UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

GS LABS, LLC,

Plaintiff,

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

MEDICA INSURANCE COMPANY,

Defendant.

MEDICA INSURANCE COMPANY'S OPPOSITION TO GS LABS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Medica Insurance Company submits this opposition to the motion for partial summary judgment filed by GS Labs, LLC, and further states as follows.

INTRODUCTION

GS Labs is a provider of COVID-19 testing that has garnered national attention for price gouging during the pandemic. It demands that insurers pay its extraordinary prices for COVID-19 testing in full, citing as support the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020).

GS Labs seeks summary judgment at the outset of this case on what it contends to be two "pure questions of law": (1) whether GS Labs has "an implied private cause of action under the CARES Act," and (2) whether the CARES Act "requires Medica to fully reimburse GS Labs" at its "publicly-posted cash price." Mem. at 1. Medica agrees that whether GS Labs has "an implied private cause of action under the CARES Act" is "a pure question of law." *Id.* Indeed, it is a question of law that many courts have

considered, and which all have answered the same way: "every court to address whether the CARES Act created an implied private right of action has held that it does not." *Am. Video Duplicating, Inc. v. City Nat'l Bank*, No. 2:20-CV-04036, 2020 WL 6882735, at *5 (C.D. Cal. Nov. 20, 2020). Binding precedent forecloses GS Labs' request that this Court supply the private right of action that Congress omitted from the CARES Act. Because GS Labs has no implied private right of action, its request for a declaratory judgment fails as a matter of law, and the Court may deny GS Labs' motion without reaching the remaining question on which GS Labs seeks summary judgment.

Even were the Court to reach that question, genuine disputes of material fact preclude summary judgment. The question of whether the CARES Act "requires Medica to fully reimburse GS Labs" at its "publicly-posted cash price" assumes at least two disputed factual premises. The first is that GS Labs *has* a "publicly-posted cash price" within the meaning of the CARES Act. It does not. Federal regulations implementing the CARES Act define "cash price" as "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 FR 71142, 71204 (Nov. 6, 2020). The prices GS Labs has posted to its website are far higher than the prices it charges patients who pay in cash, and apply only to insurers. It has attempted to elide this fact in an effort to deceive insurers into overpaying. Because GS Labs has failed to post its "cash price," it is not entitled to payment at any particular rate under the CARES Act.

The second disputed factual premise is that the testing at issue is payable under the CARES Act (or indeed, payable at all). The CARES Act applies only to "diagnostic

testing."[1] Medica disputes that all of the testing for which GS Labs seeks payment is "diagnostic testing" within the meaning of the CARES Act, and GS Labs offers no competent evidence on that issue. Moreover, Medica's pre-discovery investigation and lawsuits filed by other insurers strongly suggest there are other reasons why Medica need not pay GS Labs its exorbitant cash price for all of the testing at issue. Among other things, there is reason to believe GS Labs has billed Medica for faulty testing, testing it did not perform, and medically unnecessary testing it foisted on Medica's insureds without their informed consent. These factual disputes likewise warrant denial of GS Labs' motion. To the extent Medica is unable to produce evidence of the foregoing, it is the fact that GS Labs has moved for summary judgment before discovery that precludes Medica from doing so. Accordingly, at the very least, the Court should deny GS Labs' motion or defer ruling on it until the close of discovery pursuant to Rule 56(d).

BACKGROUND

A. The FFCRA, the CARES Act, and their Implementing Regulations

Congress passed the Families First Coronavirus Response Act ("FFCRA") on March 18, 2020. *See* Pub. L. No. 116-127, 134 Stat. 178 (2020). The FFCRA requires, among other things, that health insurers cover approved forms of COVID-19 testing at no cost to patients. *See* FFCRA § 6001(a). Congress supplemented the FFCRA with the CARES Act on March 27, 2020. As relevant here, the CARES Act requires that, in the

[1] *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44* (Feb. 26, 2021), https://tinyurl.com/2cyd56xc.

absence of an agreement to other rates, health insurers must reimburse providers for COVID-19 testing at the "cash price" posted to the provider's website. CARES Act § 3202(a). Section 3202(b) of the CARES Act requires a provider of COVID-19 testing to "make public the cash price for [its diagnostic tests] on [its] public internet website," and provides that "[t]he Secretary of Health and Human Services may impose a civil monetary penalty on any provider" who fails to do so. CARES Act § 3202(b).

The text of the CARES Act does not include a private right of action to enforce the "cash price" requirement of section 3202(a). Rather, the statute entrusts enforcement to the federal government. Section 6001(b) of the FFCRA (titled "ENFORCEMENT") states that the provisions of that law requiring coverage for COVID-19 testing "shall be applied by the Secretary of Health and Human Services, Secretary of Labor, and Secretary of the Treasury to group health plans and health insurance issuers." FFCRA § 6001(b). The provisions of the CARES Act creating the "cash price" requirement apply to "[a] group health plan or a health insurance issuer providing coverage of items and services described in section 6001(a) of division F of the Families First Coronavirus Response Act," which is thus subject to the enforcement powers of the agencies listed above. CARES Act § 3202(a). CMS guidance has likewise indicated "[t]he Departments will enforce the applicable provisions of the FFCRA (*and the related provisions of the CARES Act*)" against insurers.[2] This is consistent with the statutory scheme as a whole,

[2] *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43*, at 3 (June 23, 2020) (emphasis added), https://tinyurl.com/yc57v9vn.

which relies on enforcement by federal agencies.[3] These agencies responsible for enforcing the relevant provisions of the CARES Act "interpret the requirement to provide coverage without cost sharing in section 6001 of the FFCRA, together with section 3202(a) of the CARES Act, as establishing a process for setting reimbursement rates and protecting participants, beneficiaries, and enrollees from being balance billed for an applicable COVID-19 test." 85 FR at 71176.

In addition to federal enforcement, some state insurance regulators have stepped in to enforce the "cash price" provisions of the CARES Act. For example, the California Department of Insurance has issued a bulletin stating "[p]roviders should contact the Department's Provider Complaint Center if a health insurer is not paying the appropriate rate for COVID-19 testing and related items and services as required by federal law."[4]

They relevant federal agencies have clarified that certain kinds of testing for COVID-19 are not subject to the "cash price" provisions of the CARES Act. In particular, this requirement does not apply to "testing for general workplace health and safety, for public health surveillance, or for other purposes not primarily intended for

[3] There is one exception to the statutory scheme's reliance on government enforcement: the FFCRA expressly created a right of action for employees who face termination or retaliation for asserting their rights under the FFCRA, stating that employees may enforce those rights under the terms of the Fair Labor Standards Act. *See Kofler v. Sayde Steeves Cleaning Serv., Inc.*, No. 8:20-CV-1460-T-33AEP, 2020 WL 5016902, at *2 (M.D. Fla. Aug. 25, 2020).

[4] California Department of Insurance, *COVID-19 Testing and Coverage Frequently Asked Questions (FAQ) #1* (Oct. 2, 2020), https://tinyurl.com/2pdbednc.

individualized diagnosis or treatment of COVID-19."[5] CMS has further enacted regulations implementing the relevant provisions of the CARES Act, which define "cash price" as "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 FR at 71204. CMS explained this definition in its interim final rule as follows:

> The "cash price" is generally analogous to the "discounted cash price" as defined at 45 CFR 180.20 for purposes of the Hospital Price Transparency final rule. As we explained in that rule, providers often offer discounts off their gross charges or make other concessions to individuals who pay for their own care (referred to as self-pay individuals). . . . We also stated that the discounted cash price may be generally analogous to the "walk-in" rate that would apply to all self-pay individuals, regardless of insurance status, who pay in cash at the time of the service, and that such charges are often lower than the rate the hospital negotiates with third party payers because billing self-pay individuals would not require many of the administrative functions that exist for hospitals to seek payment from third party payers . . . . It is therefore our expectation that the "cash price" established by the provider will be generally similar to, or lower than, rates negotiated with in-network plans and insurers.

Id. at 71152.

CMS regulations implementing the CARES Act further set forth "Requirements for making public cash prices for a diagnostic test for COVID–19." *Id.* at 71204. These regulations state that a provider must post its "cash price" on its website in a prominent manner, and in doing so must include "[a]ny additional information as may be necessary for the public to have certainty of the cash price that applies to each COVID-19 diagnostic test." *Id.* As explained by CMS, "if the provider offers the same test at a

[5] *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44*, *supra* n.1.

different cash price that is dependent on location or some other factor, then on its website listing of cash prices, the provider must indicate all the cash prices that apply to the test and relevant distinguishing information as to when each different cash price applies." *Id.* at 71153. Similarly, pricing must be available "[w]ithout having to submit personal identifiable information." *Id.* at 71204.

When a provider fails to post its "cash price" in a manner consistent with federal law, it is not entitled to payment at any particular rate under the CARES Act. As CMS has explained, "[t]he requirement imposed by section 3202(a) of the CARES Act to reimburse the provider an amount that equals the cash price of a COVID-19 test is contingent upon the provider making public the cash price for the test, as required by section 3202(b) of the CARES Act."[6] CMS has further opined "section 3202(a) is silent with respect to the amount to be reimbursed for COVID-19 testing in circumstances where the provider has not made public the cash price for a test and the plan or issuer and the provider cannot agree upon a rate that the provider will accept as payment in full for the test." *Id.* Accordingly, in such cases, any right the provider may have to payment "is governed by applicable state law." *Id.*

Guidance from the federal agencies charged with enforcing the CARES Act provides that, "[t]o the extent not inconsistent with the FFCRA's prohibition on medical management, plans and issuers may continue to employ programs designed to detect and

[6] CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43*, *supra* n.3.

address fraud and abuse."[7] Notably, CMS has raised concerns that the "cash price" requirement may encourage "price gouging," and has requested comment on "authorities and safeguards that could be used to mitigate concerns for price gouging both for group health plans and issuers and for consumers receiving a COVID-19 diagnostic test." 85 FR at 71153. According to CMS, "while most providers have been pricing COVID-19 tests at reasonable levels, generally consistent with reimbursement rates set by the Medicare program, . . . some providers have not done so and are using the public health emergency as an opportunity to impose extraordinarily high charges." *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44* (Feb. 26, 2021), https://tinyurl.com/2cyd56xc.

B. GS Labs' False "Cash Price"

GS Labs is a COVID-19 testing laboratory that has gained nationwide notoriety for charging extraordinarily high prices for COVID-19 testing. *See, e.g.*, Sarah Kliff, *This Lab Charges $380 for a Covid Test. Is That What Congress Had in Mind?*, New York Times (Sept. 26, 2021) ("Health policy experts who reviewed the GS Labs prices said that, even with the company's investment in its service, it was hard to understand why their tests should cost eight times the Medicare rate of $41."). During the period relevant to this litigation, it had posted prices to its website for COVID-19 testing far higher than the Medicare rates CMS deemed reasonable, with prices ranging from *$380 to $979 per*

[7] CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44*, *supra* n.1.

test. *See* Kurtz Decl. Ex. A. For each test GS Labs offers, it lists a single price without noting any variation based on method of payment or any other factor. *See id.*

The prices GS Labs listed on its website are not "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 FR at 71204. Rather, GS Labs charges these prices solely to insurers. GS Labs has itself admitted as much. In response to a complaint of price gouging, GS Labs represented to the Washington State Attorney General's office that "the 'cash prices' listed on GS Labs' website generally are charged only to insurance companies, and *not* consumers." Kurtz Decl. Ex. C at 4. Indeed, GS Labs unequivocally stated "GS Labs has *never* charged a consumer for the 'cash price' of a COVID-19 test" as listed on its website, and that the prices listed on its website "apply to insurance companies only." *Id.* GS Labs concluded by asserting that it had not engaged in price gouging and that its tests were "affordable" to patients, as "consumers without insurance do not pay the 'cash price' for COVID-19 tests, and consumers with insurance pay *nothing*." *Id.* at 7. GS Labs made these representations on February 21, 2021, *see id.* at 1, well into the period relevant to this litigation. *See* Compl. ¶ 36 (noting that GS Labs seeks payments for tests through this lawsuit dating back to "March 2020").

Similarly, GS Labs' own filings in litigation with another insurer confirm that, during the relevant period, any patients who "ha[d] no insurance" could obtain COVID-19 testing through GS Labs' website "at up to 70% off the test price" GS Labs contends to be its "cash price." GS Labs' Answer & Counterclaims ¶ 68, *Blue Cross and Blue Shield of Kansas City v. GS Labs, LLC*, Case No. 4:21-cv-00525 (W.D. Mo. Aug. 5,

2021). In reality, *any* patient could obtain that "discount" during the relevant period. GS Labs' website provides two options for booking an appointment: "Bill My Insurance" and "Out-of-Pocket." Kurtz Decl. ¶ 10. During the relevant period, the "Out-of-Pocket" option directed patients to "Complete the form below to qualify for up to a 70% discount on the Out-Of-Pocket costs." *Id.* That form required the user to enter their name and contact information, and included a series of six radio buttons: "I do not currently have insurance," "I do not currently have insurance with out-of-network benefits," "I am not currently covered by Medicaid or a Medicaid HMO plan," "I am currently unemployed," "My monthly income is below $2,000/mo. Per dependent," and "None of the above." *Id.*

These options were such that any cash-pay patient could truthfully select a radio button other than "None of the above." Uninsured patients (who make up the vast majority of patients paying in cash) could select "I do not currently have insurance." But anyone not covered by Medicaid, including individuals enrolled in commercial health insurance or Medicare, could truthfully select "I am not currently covered by Medicaid or a Medicaid HMO Plan." And virtually anyone who qualifies for Medicaid could select "My monthly income is below $2,000/mo. per dependent." If a cash-pay patient selected any of these options, and without providing any further information or verification, the website provided a "code to receive 70% off of the testing service" to use "[o]n checkout." *Id.* ¶ 11. Inputting that code during the payment process reduced the price charged to the cash-pay patient by 70%. *Id.* ¶¶ 11-12. As a result, patients paying cash were charged less than one third of GS Labs' claimed "cash price."

Filings by another insurer in litigation with GS Labs suggest there to be further evidence that GS Labs charges cash-pay patients lower rates than those disclosed on its website. In particular, Premera Blue Cross filed suit against GS Labs, and in its complaint noted that it had conducted its own "investigation," which "indicate[d] that GS Labs systematically charges cash-pay patients significantly less than the rates posted to its website as its 'cash prices.'" Compl. ¶ 89, *Premera Blue Cross v. GS Labs, LLC*, Case No. 2:21-cv-1399 (W.D. Wash. Oct. 14, 2021).

C. GS Labs' Submission of Claims not Subject to the CARES Act and Non-Payable Claims

Lawsuits against GS Labs by other insurers allege that GS Labs has (1) submitted testing for non-diagnostic screen testing and falsified information in its claims to insurers to elide that fact; (2) billed insurers for faulty testing with tainted results; (3) billed insurers for testing that it did not perform at all; and (4) systematically performed medically unjustifiable testing on patients without informed consent to inflate its bills to insurers.[8] These allegations are consistent with Medica's pre-discovery investigation.

As explained in a complaint filed by Premera Blue Cross, "interviews with ex-employees" Premera conducted revealed "that GS Labs has performed a significant amount of screen testing for workplace safety." *Id.* ¶ 63. This type of testing is not

[8] Am. Compl., *Blue Cross and Blue Shield of Kansas City v. GS Labs, LLC*, Case No. 4:21-cv-00525 (W.D. Mo. Aug. 26, 2021). Compl., *Premera Blue Cross v. GS Labs, LLC*, Case No. 2:21-cv-1399 (W.D. Wash. Oct. 14, 2021).

"diagnostic" in nature, and is thus not subject to the CARES Act.[9] Premera alleges that GS Labs concealed the nature of the testing for which it billed Premera by indicating on virtually every claim it submitted that the patient had exposure to COVID-19—even when that patient explicitly told GS Labs otherwise. *See id.* ¶¶ 62, 101. Medica reviewed the claims submitted by GS Labs and found, as did Premera, that roughly **97%** of the more than 33,000 claims at issue indicate that the patient had exposure to COVID-19. Rambeck Decl. ¶ 4. This is statistically improbable in the extreme, and suggests that GS Labs has falsified this information in its claims to Medica. *See id*. These false diagnoses raise serious concerns as to the circumstances under which GS Labs performed the testing at issue, and whether that testing is subject to the CARES Act at all.

Moreover, documents that have surfaced in other litigation indicate that GS Labs has regularly billed Medica for faulty and inaccurate testing. One letter from GS Labs' Medical Director, Darin Jackson, states "[t]esting performed at GS Labs between 7/1/2020 and 10/31/2020 may be inaccurate due to incomplete equipment validation studies and quality control records." Kurtz Decl. Ex. D. Another such letter referenced in the complaint filed by Premera Blue Cross states that GS Labs had a lapse in its "quality control process" for some of its PCR tests from "3/17/21 [to] 4/9/21." *See* Compl. ¶ 73, *Premera Blue Cross v. GS Labs, LLC*, Case No. 2:21-cv-1399 (W.D. Wash. Oct. 14, 2021). This lapse caused GS Labs to "deviate[ ] from applicable laboratory standards for testing facilities" and "may have impacted [patients'] test results." *Id.* GS Labs'

[9] *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44*, *supra* n.1.

interrogatory responses in litigation with Blue Cross and Blue Shield of Kansas City indicate there to be at least one additional letter admitting to similar lapses in quality control. *See* Kurtz Decl. Ex. E. Beyond these letters, public records obtained by Blue Cross and Blue Shield of Kansas City reflect endemic quality issues involving patients receiving incorrect results, delayed results, and no results at all. *See id.* Ex. F. Medica generally does not pay for faulty testing. Rambeck Decl. ¶ 9.

The complaint filed by Premera Blue Cross further states that, upon receiving medical records from GS Labs, Premera discovered that GS Labs had in some instances billed it for testing that GS Labs never performed. *See* Compl. ¶ 102, *Premera Blue Cross v. GS Labs, LLC*, Case No. 2:21-cv-1399 (W.D. Wash. Oct. 14, 2021). In some cases, GS Labs billed for one test when in reality it had performed another, less expensive test. *See id.* In others, GS Labs billed for multiple tests that it simply had not performed at all. *See id.*

Finally, GS Labs stands accused of systematically over-testing patients, in some cases through coercion and deception. One ex-employee filed a complaint with a state regulator stating that GS Labs' nurses "were told [they] needed to get every person to take the antibody test" in addition to other tests. Kurtz Decl. Ex. G. The nurse claimed she was "yelled at by multiple [patients] for confirming they were having both tests done when they did not want that," and was ultimately "fired . . . for not selling enough tests." *See id.* Another ex-employee wrote that GS Labs "manipulates people into thinking they need all three Covid [sic] tests (antibody, antigen, and PCR)" that GS Labs offers. *Id*. Ex. H. This ex-employee contended that nurses coerced patients into taking multiple tests,

"were being let go if they didn't persuade enough people to get all three tests," and "[p]atients are being lied to just so [GS Labs] can make a profit." *Id.*

Premera alleges in its complaint against GS Labs that these stories are consistent with "interviews" it conducted with ex-GS Labs nurses, who said nurses "are generally expected to administer all three tests to every patient," and that nurses who failed to administer enough tests would be terminated. *See* Compl. ¶¶ 52-53, *Premera Blue Cross v. GS Labs, LLC*, Case No. 2:21-cv-1399 (W.D. Wash. Oct. 14, 2021). Premera further alleged that it is "aware of instances" of GS Labs' nurses providing false information to patients in order to induce them to undergo multiple tests. *Id.* ¶ 53. Notably, shortly after Premera filed suit against GS Labs on October 14, 2021, GS Labs ceased offering antibody testing altogether. Rambeck Decl. ¶ 8. The foregoing reports are consistent with Medica's analysis of claims submitted by GS Labs, which frequently reflect multiple tests performed in medically unjustifiable combinations. Rambeck Decl. ¶ 5.

GS Labs similarly stands accused of systematically performing expensive and medically unnecessary large-panel testing on patients to inflate its bills to insurers. *See* Compl. ¶ 57, *Premera Blue Cross v. GS Labs, LLC*, Case No. 2:21-cv-1399 (W.D. Wash. Oct. 14, 2021). These large panel tests detect 20 or more respiratory pathogens besides COVID-19, and cost far more than a COVID-19 test. *See id.* ¶ 42. Notably, the federal government has treated systematically performing large-panel testing on patients who seek only COVID-19 testing as health care fraud. *See* Indictment at ¶¶ 55-59, *United States v. Malena Badon Lepetich*, Case No. 3:21-cr-32 (May 20, 2021). Medica requested and received medical records for ten patients who received large-panel tests from GS

Labs. Rambeck Decl. ¶¶ 6-7. Its review of these records confirmed that, in every case, GS Labs performed large-panel tests for pathogens beyond COVID-19 under circumstances in which it was medically unjustifiable to do so. *Id*. ¶ 7.

D. GS Labs' Recent Changes to its Testing Practices, Website, and Claimed "Cash Price"

Notably, in the face of legal action, GS Labs has recently changed some of the testing practices challenged by other insurers and slashed its claimed "cash prices." On January 9, 2022, months after filing this lawsuit and moving for partial summary judgment, GS Labs radically altered its "COVID-19 Pricing Transparency" webpage. *See* Kurtz Decl. Ex. B. First, the webpage now shows that GS Labs no longer offers the antibody and large-panel testing that GS Labs stands accused of foisting on patients to inflate its bills. *See id*. GS Labs now offers only rapid antigen tests and COVID-19 PCR tests. *See id*. Second, GS Labs slashed the price of antigen testing by more than 50% from $380 to $179, and the cost of COVID-19 PCR testing from $385 to $229. *See id.*

Moreover, on or about December 22, 2021, GS Labs changed the form by which it awards "discounts" to cash-pay patients. *Id.* ¶ 13. The website now offers only "up to a 50% discount," and requires cash-pay patients answer a series of questions to qualify them for the "discount" without making the criteria for eligibility explicit. *Id.* But GS Labs' "COVID-19 Pricing Transparency" webpage still omits any reference to the discounted amount GS Labs charges cash-pay patients, and those patients must still enter their name and contact information to obtain the price of testing. *See id*. Ex. B, ¶¶ 13-14.

LEGAL STANDARD

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party." *Lemieux v. Soo Line R.R. Co.*, No. 16-cv-1794, 2018 U.S. Dist. LEXIS 207527, at *19-20 (D. Minn. Oct. 15, 2018). "In considering a motion for summary judgment, [courts] do not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue," and must "view the facts and evidence as a whole in the light most favorable to the nonmoving party." *Thomas v. Corwin*, 483 F.3d 516, 526 (8th Cir. 2007). Moreover, as particularly relevant here, "[a]lthough discovery does not have to be completed before a district court can grant summary judgment, 'summary judgment is proper only after the nonmovant has had adequate time for discovery.'" *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) (quoting *In re TMJ Litigation*, 113 F.3d 1484, 1490 (8th Cir. 1997)).

ARGUMENT

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

GS Labs attempts to assert a claim against Medica directly under the CARES Act. But GS Labs "face[s] a threshold obstacle: the CARES Act does not expressly provide a private right of action." *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 748 (D. Md. 2020). Accordingly, GS Labs can only succeed on its claim under the CARES Act if the Court finds that, despite Congress declining to provide a private cause of action in the

text of the statute, and despite Congress entrusting enforcement of the statute to various federal agencies, Congress nonetheless intended to *imply* a private right of action here.

"Unsurprisingly, every court to address whether the CARES Act created an implied private right of action has held that it does not." *Am. Video Duplicating, Inc. v. City Nat'l Bank*, No. 2:20-CV-04036, 2020 WL 6882735, at *5 (C.D. Cal. Nov. 20, 2020).[10] "[T]he Supreme Court does not look with favor on implied private rights of action." *Chase v. Andeavor Logistics, L.P.*, ___ F.4th ___, No. 20-1747, 2021 U.S. App. LEXIS 27398, at *30 (8th Cir. Sep. 13, 2021). This is because "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Courts may not infer a private right of action "unless Congress speak[s] with a clear voice, and manifests an unambiguous intent to confer individual rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (cleaned up). Moreover, a statute must "display[ ] an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S.

[10] *See also, e.g.*, *Lamar v. Hutchinson*, No. 4:21-CV-00529, 2021 WL 4047158, at *5 (E.D. Ark. Sept. 3, 2021) (finding no private right of action under the CARES Act); *Adeleye v. Ducey*, No. CV-21-00679, 2021 U.S. Dist. LEXIS 122057, at *1-2 (D. Ariz. June 29, 2021) ("Any claim for violations of the CARES Act, however, must necessarily fail as the CARES Act does not create a private right of action."); *Autumn Ct. Operating Co. LLC v. Healthcare Ventures of Ohio*, No. 2:20-CV-4901, 2021 WL 325887, at *6 (S.D. Ohio Feb. 1, 2021) (noting that the court was "aware of no decision finding that the CARES Act creates an implied private right of action" and "conclude[ing] that the CARES Act creates no implied private right of action"); *Profiles, Inc.*, 453 F. Supp. 3d at 751 (holding the court was "not persuaded that the language of the CARES Act evidences the requisite congressional intent to create a private right of action"); *Matava v. CTPPS, LLC*, No. 3:20-CV-01709 (KAD), 2020 WL 6784263, at *1 (D. Conn. Nov. 18, 2020) (declining to imply a private right of action under the CARES Act); *Shehan v. U.S. Dep't of Justice*, No. 1:20-CV-00500, 2020 WL 7711635, at *11 (S.D. Ohio Dec. 29, 2020) ("[T]his Court is aware of no decision finding that the CARES Act creates any implied private right of action").

at 286. If it is silent or ambiguous, courts may not imply a cause of action "no matter how desirable that might be as a policy matter." *Id*. at 286-87. Recent precedent makes "clear that the proper focus is on congressional intent, and 'nothing short of an unambiguously conferred right' will support an implied right of action," and that "[i]t is insufficient to show merely that a particular statute 'intend[ed] to benefit the putative plaintiff.'" *Osher v. City of St. Louis, Missouri*, 903 F.3d 698, 702 (8th Cir. 2018) (quoting *Does v. Gillespie*, 867 F.3d 1034, 1039-1040 (8th Cir.2017)). This precedent forecloses GS Labs' effort to imply a private right of action under the CARES Act.

A. The CARES Act lacks "rights creating language."

GS Labs first posits that the language of CARES Act section 3202(a) creates a private right of action because it states "a health insurance issuer . . . ***shall*** *reimburse the provider* of the diagnostic testing . . . in an amount that equals the cash price for such service as listed by the provider on a public internet website." Mem. at 10. But binding precedent dictates the opposite conclusion.

"Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Section 3202(a) of the CARES Act, as well as the subpart of the statute in which it appears ("Coverage of Testing and Preventive Services"), focus on the regulated party, the insurer, and do not include "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga Univ.*, 536 U.S. at 287. Thus, for example, the Eighth Circuit has held that statutory language stating "the head of

the displacing agency *shall provide for the payment*," and "the head of the displacing agency *shall make an additional payment*," demonstrated Congress *did not* intend to create an implied private right of action, as the statute was "phrased as a directive to the regulated agency." *Osher*, 903 F.3d at 703 (emphasis added). The Supreme Court reached the same conclusion regarding statutory language dictating certain contracts "shall contain" specific terms. *Univs. Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981). Although the statute "require[d] that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers," the statutory language "d[id] not confer rights directly on those individuals," but was instead phrased as a directive to the regulated party. *Id.*; *see also Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 709 F.3d 584, 590 (6th Cir. 2013) (declining to imply a private right of action based on "the use of the word 'shall'" as "the existence of an explicit obligation does not expressly create a right of action").

The cases cited by GS Labs are not to the contrary—indeed, to the extent they are apposite at all, they undercut GS Labs' argument. For example, GS Labs relies on the Supreme Court's opinion in *Cannon v. University of Chicago*, which implied a private right of action based on statutory text stating "'no person . . . shall . . . be subjected to discrimination.'" 441 U.S. 677, 681 (1979) (citation omitted). But as the Court explained in *Cannon*, that language focused on the persons subject to discrimination, and "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or

as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 690-93. Similarly, in *Transamerica Mortgage Advisors v. Lewis*, the Supreme Court held that statutory language declaring "void" certain contracts "fairly implie[d] a right to specific and limited relief in a federal court" given the "the legal consequences" that flow from voiding a contract, but declined to do what GS Labs requests here—*i.e.*, read into the statute "claims for damages and other monetary relief." 444 U.S. 11, 18-19 (1979). And the Court's opinion in *Maine Community Health Options v. United States* does not address the issue of implied causes of action at all, but rather the federal government's waiver of sovereign immunity under the Tucker Act. 140 S. Ct. 1308, 1320-21 (2020). It has no clear bearing here.

GS Labs concludes by baldly asserting that the provisions of the CARES Act at issue "can only have been intended for the benefit of diagnostic testing providers." Mem. at 11. But that is plainly not the "only" reading of the statute, nor is it the prevailing one. The agencies charged with enforcing the CARES Act "interpret the requirement to provide coverage without cost sharing in section 6001 of the FFCRA, together with section 3202(a) of the CARES Act" as intended to "ensure consumers can be tested for COVID-19 without barriers related to cost," thus helping to "detect the virus and stop its spread." 85 FR at 71176. Tellingly, the section of the CARES Act in which the relevant provisions appear is titled "PART II—ACCESS TO HEALTH CARE FOR COVID–19 PATIENTS." Congress did not leap to action and pass the CARES Act quickly and unanimously out of a concern for the financial health of diagnostic labs; its concern was

for the health of Americans faced with a global pandemic. Any benefit to diagnostic labs under the CARES Act is incidental to that goal.

B. The delegation of enforcement power to federal agencies creates a strong presumption against finding an implied private right of action.

GS Labs next contends that "[t]he CARES Act does not provide any alternate means of enforcing Section 3202(a)'s reimbursement right." Mem. at 11-13. This is technically correct; the enforcement mechanism of Section 3202(a) is not in the CARES Act, but rather in the FFCRA. As discussed above, Section 6001(b) of the FFCRA (titled "ENFORCEMENT") states that the provisions of that law requiring coverage for COVID-19 testing "shall be applied by the Secretary of Health and Human Services, Secretary of Labor, and Secretary of the Treasury to group health plans and health insurance issuers." FFCRA § 6001(b). And the provisions of the CARES Act creating the "cash price" requirement apply to "[a] group health plan or a health insurance issuer providing coverage of items and services described in section 6001(a) of division F of the Families First Coronavirus Response Act," which is subject to the enforcement powers of the agencies listed above. CARES Act § 3202(a). This is why, as GS Labs notes, the CARES Act provides for federal enforcement of its "cash price" requirement against only providers; the corresponding enforcement mechanism for insurers exists in the FFCRA, as made clear by Congress' reference to that statute in the "cash price" provisions.

It is difficult to see how FFCRA § 6001(b) can grant federal agencies the authority to enforce the coverage requirements of FFCRA § 6001(a) without the authority to police the terms (financial or otherwise) on which insurers provide coverage. It is likewise

difficult to see how labs can bring private actions under the CARES Act's "cash price" provisions without intruding on the aspects of the FFCRA Congress entrusted to federal agency enforcement. Indeed, GS Labs relies on provisions of the FFCRA that Congress has unambiguously dictated "shall be applied by" federal agencies, FFCRA § 6001(b), in arguing for summary judgment. *See* Mem. at 7-8. Similarly, GS Labs repeatedly cites guidance from these agencies in its brief, *see* Mem. at 8, 16-17, as well as in its Complaint, *see* Compl. ¶¶ 49, 69, as though legally binding. GS Labs cannot both rely on these agencies' interpretations of the law and insist that they lack authority over the "cash price" provisions of the CARES Act. And while GS Labs notes that these agencies have not created a regulatory scheme for enforcing the "cash price" requirement of the CARES Act, *see* Mem. at 12-13, they have not yet done so with respect to *any* aspect of their enforcement power under FFCRA § 6001(b). That is not reason to doubt these agencies possess the enforcement power expressly entrusted to them by Congress.

"The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290. Here, the delegation of enforcement power to federal agencies creates "a strong presumption against [an] implied private right[ ] of action." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007).

In any event, GS Labs is simply wrong on the law. Couching it as a principle the Supreme Court has "long held," GS Labs cites a case from 1944, *see* Mem. at 11-12, for the proposition that courts have the "jurisdiction and duty to afford a remedy for a breach of statutory duty" where "there is no mode of enforcement other than resort to the courts." *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 207 (1944). But the Supreme

Court has long since "abandoned th[e] understanding" that "'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Sandoval*, 532 U.S. at 287 (quoting J.*I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). Modern precedent holds that a statute must "display[ ] an intent to create not just a private right but also a private remedy," and in the face of silence or ambiguity, courts may not imply a cause of action "no matter how desirable that might be as a policy matter." *Id*. at 286-87.

C. A private right of action is not consistent with purpose of the CARES Act.

The argument to which GS Labs dedicates the most space in its brief is that implying a private right of action "is . . . the only interpretation that is consistent with the underlying purpose of Act [sic]." Mem. at 13. But again, courts may not imply a cause of action absent clear congressional intent "no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286-87. Given that the text of the CARES Act gives no indication that Congress intended to imply a private right of action, the analysis can and should end there. *See Sandoval*, 532 U.S. at 291 (declining to imply a private right of action where there was "no evidence anywhere in the text [of the statute] to suggest that Congress intended to create a private right" to sue).

Regardless, GS Labs' policy arguments are unavailing. GS Labs first provides three full pages of block quotes from congressional proceedings, which it contends support its position. *See* Mem. at 14-16. But none of the legislative history to which GS Labs points mentions the "cash price" provisions of the CARES Act, much less their enforcement by private labs. Indeed, four of the seven passages GS Labs quotes—those

from Senators Cornyn, Alexander, and Durbin, as well as Representative Buchanan—do not pertain to the CARES Act at all. Rather, the quotes from Senators Cornyn, Alexander, and Durbin seemingly relate to the FFCRA,[11] and the passage from Representative Van Hollen pertains to the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020.[12]

GS Labs contends that this legislative history nonetheless shows that "Congress was attempting to address a crisis in a very short period of time." Mem. at 13. That crisis was not the underpayment of diagnostic laboratories, but rather a deadly pandemic. The consistent theme of the legislative history GS Labs cites is concern for the public's health and the need "to test every American who needs it for COVID-19 as soon as possible" to contain the virus.[13] GS Labs infers from this that Congress intended to create large financial incentives for private labs, and further infers that Congress intended to imply a private right of action so that private labs could recover those financial incentives directly from insurers. *See id.* at 18. But these policies appear nowhere in the legislative history GS Labs cites; they are all GS Labs' own. Indeed, not only does this legislative history omit any mention of a private right of action for diagnostic labs to enforce the "cash price" provisions, it indicates that "*the Federal Government* needs to take a much more active role in establishing that infrastructure." 166 Cong. Rec. S1879, S1883-S1884

[11] *See* 166 Cong. Rec. S1781, S183, S1792; 166 Cong. Rec. S1893, S1895.
[12] *See* 166 Cong. Rec. S1879, S1883-S1884.
[13] 166 Cong. Rec. S1893, S1895.

(emphasis added). This is consistent with enforcement of the CARES Act by federal agencies rather than private parties.

In any event, this case demonstrates why implying a private right of action under the CARES Act would disserve Congress' purpose and produce absurd results. GS Labs contends that, because it has a private right of action under the CARES Act, it may take insurers to court and demand that they pay whatever it chooses. *See, e.g.*, Compl. ¶ 71. There is no limiting principle. GS Labs currently demands as much as eight times the rates set by Medicare for COVID-19 testing. If GS Labs has a private right of action under the CARES Act, it can charge 1,000 times Medicare rates, or 1,000,000 times those rates, and recover this "cash price" in full through litigation. Congress surely did not mean to permit diagnostic labs to recover millions of dollars per test through private enforcement of the statute. Without the moderating force of government enforcement, the statutory scheme is unworkable.

D. The regulation of insurance is traditionally a state function.

GS Labs closes its argument by contending that "responding to pandemics has been a federal (and international) matter that has not ever been left by Congress solely to the states." Mem. at 19. Be that as it may, the regulation of insurance *is* a traditional state function. *See, e.g.*, *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 963 (8th Cir. 2008). The federal agencies entrusted with enforcing the CARES Act have attempted to preserve the traditional role of state law in the face of the CARES Act, explaining that "to the extent that a state law does not prevent the application of the requirements of section

3202(a) of the CARES Act, the state law is not preempted and continues to apply."[14] And as discussed above, some state regulators have stepped in to enforce the "cash price" provisions of the CARES Act. *See supra* p. 5. The amounts insurers pay providers is far from an area of exclusive federal concern.

In sum, every relevant factor weighs against implying a private right of action under the CARES Act to enforce its "cash price" provisions. This Court should, like every other court to have considered the question throughout the United States, decline to supply a private right of action under the CARES Act that Congress omitted.

II. GS Labs cannot state a claim for declaratory relief without a right of action under the CARES Act.

Because GS Labs has no private right of action under the CARES Act, its request for a declaratory judgment regarding Medica's obligations under the CARES Act fails as a matter of law. Where "there is no private right of action, the Declaratory Judgment Act cannot be used as an independent cause of action" *Vanegas v. Carleton College*, No. 19-cv-1878 (MJD/LIB), 2020 WL 4511821, at *6 (D. Minn. Feb. 10, 2020); *see also Wolfchild v. Redwood Cty.*, 91 F. Supp. 3d 1093, 1102 (D. Minn. 2015) (where a statute does not "provide for a private right of action, the Declaratory Judgment Act does not operate to transform such a non-existent right into a claim that may be remedied"). "To entertain, under the auspices of the Declaratory Judgment Act, a cause of action brought by private parties seeking a declaration that" a statute with no private cause of action "has

[14] CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43*, *supra* n.3.

been violated would, in effect, evade the intent of Congress not to create private rights of action under th[at] statute[ ] and would circumvent the discretion entrusted to the executive branch in deciding how and when to enforce th[at] statute[ ]." *Jones v. Hobbs*, 745 F. Supp. 2d 886, 893 (E.D. Ark. 2010). Accordingly, the Court need not reach the question of whether the CARES Act "requires Medica to fully reimburse GS Labs" at its "publicly-posted cash price." Mem. at 1.

III. Genuine disputes of material fact preclude summary judgment on whether the CARES Act "requires Medica to fully reimburse GS Labs" at its "publicly-posted cash price."

GS Labs asserts "there can be no genuine dispute that the CARES Act requires Medica to fully reimburse GS Labs for the COVID-19 diagnostic testing that GS Labs has provided to Medica's insureds, at the cash price listed on GS Labs' public internet site when GS Labs performed the testing." Mem. at 8. There are two such disputes foreclosing summary judgment prior to discovery. First, Medica disputes that GS Labs *has* a "publicly-posted cash price" for purposes of the CARES Act. Second, Medica disputes that all of the testing for which GS Labs submitted claims is subject to the CARES Act, or is payable at all. To the extent the Court finds Medica's evidence related to these issues insufficient, it should deny or defer GS Labs' motion pending discovery.

A. GS Labs has no "publicly posted cash price" within the meaning of the CARES Act.

As discussed above, federal regulations define "cash price" under the CARES Act to mean "the charge that applies to an individual who pays in cash (or cash equivalent) for a COVID-19 diagnostic test." 85 FR at 71204. A provider's "cash price" under the

CARES Act should account for "discounts" the provider offers "off their gross charges or . . . other concessions to individuals who pay for their own care." *Id.* at 71152. By its own admission, "GS Labs has *never* charged" cash-pay patients "the 'cash price' of a COVID-19 test" as listed on its website; those prices instead "apply to insurance companies only." Kurtz Decl. Ex. C at 4. GS Labs (again, by its own admission) charges patients who pay cash a fraction of the prices listed on its website. *See supra* at pp. 9-11. This gets the CARES Act precisely backwards. Accordingly, the prices GS Labs has listed on its website are not its "cash price" within the meaning of the CARES Act.

Moreover, federal regulations set out "[r]equirements for making public cash prices for a diagnostic test for COVID–19." 85 FR at 71204. A provider must include in its "cash price" webpage "[a]ny additional information as may be necessary for the public to have certainty of the cash price that applies to each COVID-19 diagnostic test," *id.*, including whether "the provider offers the same test at a different cash price that is dependent on location or some other factor." *Id.* at 71153. GS Labs' webpage listing what it claims to be its "cash price" omits that GS Labs charges cash-pay patients far less than insurance companies. *See* Kurtz Decl. Exs. A, B. And federal regulations require pricing for COVID-19 tests to be available "[w]ithout having to submit personal identifiable information." 85 FR at 71204. Cash-pay patients are required to enter their name and contact information before GS Labs informs them of its cash-pay "discount." *See* Kurtz Decl. ¶¶ 10-14. GS Labs thus stands in violation of federal "[r]equirements for making public cash prices for a diagnostic test for COVID–19." 85 FR at 71204.

Consistent with the statute's text, CMS guidance states that "[t]he requirement imposed by section 3202(a) of the CARES Act to reimburse the provider an amount that equals the cash price of a COVID-19 test is contingent upon the provider making public the cash price for the test, as required by section 3202(b) of the CARES Act."[15] Because GS Labs has failed to post its "cash price" within the meaning of the statute, and because it stands in violation of federal regulations that dictate requirements for making public cash prices for a diagnostic test for COVID-19, GS Labs is not entitled to reimbursement at any particular rate under the CARES Act. That GS Labs has no "publicly-posted cash price" for purposes of the CARES Act forecloses its bid for summary judgment on the issue of whether the CARES Act "requires Medica to fully reimburse GS Labs" at its "publicly-posted cash price." Mem. at 1.

B. GS Labs has failed to show that all claims at issue in this litigation are payable under the CARES Act (or at all).

It is axiomatic that "the plaintiff bears the burden to prove all elements of his claim." *Krakover v. Mazur*, 48 F.3d 341, 346 (8th Cir. 1995). As the plaintiff in this litigation, GS Labs bears the burden of establishing that it is entitled to payment under the CARES Act for testing it performed for Medica's insureds. On summary judgment, when "'the moving party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial.'" *Leone v.*

[15] CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43*, *supra* n.3.

Owsley, 810 F.3d 1149, 1153 (10th Cir. 2015) (quoting *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013)); *see also id.* (listing cases). "'In other words, the evidence in the movant's favor must be so powerful that no reasonable jury would be free to disbelieve it,'" and "'[a]nything less should result in denial of summary judgment.'" *Id.* (quoting 11 Moore's Federal Practice, § 56.40[1][c] (Matthew Bender 3d Ed. 2015)).

GS Labs offers no competent evidence related to the testing at issue, much less evidence establishing as a matter of law that *all* of the testing at issue in this litigation is payable under the CARES Act. It instead relies solely on a short declaration from Kirk Thompson, who describes himself as "a 'Partner' at Plaintiff GS Labs, LLC." Thompson Decl. ¶ 1. That declaration states simply "GS Labs has provided COVID-19 diagnostic tests to over 16,000 patients who are Medica insureds," and "Medica has never disputed that the tests provided by GS Labs to Medica's insureds meet the definition of 'diagnostic testing' under the CARES Act and FFCRA." *Id*. ¶¶ 8-9. GS Labs fails to lay a foundation for these statements or to "show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). And GS Labs makes no effort whatsoever to affirmatively show that the testing at issue is subject to the CARES Act—the declaration merely asserts that, at a point before Medica had responded to GS Labs' complaint, it "ha[d] never disputed" the applicability of the CARES Act. Thompson Decl. ¶ 9. This failure to offer competent evidence that the testing at issue is payable under the CARES Act warrants denial of GS Labs' motion. And the Court should not permit GS Labs to sandbag Medica by offering such evidence for the first time in its reply.

Regardless, there are numerous material factual disputes as to whether all of the testing at issue is payable under the CARES Act, or is payable at all. Mem. at 8. Beyond GS Labs' failure to post its "cash price" within the meaning of the CARES Act, Medica's pre-discovery investigation and the allegations of insurers in parallel litigation cast substantial doubt on GS Labs' claim that *all* of the testing at issue is "diagnostic testing" within the meaning of the CARES Act. *See supra* pp. 11-12. Moreover, documents that have surfaced in parallel litigation indicate that at least some of the testing for which GS Labs billed Medica was faulty and inaccurate. *See supra* pp. 12-13. Medica does not reimburse for faulty testing, and nothing in the CARES Act requires that Medica pay GS Labs' exorbitant "cash price" for tests GS Labs rendered unreliable through its seemingly frequent lapses in quality control.

Moreover, given the findings of other insurers in litigation with GS Labs, there is reason to doubt that GS Labs even performed some of the testing for which it billed Medica. *See supra* pp. 13. And as discussed above, Medica has reason to believe that GS Labs has systematically subjected Medica's insureds to expensive and medically unnecessary testing without their informed consent. *See supra* pp. 13-14. The CARES Act does not require Medica to turn a blind eye to this sort "fraud and abuse."[16] For these reasons as well, the Court should deny GS Labs summary judgment as to whether "the CARES Act requires Medica to fully reimburse GS Labs for the COVID-19 diagnostic

[16] *See* CMS, *FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44*, *supra* n.1.

testing that GS Labs has provided to Medica's insureds, at the cash price listed on GS Labs' public internet site when GS Labs performed the testing." Mem. at 8.

C. Alternatively, the Court should deny or defer GS Labs' motion pursuant to Rule 56(d).

Discovery in this matter had not even begun at the point GS Labs filed its motion for summary judgment. Indeed, although no substitute for the discovery process, GS Labs resisted Medica's requests for medical records that may bear on this dispute even prior to filing suit. Rambeck Decl. ¶ 6. At the very least, the Court should deny or defer GS Labs' motion pending discovery pursuant to Federal Rule of Civil Procedure 56(d). For the reasons discussed above and in the declaration accompanying this motion, Medica has reason to believe that some or all of the testing at issue is not payable under the CARES Act—or payable at all. *See* Kurtz Decl. ¶¶ 15-20. Medica requires discovery to confirm as much. *See id*. This discovery is reasonably likely to raise material issues of fact as to GS Labs' entitlement to payment. "Although discovery does not have to be completed before a district court can grant summary judgment, 'summary judgment is proper only after the nonmovant has had adequate time for discovery.'" *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) (quoting *In re TMJ Litigation*, 113 F.3d 1484, 1490 (8th Cir. 1997)). That plainly is not the case here.

CONCLUSION

For the foregoing reasons, the Court should deny GS Labs' motion in its entirety.

Dated: January 14, 2022

Respectfully submitted,

ROBINS KAPLAN LLP

/s/ Jamie R. Kurtz
Jamie R. Kurtz, #0391792
Jeffrey S. Gleason, #0396190
Charles C. Gokey, #0402225
Stephanie A. Chen, #0400032
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
Phone: (612) 349-8500
Facsimile: (612) 339-4181
jkurtz@robinskaplan.com
jgleason@robinskaplan.com
cgokey@robinskaplan.com
schen@robinskaplan.com

Attorneys for Defendant Medica Insurance Company

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

GS LABS, LLC,

Plaintiff,

v.

MEDICA INSURANCE COMPANY,

Defendant.

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

L.R. 7.1(f) CERTIFICATE OF COMPLIANCE

I, Jamie R. Kurtz, certify that Medica Insurance Company's Opposition to GS Labs, LLC's Motion for Partial Summary Judgment complies with Local Rule 7.1(f).

I further certify that in preparation of the above document, I used Microsoft Office Word 2016, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the foregoing memorandum contains 9,430 words.

I further certify that the foregoing memorandum complies with Local Rule 7.1(h) in that it is typewritten in size 13 font, double-spaced (except for headings, footnotes and quotations that exceed two lines), and utilizes 8 ½ x 11 inch margins.

Dated: January 14, 2022

Respectfully submitted,

ROBINS KAPLAN LLP

/s/ Jamie R. Kurtz
Jamie R. Kurtz, #0391792
Jeffrey S. Gleason, #0396190
Charles C. Gokey, #0402225
Stephanie A. Chen, #0400032
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
Phone: (612) 349-8500
Facsimile: (612) 339-4181
jkurtz@robinskaplan.com
jgleason@robinskaplan.com
cgokey@robinskaplan.com
schen@robinskaplan.com

Attorneys for Defendant Medica Insurance Company