IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

MARTIN ZAKARIAN, and MARY JONES, on behalf of themselves and those similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 24-cv-00229-SRB
THE RAWLINGS COMPANY LLC, RAWLINGS FINANCIAL SERVICES, LLC, and RAWLINGS & ASSOCIATES, PLLC,	)	
Defendants.	)	

ORDER

Before the Court is Defendants The Rawlings Company LLC, Rawlings Financial Services, LLC, and Rawlings & Associates, PLLC's (collectively, "Defendants") Motion to Dismiss for Failure to State a Claim (Doc. #9) and Motion to Strike Class Allegations (Doc. #10). For the reasons set forth below, both motions are DENIED.

I. FACTUAL BACKGROUND

The following allegations are taken from Plaintiff Martin Zakarian and Mary Jones's ("Plaintiffs") Class Action Complaint (Doc. #1) without further citation or attribution unless otherwise noted.[1] Because this matter comes before the Court on a motion to dismiss, the allegations are taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015). Additional allegations relevant to the parties' arguments are discussed in Section III.

[1] All page numbers refer to the pagination automatically generated by CM/ECF.

Plaintiffs are covered by and receive benefits through Medicare. Plaintiffs "entered into valid contracts with Medicare for the provision of healthcare insurance." (Doc. #1, ¶ 46.) Defendants are the nation's leading provider in Medicare recovery services and are authorized to collect Medicare lien payments from proceeds of legal settlements or judgments. "Defendants are contracted by Medicare as Medicare's agent in the provision of healthcare insurance to Plaintiffs[.]" (Doc. #1, ¶ 47.)

Both Plaintiffs were injured in automobile accidents and resolved their claims against unidentified third parties. Defendants then "asserted a Medicare lien on the proceeds of [Plaintiffs'] settlement." (Doc. #1, ¶¶ 16, 22.) For both Medicare liens, Defendants "did not include an offset for the proportionate share of procurement costs." (Doc. #1, ¶¶ 17, 23.) Plaintiffs allegedly "paid, under protest, the Medicare lien as calculated and demanded by Defendants." (Doc. #1, ¶¶ 18, 24.) According to Plaintiffs, Defendants' alleged failure to "include an offset for the proportionate share of procurement costs" was in violation of the two methodologies for calculating the amount of recoverable Medicare payments under 42 C.F.R. § 411.37 (the "Procurement Cost Regulation"). (Doc. #1, ¶¶ 31-33.)

On March 29, 2024, Plaintiffs filed this lawsuit against Defendants. Plaintiffs assert two causes of action on behalf of themselves and on behalf of two putative classes: Count I– Negligence Per Se; and Count II—Breach of Contract. Defendants now move to dismiss both claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Defendants also move to strike Plaintiffs' class action allegations under Rule 12(f). Plaintiffs oppose the motions, and the parties' arguments are addressed below.

II. LEGAL STANDARD

Rule 12(b)(6) provides that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ash v. Anderson Merchs., LLC*, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678).

Under Federal Rule of Civil Procedure 12(f), "the court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A "district court may grant a motion to strike class-action allegations prior to the filing of a motion for class-action certification" if it is "apparent from the pleadings that the class cannot be certified" and "permitting such allegations to remain would prejudice the defendant." *Donelson v. Ameriprise Fin. Servs.*, 999 F.3d 1080, 1092 (8th Cir. 2021). However, motions to strike are viewed with disfavor and infrequently granted. *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (internal citation omitted).

III. DISCUSSION

1. Motion to Dismiss

A. Negligence Per Se

In Count I, Plaintiffs assert a claim for negligence per se. Plaintiffs allege in part that "Defendants' pattern and practice of not factoring in 'procurement costs' when calculating and

collecting on Medicare liens is a violation of 42 CFR § 411.37." (Doc. #1, ¶ 41.) Plaintiffs' opposition brief explains that under the Procurement Cost Regulation, 42 C.F.R. § 411.37:

> when Medicare is reimbursed out of a judgment or settlement, the amount of money it takes is reduced by a pro-rata share of the 'procurement costs,' which include attorney's fees of the judgment or settlement . . . Medicare . . . contracts with third parties to conduct its recoupment and reimbursement program. Defendants are one such third party group, meaning Defendants are supposed to follow the Procurement Cost Regulation just like the Federal Government, but have failed to do so.

(Doc. #20, p. 7) (citing 42 C.F.R. § 411.37).

A negligence per se claim contains four elements: "(1) the defendant violated a statute or regulation; (2) the injured plaintiff was a member of the class of persons intended to be protected by the statute or regulation; (3) the injury complained of was of the kind the statute or regulation was designed to prevent; and (4) the violation of the statute or regulation was the proximate cause of the injury." *Dibrill v. Normandy Assoc., Inc.*, 383 S.W.3d 77, 84-85 (Mo. App. E.D 2012).[2]

Defendants argue this claim should be dismissed for three primary reasons. (Doc. #9, p. 8.) First, Defendants contend that the "negligence per se claim fails because Plaintiffs are seeking damages for purely economic injuries." (Doc. #29, p. 6.) In particular, Defendants contend that a negligence per se claim is "only viable where there is an alleged 'violation of a safety statute in cases involving personal injury or physical injury to property.'" (Doc. #29, p. 7.) According to Defendants, the Procurement Cost Regulation "is unrelated to public safety." (Doc. #29, p. 7.)

Upon review of the Complaint, the Court rejects Defendants' arguments. In general, "recovery in tort for pure economic damages are . . . limited to cases where there is personal

[2] The parties cite Missouri case law for the substantive elements of an unjust enrichment and breach of contract claim. Because the parties do not raise any choice-of-law issues, this Order assumes that Missouri law applies.

injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence." *Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc.*, 332 S.W.3d 184, 192 (Mo. Ct. App. 2010). Here, Plaintiffs' negligence per se claims arise from personal injuries and are thus not barred. As explained by Plaintiffs, this "action involves a personal injury . . . because Defendants [allegedly] violated the Procurement Cost Regulation [by] wrongfully excluding procurement costs from their monetary recoupment out of personal injury settlements." (Doc. #20, p. 9.) Because Plaintiffs allegedly suffered a personal injury and were allegedly deprived proceeds from those injuries, this case does not involve purely economic damages.

Second, before deciding whether a negligence per se claim may proceed, a court must "examine the statute itself to determine if it is a statute on which negligence per se may be premised." *Marvin's Midtown Chiropractic Clinic, LLC v. Am. Family Ins. Co.*, No. 4:17-CV-0996-DGK, 2018 WL 2326625, at *4 (W.D. Mo. May 22, 2018) (citation and quotation marks omitted). The Medicare Secondary Payer Act ("MSP") is the authorizing statute for the Procurement Cost Regulation. "The MSP statute . . . was enacted . . . to reduce federal health care costs, [and] makes Medicare the secondary payer for medical services provided to Medicare beneficiaries whenever payment is available from another primary payer." *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 21 (1st Cir. 2007). However, "Medicare may pay the beneficiary up front, but such payment is conditioned on Medicare's right to reimbursement in the event that a primary plan later pays or is found responsible for payment of the item or service." *Id.* (citing 42 U.S.C. § 1395y(b)(2)(B)).

"To facilitate recovery of these conditional payments, the MSP. . . creates a private cause of action with double recovery to encourage private parties to bring actions to enforce Medicare's

rights." *Id.* at 22. The MSP provides that "[t]here is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement)." 42 U.S.C. 42 U.S.C. § 1395y(b)(3)(A).[3] This cause of action is "available to a Medicare beneficiary whose primary plan has not paid Medicare of the beneficiary's healthcare provider." *Humana Med. Plan, Inc.*, 832 F.3d at 1234.

Defendants argue this private cause of action does not apply because they are not a primary plan. Defendants further argue the MSP, the Procurement Cost Regulation, and legislative history do not support implying a private cause of action in favor of Plaintiffs. Plaintiffs argue that Defendants are incorrect on both points.

Upon review, the Court rejects Defendants' arguments. The Complaint alleges that: (1) Defendants violated the Procurement Cost Regulation; (2) "Plaintiffs and the members of the Kansas Class and the Missouri Class are all members of the class of persons intended to be protected by 42 CFR § 411.37;" (3) the "injury sustained by the failure to factor in 'procurement costs' when calculating and collecting on Medicare liens is the kind of injury 42 CFR § 411.37 was designed to protect against;" and (4) Plaintiffs sustained substantial injury as a direct and proximate cause of Defendants failure to factor in 'procurements costs' when calculating and collecting on Medicare liens." (Doc. #1, ¶¶ 40-44.) These allegations and the additional allegations alleged by Plaintiffs are sufficient to state a claim for negligence per se under 42 C.F.R. § 411.37. *Dibrill*, 383 S.W.3d at 84-85.

[3] A "primary plan" is a group health plan, worker's compensation plan or law, automobile or other liability insurance policy or plan, no-fault insurance, or self-insured plan that has made or can reasonably be expected to make payment for an item or service. *Humana Med. Plan, Inc. v. Western Heritage Ins. Co.*, 832 F.3d 1229, 1233 n.1 (11th Cir. 2016) (citing 42 U.S.C. § 1395y(b)(2)(A)).

Additionally, the Court finds nothing in the statutory or regulatory text that would preclude a negligence per se claim under the Procurement Cost Regulation. Both parties also appear to acknowledge the absence of case law either expressly recognizing or rejecting such a claim. "[A]bsent binding authority as to whether [the Procurement Cost Regulation] can support a negligence *per se* claim, this Court declines to find that [Plaintiffs'] claim merits dismissal at this stage." *Baldwin v. National Western Life Ins. Co.*, 2021 WL 4206736, at *5 (W.D. Mo. Sept. 15, 2021.)

Finally, the parties' briefs dispute whether the express right of action under 42 U.S.C. § 1395y is applicable. However, the Complaint does not cite that statute or expressly assert a cause of action under it. At this time, and because Plaintiffs have adequately stated a negligence per se claim under the Procurement Cost Regulation, the Court need not determine the applicability of 42 U.S.C. § 1395y.

B. Breach of Contract

In Count II, Plaintiffs asserts a breach of contract claim. To state a claim for breach of contract under Missouri law, the plaintiff must allege facts showing: "(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 850 (8th Cir. 2014) (citing *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. banc 2010)). "Only parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract." *Torres v. Simpatico, Inc.*, 781 F.3d 963, 971 (8th Cir. 2015) (quoting *Verni v. Cleveland Chiropractic Coll.*, 212 S.W.3d 150, 153 (Mo. banc 2007)).

Defendants argue this claim should be dismissed. Defendants contend they are not a party to any contract with Plaintiffs, that there are no allegations showing an agency relationship between Defendants and Medicare, and that Plaintiffs fail to allege "how [Defendants] would be liable for breaching Plaintiffs' contract with Medicare. Plaintiffs argue that "pure contractual privity" is not required to state a breach of contract claim. (Doc. #20, p. 14.)

Upon review, the Court agrees with Plaintiffs. The Complaint alleges that Plaintiffs "entered into valid contracts with Medicare for the provision of healthcare insurance." (Doc. #1, ¶ 46.) The Complaint alleges that "Defendants are contracted by Medicare as Medicare's agent in the provision of healthcare insurance to Plaintiffs and the members of the Kansas Class and the Missouri Class." (Doc. #47.) The Complaint alleges that "Defendants while acting as agents for Medicare breached the Plaintiffs['] . . . contracts by failing to factor in 'procurements costs' when calculating and collecting on Medicare liens." (Doc. #1, ¶ 48.) Finally, the Complaint alleges that Plaintiffs suffered damages as a result.

These allegations are sufficient to withstand a motion to dismiss. The Court agrees with Plaintiffs that they adequately "allege that they are (and were) insured through Medicare and were forced to deal with the Defendants who are authorized by Medicare to collect Medicare lien payments as Medicare's agent by reason of the contract(s) between Defendants and Medicare." (Doc. #20, p. 14.) Additionally, "a party to a contract may assign its rights, obligations, and duties to an assignee and the assignee may be sued for breach." (Doc. #20, p. 15.) For these reasons, the Court rejects Defendants' argument that a breach of contract claim cannot be stated against them.

Defendants next argue that the "Complaint fails to identify any contractual provision that [they] breached." (Doc. #9, p. 15.) This argument is rejected. In part, the Complaint alleges that:

> 46. Plaintiffs and the members of the Kansas Class and the Missouri Class have entered into valid contracts with Medicare for the provision of healthcare insurance.
>
> 47. Defendants are contracted by Medicare as Medicare's agent in the provision of healthcare insurance to Plaintiffs and the members of the Kansas Class and the Missouri Class.
>
> 48. Defendants while acting as agents for Medicare breached the Plaintiffs and the members of the Kansas Class and the Missouri Class contracts by failing to factor in 'procurements costs' when calculating and collecting on Medicare liens.

(Doc. #20, pp. 15-16.) For purposes of a motion to dismiss, these allegations adequately identify the contracts at issue, and the provisions that were allegedly breached. Defendants' motion to dismiss Count II is denied.

2. Motion to Strike

Defendants also move to strike Plaintiffs' class allegations. Plaintiff Martin Zakarian seeks a class action on behalf of himself and the following proposed class: "All Kansas citizens who settled any lawsuit, claim, or cause of action since January 1, 2021 and whom Defendants (or a Defendant) was the agent for Medicare. ("Kansas Class")." (Doc. #1, ¶ 10.) Plaintiff Mary Jones seeks a class action on behalf of herself and the following proposed class: "All Missouri citizens who settled any lawsuit, claim, or cause of action since January 1, 2019 and whom Defendants (or a Defendant) was the agent for Medicare. ("Missouri Class")." (Doc. #1, ¶ 11.) Plaintiffs further allege that all requirements for a class action are satisfied.

Defendants argue Plaintiffs' "putative classes must be stricken because they are facially uncertifiable as a matter of law. (Doc. #10, p. 5.) Among other things, Defendants argue the

class definitions are vague and ambiguous, overly broad, and that individualized questions will overwhelm any common issues. (Doc. #31, pp. 5-14.) Plaintiffs argue they "have provided the Court with workable (and, as always, modifiable) class definitions and have brought two causes of action to redress a single wrong that is easily capable of class wide resolution." (Doc. #21, pp. 1-2.)

As stated above, a "district court may grant a motion to strike class-action allegations prior to the filing of a motion for class-action certification" if it is "apparent from the pleadings that the class cannot be certified" and "permitting such allegations to remain would prejudice the defendant." *Donelson*, 999 F.3d at 1092. Here, the Court finds that Defendant's arguments are premature. "Judges in the Eighth Circuit . . . typically deny as premature motions to strike class allegations filed significantly in advance of any possible motion for class certification." *In re Folgers Coffee*, Case No. 21-2984-MD-W-BP, 2021 WL 7004991, at *4 (W.D. Mo. Dec. 28, 2021) (citing cases); *Bishop v. DeLaval Inc.*, Case No. 5:19-cv-06129-SRB, 2020 WL 4669185, at *2 (W.D. Mo. Jan. 28, 2020).

This case is in its early stages and discovery has not yet commenced. Consequently, "[p]rior to any class discovery or a motion for class certification, the Court cannot determine whether individualized matters will predominate over common issues. Plaintiffs have set forth plausible claims for relief." *Bishop*, 2020 WL 4669185, at *2. For these reasons, and for the additional reasons stated by Plaintiffs, the Court denies Defendants' motion to strike as premature.

IV. CONCLUSION

Accordingly, Defendants' Motion to Dismiss for Failure to State a Claim (Doc. #9) and Motion to Strike Class Allegations (Doc. #10) are DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: August 29, 2024