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 OPPOSITION TO PLAINTIFF PREMERA BLUE CROSS'S MOTION FOR AN ORDER TO PRESERVE EVIDENCE

NOTE ON MOTION CALENDAR: OCTOBER 28, 2022

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Premera's motion seeking an "order to preserve evidence" seeks an extraordinarily overbroad injunction and prematurely attempts to manufacture a spoliation dispute where none exists. For the first year of this case, Premera served substantial discovery—no less than 87 separate requests—none of which sought to inspect GS Labs' testing sites. To date, Premera has not served ***any*** Rule 34 inspection demands. This is not surprising because Premera's Complaint made clear that this action is about seeking this Court's approval of Premera's refusal to pay over $60 million in claims submitted by GS Labs to Premera for COVID-19 testing based on Premera's challenges to GS Labs' pricing model and the medical necessity of the tests. (Compl. ¶¶ 1–3.)

But on September 27, 2022, Premera learned that GS Labs was winding down its COVID-19 testing operations. So, after a year of litigating and several months of discovery, Premera raised for the first time a request that GS Labs confirm that it had preserved all "relevant" evidence to this dispute from its Washington testing site operations. Over the next two weeks, GS Labs repeatedly asked Premera to identify what it sought to inspect from the testing sites and what evidence could potentially be "relevant." After multiple rounds of deflections and non-responsive emails, on October 13, 2022, Premera's counsel finally revealed that it wanted to inspect (1) GS Labs' testing equipment; and (2) GS Labs' testing site premises "as operational," and demanded that GS Labs answer within a matter of hours ("by close of business") whether it had wound down operations.

Rather than afford GS Labs a meaningful opportunity to respond, Premera rushed to file this motion less than four business days from when it first identified the things it sought to inspect. Had Premera given GS Labs a fair opportunity to respond, it would have learned that there is no need to order GS Labs to preserve evidence because GS Labs has preserved and maintained all testing equipment. Further, to the extent that Premera actually serves a Rule 34 demand to inspect the premises where GS Labs hosted testing sites, GS Labs will endeavor to arrange for inspections of those with the existing landlords, though GS Labs' access to those sites is now largely expired.

Premera thus has not and cannot demonstrate grounds on which this Court should enter an injunction ordering GS Labs to preserve evidence under *Capricorn Power Co. v. Siemens Westinghouse*

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Power Corp., 220 F.R.D. 429 (W.D. Pa. 2004) because (1) Premera cannot demonstrate any risk that it will be deprived of an opportunity to inspect the subject evidence, despite its failure to serve a Rule 34 inspection demand, because it can do so now; (2) Premera cannot show irreparable harm because it has failed to demonstrate the importance of a present day inspection to Premera's claims as-pleaded, and in any event, still has an adequate remedy at law (Rule 34); and (3) GS Labs faces substantial risks and burdens if it is compelled to maintain operations or otherwise required to store its testing equipment. Nor has Premera properly moved for any such injunction. Because GS Labs has ceased testing operations, the wildly overbroad relief Premera seeks is impossible—and there is no legal basis to force GS Labs to continue offering services (without compensation) or to reopen its closed sites simply because Premera slept on its rights to demand an inspection.

II. BACKGROUND

A. Premera Refuses to Pay for the COVID-19 Testing of Thousands of Its Insureds.

On March 18, 2020, the federal government passed the first piece of COVID-19 legislation, the Families First Coronavirus Response Act ("FFCRA"), Pub. L. No. 116-127 (2020), which provided, among other things, free coronavirus testing and coverage requirements. Under the FFCRA, plans and issuers, like Premera, must provide this coverage without imposing any cost-sharing requirements (including deductibles, co-payments, and coinsurance), prior authorization, or medical management.

On March 27, 2020, the second phase of coronavirus legislation was signed into law: the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136 (2020), which expanded upon the coverage requirements of the FFCRA and requires plans and issuers providing coverage for COVID-19 testing to reimburse the provider of diagnostic testing at an amount that equals the rate the plan and provider have negotiated or, if the plan or issuer does not have a negotiated rate with the provider, the "cash price" for such service that is listed by the provider on a public website.

Despite Congress's clear federal mandate to cover COVID-19 testing, Premera refused to pay GS Labs for COVID-19 testing administered to tens of thousands of Washingtonians. (Complaint ¶ 98.) To date, Premera has paid roughly $60,000 to GS Labs' COVID-19 testing claims and currently owes GS Labs over $60 million, though GS Labs continued to provide care to Premera's plan beneficiaries.

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B. Premera Files This Action Challenging GS Labs' Pricing Model and the Medical Necessity of GS Labs' COVID-19 Testing Claims.

In apparent response to GS Labs' notice of Premera's non-payment of claims owed under the CARES Act and the FFCRA, Premera filed this lawsuit in October 2021 asserting three causes of action: (1) violation of the Washington Consumer Protection Act ("CPA"); (2) ERISA section 502(a)(3) and 28 U.S.C. sections 2201, 2202; and (3) declaratory relief. In the Complaint, Premera objects to paying GS Labs for COVID-19 testing and sought declaratory relief to declare GS Labs' claims void on three primary grounds: (1) the medical necessity of combined antibody, antigen, and/or PCR testing, along with other respiratory panels; (2) the validity of GS Labs' "cash price" pricing when GS Labs offered hardship discounts; and (3) the tests were "not covered by Premera's policies." (*Id.* ¶¶ 100–107.)

Though Premera now attempts to cast this dispute as litigation over whether GS Labs "maintain[s] acceptable quality levels in its testing and reporting of results" based on a single, out-of-context allegation, even the most cursory review of the Complaint confirms that is simply not what this action is really about. (Mot. at 2:24–3:12 citing Compl. at ¶ 3, 69–75.) Premera itself characterizes this action ***in the Complaint*** as a case against "a laboratory that has attempted to exploit the COVID-19 pandemic—and the extraordinary legislation Congress enacted to combat the pandemic—for its own financial gain" by "systematically subject[ing] patients to expensive and medically unnecessary testing" in order "to increase the amounts it may bill insurers." (Compl. ¶¶ 1–2.) As to the claim that GS Labs has not adhered to "acceptable quality levels in its testing and reporting of results," Premera cites (1) news reports of delayed results in 2020 (*id.* ¶¶ 3; 69–71) and (2) an alleged lapse in its "quality control process" in March 2021 ***in Nebraska*** (*id.* ¶¶ 72–75) as the sole evidence of "endemic quality problems."

C. Premera Serves 87 Discovery Requests—And No Inspection Demand.

Premera's discovery to date confirms that site inspections are not important to Premera's prosecution of its claims. Indeed, Premera propounded 87 discovery requests on April 1, 2022. Phillis Decl., Exs. A–C. In those requests, Premera sought information about GS Labs' pricing, the antibody and panel testing that GS Labs offered, and the medical necessity of GS Labs' claims for reimbursement (RFPs No. 1-10, 29–30, 31–35, 37–38, 40–41); GS Labs' operating costs, revenues, and business model (RFP Nos. 11–12, 42–45); GS Labs' "diagnostic testing practices" and communications, training, and

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guidance for nurses (RFP No. 13, 16–19); patient and government complaints and press coverage (RFP Nos. 14–15, 21–22); GS Labs' corporate structure, related entities, and personnel matters (RFP Nos. 23–26), interpretations of the CARES Act, the FFCRA, the PREP Act (RFP Nos. 27–28); non-diagnostic/surveillance testing services (RFP No. 39); documents related to Dr. Steven Powell (RFP No. 46); and documents used in connection with GS Labs' responses to Interrogatories or RFAs, to be used at deposition, or on which GS Labs intends to rely for any claim or defense (RFP Nos. 47–49). Phillis Decl., Ex. A. Premera propounded only ***one*** request about "instances in which GS Labs' COVID-19 testing practices deviated from regulatory or industry standards," (RFP No. 20), which appeared to be related to GS Labs' Nebraska laboratory, not Washington testing sites. *Id.*

D. Premera Learns that GS Labs is Winding Down Operations and Only Then Demands a "Site Inspection."

On September 29, 2022, in connection with unrelated discovery conferral efforts, Premera raised at the end of a three page letter a request that GS Labs "confirm that GS Labs is making diligent efforts to preserve" evidence from winding down testing operations in Washington state. Gokey Decl., Ex. B at 3. That same day, GS Labs internally confirmed its compliance with its preservation obligations while it is winding down its businesses along with much of the testing industry. Thompson Decl. ¶ 4.

On October 10, 2022, having not received any Rule 34 inspection demand from Premera, GS Labs followed up with Premera's counsel to inquire what, specifically, Premera contended needed to be preserved from the Washington test sites. Phillis Decl. Ex. D. In its response on October 11, Premera refused to identify what it wanted to inspect or what it believed GS Labs was obligated to preserve, but stated that it filed its suit based "in part on substandard testing operations" and pointed to GS Labs' antitrust counterclaims in Minnesota federal court as the basis for its nebulous preservation demand. *Id.*

On October 11 and 12, GS Labs followed up again repeatedly asking what Premera wanted to inspect. Phillis Decl., Ex. E–F. Following a series of deflections, Premera responded on October 13:

> *What Premera will inspect.* ***In connection with both of the above issues, Premera is entitled to inspect the premises and testing equipment of GS Labs' Washington testing sites, in the condition in which GS Labs maintained them while the sites were operational.*** This includes equipment used to perform testing, store samples, analyze results, and any other equipment GS Labs utilized in the ordinary course of its business. This also includes the physical space(s) where GS Labs tested and stored samples at these sites….

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Phillis Decl., Ex. G (emphasis added). In the same email, Premera demanded that GS Labs respond "before the close of business" that same day as to whether GS Labs had "already dismantled and emptied all of its Washington testing sites." *Id.* While GS Labs was working on a response to Premera's requests in the interim, Premera rushed to file this motion on October 19, 2022—a mere ***four business days*** after the first time it colorably identified any categories of evidence for inspection. *Id.*

III. LEGAL STANDARD

The seminal case setting the standard for a motion for a preservation order is *Capricorn Power Co. v. Siemens Westinghouse Power Corp.,* 220 F.R.D. 429 (W.D. Pa. 2004). There, the district court articulated the following three-factor test to decide a motion to preserve evidence:

> 1) the **level of concern the court has for the continuing existence and maintenance of the integrity of the evidence** in question …; 2) any **irreparable harm** likely to result to the party seeking the preservation of evidence…; and 3) the **capability of an individual, entity, or party to maintain the evidence sought to be preserved**, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Id. at 433–34 (emphasis added); *see also Daniel v. Coleman Co.*, No. 06-5706 KLS, 2007 WL 1463102, at *2 (W.D. Wash. May 17, 2007) (applying *Capricorn Power* and denying motion for preservation order where party failed to show irreparable harm and where "maintaining [evidence] for the duration of the litigation would cause and is causing a financial hardship…"). [1]

IV. ARGUMENT

A. GS Labs Preserved Relevant Evidence, Which Premera Made No Effort to Inspect.

Premera fails to demonstrate any material concerns about the preservation of evidence under the first prong of *Capricorn Power* because: (1) Premera has not propounded any Rule 34 inspection

[1] Though Premera characterizes its motion as governed by the standard for a "motion to preserve evidence," to the extent the Motion purports to require GS Labs to maintain operations in Washington state, the motion should be evaluated under the standard for mandatory injunctive relief. Throughout its briefing, Premera asserts that it seeks an order requiring GS Labs to "maintain[] its testing sites"—suggesting it seeks an order requiring GS Labs to act, i.e., a mandatory injunction. (Mot. at 10:5–23.) Given that GS Labs wound down its testing sites in late September, any order requiring GS Labs to operate testing sites is not preserving the status quo, and thus necessarily mandatory in nature (though, notably, it would be impossible to restart testing operations). Motions for such relief should be governed by the Ninth Circuit's heightened burden for a mandatory injunction, which requires that such motions be denied "unless extreme or very serious damages will result." *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). Regardless of whether Premera is governed by the mandatory preliminary injunction standard or an order for preservation of evidence under *Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corporation,* 220 F.R.D. 429 (2004), Premera falls far short of its burden.

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demand to date—and only vaguely defined the categories of evidence and information it seeks to inspect as (a) testing equipment and (b) testing site premises; and (2) in any event, GS Labs has preserved all relevant evidence to this matter, including contemporaneous evidence of the quality of GS Labs' testing sites, and will provide Premera with an opportunity to inspect all testing equipment from Washington, as well as GS Labs' former testing site locations (to the extent available) in Washington.

1. Premera Failed to Serve a Rule 34 Inspection Demand Identifying Any Evidence to Be Preserved In the First Place.

Premera's motion is ill-taken and manufactured because Premera has not yet propounded an inspection demand for anything in this action—or otherwise meaningfully and clearly put GS Labs on notice of what, exactly, it seeks to inspect. Requests for inspection are governed by Rule 34, and Premera must follow Rule 34's procedures. Indeed, Premera admits in its own motion that it has not yet propounded a Rule 34 demand, but states in its proposed order that it "shall serve Rule 34 requests for inspection upon GS Labs as to any premises and equipment GS Labs has identified that Premera intends to inspect." (Proposed Order at 2:1–3.) Premera's failure to include an inspection demand in any of the ***87 discovery requests*** it served over six months ago belies its newfound position that an inspection of testing sites in Washington is of vital "importance" to this litigation. *Townes v. Cove Haven, Inc.,* No. 00 CV 5603 2003 WL 22861921, at *4 (S.D.N.Y. Dec. 2, 2003) (denying spoliation sanctions where party had "reasonable opportunity to inspect evidence" for over a year after complaint was filed).

On the scope and duration of GS Labs' preservation obligations, *Townes* is instructive. 2003 WL 22861921, at **3–4. There, the plaintiff brought suit on behalf of her husband's estate alleging negligence and other claims after he drowned in a resort pool, which the plaintiff alleged was negligently designed. *Id.* Nearly two years after the accident and one year after the plaintiff filed her complaint, the defendants altered the structure of the pool. *Id.* Prior to that time, the plaintiff failed to propound any inspection demand or otherwise inspect the pool. *Id.* After the pool was altered, the Plaintiff sought spoliation sanctions, which the court denied. In so ruling, the Court explained:

> Defendants' preservation of the pool for two year safter the accident afforded Plaintiff a reasonable opportunity to avail herself of the evidence. … Defendants here provided Plaintiff with adequate and meaningful opportunity to inspect the evidence. … ***Plaintiff knew exactly where the pool was located; she had over one year from the date of the complaint to request inspection of the pool***.

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Townes, 2003 WL 22861921, at *4 (emphasis added).

Here, GS Labs' position is even more compelling than in *Townes*. GS Labs operated testing sites in Washington for over 18 months, despite the fact that Premera has unlawfully and illegally withheld payment for GS Labs' services in violation of federal law for the entire pandemic. Premera filed this action in October 2021 challenging GS Labs' pricing model and the medical necessity of its tests. In April 2022, Premera propounded ***87 discovery requests***—none of which consisted of any inspection demands. Only after Premera heard that GS Labs was pausing operations did Premera ever express any interest in inspecting GS Labs' facilities. And we know that Premera was more than capable of going to and inspecting the GS labs testing sites because it has repeatedly (and surreptitiously) conducted site visits, taken pictures of GS Labs' locations, contacted both current and former employees, and submitted ***declarations*** from two Premera employees (not their counsel of record) who indicated that they each attempted to visit testing sites ***on October 7***, peered in windows, and interviewed other tenants. There is no doubt that Premera has long had occasion to formally inspect GS Labs' sites while operational, but forewent that opportunity. Instead, Premera waited until after it learned of GS Labs' site closures to assert nebulous preservation demands, all but confirming that the real impetus for this motion is to manufacture leverage and obtain litigation concessions.[2]

2. GS Labs Preserved All Relevant Evidence, Which It Can Make Available for Premera's Inspection.

Despite being untethered to any of Premera's claims, GS Labs preserved all testing equipment and premises evidence identified by Premera in its October 13, 2022 email, which are available for Premera's review. Phillis Decl., Ex. G (Oct. 13, 2022 Email from C. Gokey).

"[T]he duty to preserve evidence attaches only if (1) the party has notice that the would-be evidence was relevant to the litigation and (2) fails to offer a credible explanation for the destruction of

[2] This Court need look no further than Premera's correspondence to confirm Premera's true motive: rather than propound a Rule 34 inspection demand after identifying the testing equipment and premises information at issue, Premera's counsel attempted to extract a litigation concession regarding GS Labs' anticipated antitrust counterclaims against Premera for anticompetitive market behavior. *See* Phillis Decl. Ex. G ("***If you can represent to us that GS Labs anticipates filing completely different counterclaims against Premera, that it is not going to argue that Premera is a coconspirator in the antitrust conspiracy it has alleged against Blue KC and BCBSM, and if you can commit to us in writing now that GS Labs will not allege any counterclaim based on its status as a distinctly high-quality testing operation, that may change the analysis of this issue***.")

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such evidence." *Hull v. Remington Arms Co.*, No. CV-10-05010-RBL, 2011 WL 338803, at *2 (W.D. Wash. Feb. 3, 2011) (declining to impose sanctions where physical parts of rifle had been discarded, but it was "less than clear" that they were discarded for any "improper purpose.") (citing *U.S. v. Kitsap Physicians Serv.,* 314 F.3d 995 (9th Cir. 2002)). However, the duty to preserve evidence "does not extend indefinitely," particularly where, as here, a party failed to request to inspect the evidence at issue. *Gaffield*, 616 F. Supp. 2d at 337; *Fujitsu Ltd. v. Fed. Express Corp.,* 247 F.3d 423 (2d Cir. 2001) (no abuse of discretion in denying sanction where party did not request to inspect the evidence prior to destruction). "Courts have in many cases been unwilling to award sanctions for spoliation of evidence when the moving party has had an adequate opportunity to inspect the evidence prior to its destruction." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 291 (S.D.N.Y. 2011).

Contrary to Premera's fears, GS Labs has preserved ***all testing equipment*** from Washington testing sites, including Accula, Indicaid, Status and Hardy Diagnostic COVID-19 and panel tests, timers, baskets, nitrile gloves and specimen collection kits. This testing equipment is available for Premera's inspection. Thompson Decl. ¶¶ 2–5. Moreover, this inspection is not the only evidence of the quality of GS Labs' testing operations and equipment. Among other things, GS Labs maintained weekly quality assurance reports, which included inspection surveys documenting physical set up of advertisements, signage, set-up, departmental compliance review, operational review for all core test site roles, and documentary photographs of each of its Washington testing sites. *Id.* ¶ 6. Third party inspections of the sites were often conducted, including for CLIA certification. *Id.* As to the premises, though the leases are now largely expired for the Washington state testing sites, GS Labs is willing to work to facilitate arrangements with the former landlords to allow for the inspection of those testing sites. *Id.* ¶ 7. Given that this equipment has been adequately stored and preserved, Premera cannot meet its burden to show any risk of destruction of evidence. *Capricorn Power,* 220 F.R.D. at 433–34.

B. Premera Has Not and Cannot Show Irreparable Harm.

Premera cannot show irreparable harm required under the second prong of *Capricorn Power* for two separate and independent reasons: (1) Premera has not made any showing of the "importance of the evidence" (namely physical inspection site operations) to the claims it has actually alleged ***in this***

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action—or, quite frankly, to any other action; and (2) Premera has an adequate remedy at law—a Rule 34 inspection demand—which it can serve, to obtain the relief it seeks in this motion.

A party seeking an order to preserve evidence must show "irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation." *Daniel*, 2007 WL 1463102, at *2; *see also Capricorn Power*, 220 F.R.D. at 433–34 (declining to order preservation of evidence in absence of developed record showing the "importance of the evidence" to moving party's theories); *Jacobs v. Scribner*, 2007 WL 1994235, *1 (E.D. Cal. 2007) (denying motion to preserve evidence). Where a moving party has an adequate remedy at law, there is no risk of irreparable harm. *Anderson v. Zenali*, 163 F.3d 605 (9th Cir. 1998). Premera falls far short of this showing.

1. Premera's Allegations and Discovery Prosecutions Confirms that the Requested Inspection Is Not Important to its Allegations in this Action.

The second prong of *Capricorn Power* weighs against issuance of a preservation order because Premera has shown through its express allegations and its pursuit of discovery to date that an inspection of GS Labs' Washington testing sites is ***not important*** to this Court's resolution of its claims. *See, e.g.*, *Dickinson Frozen Foods, Inc. v. FPS Food Process Solutions Corp.*, 2020 WL 2841517, at *1 n.29 (D. Idaho June 1, 2020) (Ninth Circuit courts have "delineated a pre-litigation and post-litigation distinction in determining whether a party has had an adequate opportunity to inspect evidence," supporting that duty to preserve does not extend indefinitely after party files suit); *Ryan's Express Transp. Services, Inc. v. Caterpillar*, 2009 WL 10692858, at *5 (D. Nev. Jan. 6, 2009) ("Defendants' failure to promptly seek inspection of the buses for many months after this action was filed supports the conclusion that such inspections were not necessary for Defendants to adequately defend this action.").

On this point, the foundational case on which Premera's entire motion lies—*Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*—is instructive. 220 F.R.D. 429, 433-434 (W.D. Pa. 2004). There, the district acknowledged that while "the information sought could provide a valid basis…to posit an alternative theory" of causation in the case. Nonetheless, the Court held that "a preservation order is found to be insufficiently justified" under the irreparable harm prong of the balancing test, because "the importance of the evidence" was "not fully developed in the record." *Id.*

So too here. In its threadbare, half-page argument for irreparable harm, Premera makes vague

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assertions to the importance of a site inspection fails to explain why an inspection of GS Labs' testing sites as they presently exist is at all important to proving any of its claims, which focus on the fairness of GS Labs' pricing model, its hardship discount program, and the medical necessity of its testing. (*See* Compl. at ¶¶ 116(a) (alleging Consumer Protection Act claim based on performing allegedly medically unnecessary and unwarranted testing, failing to obtain informed consent, routinely performing testing without physician authorization to obtain higher payments from insurers, and price gouging); 120 (alleging CPA claim based on allegedly misleading patients as to medical necessity of testing and the capabilities of antibody testing, posting false and deceptive "cash prices," and submitting false and misleading claims to health insurers); 131–139 (alleging ERISA claim based on allegation 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"); 141–150 (seeking declaratory judgment that Premera is not obligated to pay for COVID-19 testing that "it contends was medically unnecessary, inappropriate and unauthorized," or that contains "material falsehoods," or that have been impacted by alleged deviations in laboratory standards that "may have impacted patient test results," and that Premera not pay GS Labs' posted "cash prices).

Now, Premera contends that it suddenly needs to inspect GS Labs' testing sites to determine "whether [GS Labs] deviated 'from applicable laboratory standards for testing facilities." (Mot. at 9:18–23.)[3] Premera ignores the fact that the only allegations in the Complaint related to alleged deviations from "applicable laboratory standards for testing facilities" arise from a CLIA citation for a GS Labs' laboratory ***in Nebraska*** (not Washington state) and reports of delayed testing results during the height of the Delta surge in December 2020, when testing equipment supply ***and*** the demand for testing services was materially different than it is now. (Compl. ¶¶ 69–75.) Nor does Premera explain how a site

[3] Premera also makes reference to GS Labs' antitrust claims filed against its affiliates in other jurisdictions. (Mot. at 9:24–10:4.) Indeed, GS Labs has filed antitrust claims against Premera's affiliates for conspiring with one another to fix low reimbursement rates in an effort to enrich themselves while causing shortages, long wait times, and worse health results. Premera apparently intends to "vehemently" dispute the quality of GS Labs' product in those counterclaims, but the quality of GS Lab's product is beside the point in those cases as well. Those antitrust claims are premised upon an agreement to fix prices, which Premera's affiliates deny. All the points made above concerning the timing of this late inspection demand, the preservation of the Nebraska facility, and all of the other existing evidence of GS Labs' quality also apply to the antitrust issue. Nor has Premera cited a single case where such a demand is considered "vitally important" in an antitrust matter.

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inspection in November 2022 is important to determining whether GS Labs submitted claims based on alleged "substandard" conditions or results ***prior to the filing of the Complaint in November 2021***. *Id.* This history confirms the ***lack*** of "importance of the evidence," which simply cannot warrant the injunctive relief that Premera seeks. *Capricorn Power*, 220 F.R.D. at 433–34.

2. Premera Cannot Show Irreparable Harm Because It Has An Adequate Remedy at Law in a Rule 34 Inspection Demand—Which It Has Not Used.

Premera cannot show irreparable harm because Premera had and still has an adequate remedy at law to obtain the information it seeks—a Rule 34 Inspection Demand. It simply has not availed itself of the opportunity. *See, e.g.*, *Zhenhua Logistics (Hong Kong) Co. v. Metamining, Inc.*, No. C-13-2658 EMC, 2013 WL 3360670, at *2 (N.D. Cal. July 3, 2013) (finding no irreparable harm because party had "adequate remedy at law" where rule provided for procedure to obtain relief party sought by motion).

Premera has not propounded such a demand, presumably because it knows that nothing it will inspect has any real bearing on the claims it asserts in this action. Moreover, had Premera availed itself of Rule 34—and adequately complied with its procedures requiring identification of the "designated tangible things" or specific locations of the things to be inspected—GS Labs could have met and conferred with Premera regarding the status of its demand and the parties could have proceeded accordingly. Instead, Premera repeatedly refused to identify the evidence it purportedly needed to inspect, attempted to leverage a litigation concession out of it, and then rushed to this Court with this premature and unnecessary motion. Because Premera still has an adequate remedy at law through which to obtain the inspection it seeks—without a judicial order—and it simply has not done so, it cannot prove irreparable harm. *Zhenhua Logistics,* 2013 WL 3360670, at *2.

C. GS Labs Faces Grave Expense and Burdens If Premera's Motion is Granted.

Premera's position is untenable—not only does it refuse to pay GS Labs for testing performed for its beneficiaries, but now it seeks to force GS Labs to stay open and continue offer such testing (presumably for free). Premera's motion fails under the third and final prong of *Capricorn Power* because of the expense and burden GS Labs would be forced to incur if ordered to preserve all testing equipment from Washington testing facilities indefinitely. *Capricorn Power*, 220 F.R.D. at 436 (courts consider storage space, maintenance and storage fees, and physical deterioration of the evidence as part

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of analysis of third prong's "ability to maintain and preserve the evidence"). This expense is only exacerbated by the $60 million Premera owes to GS Labs for COVID-19 testing care in Washington. Courts applying *Capricorn Power* have recognized that "[c]ertain circumstances may impose burdens upon those parties…possessing evidence which may be unfair or oppressive to the point that a judicially imposed allocation of the burdens between the parties to the civil action may be required." *Id.*

In the event this Court is inclined to grant any relief, or the extraordinary relief Premera requests in forcing GS Labs to keep its business open, GS Labs requests that (1) Premera be required to post bond for the present value of the testing equipment, which GS Labs will not be able to sell, and (2) that Premera be ordered to assume any incidental costs that GS Labs is forced to incur because of Premera's delays in demanding inspection. Premera's demand that GS Labs be ordered to "cease further dismantling and removing the contents of its testing sites locating in Washington" indefinitely imposes a material and untenable financial burden on GS Labs. Among other things, it forces GS Labs to again assume the risk of diminution in value in the future sale of testing equipment, which is weakening due to both advances in technology and diminishing demand. Thompson Decl. ¶¶ 8–9. Given the peripheral relevance, if any, to the claims that Premera has alleged in this action, the burden on GS Labs to preserve this equipment far outweighs any benefit. To the extent this Court is inclined to consider issuance of any such order, GS Labs requests that Premera be ordered to post a bond of $3,000,000, which reflects the potential loss to GS Labs of the value of the equipment, as well as cost shifting for the costs of maintaining the leases of each facility in Washington state until Premera completes its inspection(s). *Capricorn Power*, 220 F.R.D. at 436.

V. CONCLUSION

GS Labs respectfully asks this Court to deny Premera's motion in its entirety.

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Respectfully submitted,

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