLC v. Gridforce Energy Mgmt. LLC*, No. CV 20-3241, 2021
16 WL 5541787, at *4 (E.D. Pa. Jan. 19, 2021). “The Court may enter an order for the
17 preservation of evidence on the motion of a party.” *Schiefelbein v. Certainteed Gypsum Can.,*
18 *Inc.*, No. CV-12-400, 2012 U.S. Dist. LEXIS 93879, at *3 (E.D. Wash. July 6, 2012). “In
19 considering such a motion, other district courts, both in the Ninth Circuit and across the
20 country, have adopted a balancing test and weighed: (1) the level of concern the court has for
21 the continuing existence and maintenance of the integrity of the evidence in question in the
22 absence of an order directing preservation of the evidence; (2) any irreparable harm likely to
23 result to the party seeking the preservation of the evidence absent an order directing
24 preservation; and (3) the capability of an individual, entity, or party to maintain the evidence
25 sought to be preserved.” *Id.*

1 **1. There is a legitimate concern regarding the preservation of the evidence in**
2 **question.**

3 For the reasons discussed above, there is legitimate concern that the evidence at issue in
4 this motion is not being preserved. Indeed, Premera has independently confirmed that GS Labs
5 has already begun the process of dismantling its Washington testing sites and has destroyed
6 some of the relevant evidence. Despite Premera’s repeated requests, GS Labs has refused to
7 confirm to Premera that it will pause that process long enough for Premera to inspect any
8 remaining testing sites, and has refused even to tell Premera whether it has already completed
9 the process.

10 **2. Premera is highly likely to suffer irreparable harm if GS Labs is allowed to**
11 **continue destroying its testing sites.**

12 “Irreparable harm is traditionally defined as a harm for which there is no adequate legal
13 remedy, such as an award of damages.” *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053,
14 1068 (9th Cir. 2014). “[T]he threat of allowing spoliation of evidence presents an irreparable
15 harm of sabotaging plaintiff’s potentially meritorious claims.” *Landus Coop. v. New Coop.,*
16 *Inc.*, No. 21-CV-3003-CJW-MAR, 2021 WL 1095333, at *2 (N.D. Iowa Feb. 3, 2021); *see also*
17 *Andres v. Town of Wheatfield*, No. 1:17-cv-00377, 2017 U.S. Dist. LEXIS 167465, at *16
18 (W.D.N.Y. Oct. 6, 2017) (finding “irreparable harm in the form of spoliation of the evidence”).

19 For the reasons discussed above, GS Labs’ testing sites are squarely relevant to
20 Premera’s claims. Premera is entitled to inspect GS Labs’ testing facilities to determine
21 whether they deviated “from applicable laboratory standards for testing facilities” that may
22 have impacted patient results. Compl. ¶ 144. GS Labs’ facilities constitute important direct
23 evidence bearing on this issue. Premera will be irreparably harmed if that evidence is
24 destroyed.

25 GS Labs’ testing sites are further relevant to GS Labs’ own threatened counterclaims.
26 As discussed above, GS Labs has threatened counterclaims that will almost certainly rest on its
27 status as a “distinctly high-quality COVID-19 diagnostic testing operation,” with features
including “premium space and equipment.” Premera intends to vehemently dispute that

1 premise. Premera is entitled to perform its own inspection and gather direct evidence to test
2 GS Labs' claims about its operations and facilities. Premera will be irreparably harmed if GS
3 Labs destroys this evidence bearing on Premera's defense to GS Labs' anticipated
4 counterclaims.

5 **3. GS Labs is capable of maintaining its testing sites until Premera can inspect**
6 **them.**

7 GS Labs has maintained its testing sites in Washington for two years. There is no
8 apparent reason why GS Labs would be incapable of maintaining those sites for a few more
9 weeks to permit Premera to inspect the premises and equipment (assuming any sites remain).

10 GS Labs has not raised any concerns with Premera about difficulties in continuing to
11 maintain its testing sites. GS Labs' counsel has instead implied through repeated demands that
12 Premera explain what it is entitled to inspect and why, and that GS Labs has maintained at least
13 *some* testing sites intact but is withholding access until Premera convinces GS Labs of the sites'
14 relevance to this litigation. If GS Labs had concerns about its ability to maintain its testing
15 sites pending inspection, presumably GS Labs would have raised them at some point over the
16 two weeks during which the parties corresponded about this issue. Similarly, if GS Labs has
17 already dismantled all its Washington testing sites, it is unclear why GS Labs' counsel would
18 have responded to Premera's inquiries about preservation by demanding Premera justify its
19 request to inspect testing sites that no longer exist.

20 In any event, any hardship in maintaining the testing sites for a few additional weeks
21 could have been avoided had GS Labs simply informed Premera that it would be closing its
22 testing sites and dismantling them. Instead of giving Premera advance notice, GS Labs
23 required Premera to discover for itself that GS Labs was in the process of destroying this
24 evidence.

25 **CONCLUSION**

26 The Court should enter an order requiring GS Labs to refrain from dismantling any
27 remaining testing sites it maintains in Washington pending their inspection in connection with

1 this litigation, and from moving any equipment it has removed from its Washington testing
2 sites out of the state before Premera has an opportunity to inspect it.

3 DATED this 19th day of October, 2022.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, PREMERA BLUE CROSS'S MOTION FOR AN ORDER TO PRESERVE EVIDENCE to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

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DATED this 19th day of October, 2022.

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