IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ERIN ANGELO, et al.	§	
	§	
v.	§	**1:20-cv-0484-RP**
	§	
CENTENE MANAGEMENT COMPANY, LLC, et al.	§	
	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Before the Court is Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt. No. 25), Plaintiffs' Response (Dkt. No. 35), and Defendants' Reply (Dkt. No. 36). The District Judge referred the above-motions to the undersigned for report and recommendation pursuant to 28 U.S.C. §636(b)(1)(B), FED. R. CIV. P. 72, and Rule 1(d) of Appendix C of the Local Court Rules.

I. GENERAL BACKGROUND

Plaintiffs Cynthia Wilson and Erin and Nicholas Angelo are Texas residents who purchased ACA Ambetter insurance policies from Defendants. Dkt. No. 1. Plaintiffs allege that Defendants engage in "a classic bait-and-switch, targeting low-income customers with the promise of certified quality health coverage including networks of medical providers to provide that care but providing woefully little coverage after they signed up." Dkt. No. 35 at 1. After Plaintiffs were denied coverage under the policies for out-of-network healthcare providers, Plaintiffs filed a a purported class action alleging three causes of action against Defendants: (1) breach of contract, (2) breach of express warranty, and (3) violations of the Texas Deceptive Trade Practices Consumer Protection Act ("DTPA"). Dkt. No. 19.

In the instant motion Defendants assert that Plaintiffs' claims should be dismissed for four reasons: (1) all of Plaintiffs' claims are precluded by the filed-rate doctrine; (2) Plaintiffs failed to identify any specific insurance policy provision that was breached; (3) Plaintiffs have no basis to make a claim for breach of express warranty on a contract that does not involve the sale of goods; and (4) Plaintiffs' DTPA claim fails to meet the heightened pleading standards applicable to claims of fraud or misrepresentation. Dkt. No. 25.

II. LEGAL STANDARD

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court has explained that a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (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." *Id.* In evaluating a motion to dismiss, the Court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2009).

Claims subject to Rule 9(b) must "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). The Fifth Circuit "interprets Rule 9(b) strictly, requiring a

plaintiff pleading fraud to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Dorsey v. Portfolio Equities, Inc*., 540 F.3d 333, 339 (5th Cir. 2008). "Put simply, Rule 9(b) requires 'the who, what, when, where, and how' to be laid out." *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010). "Facts and circumstances constituting charged fraud must be specifically demonstrated and cannot be presumed from vague allegations." *Schnurr v. Preston*, 2018 WL 8584292, at *3 (W.D. Tex. May 29, 2018) (quoting *Howard v. Sun Oil Co.*, 404 F.2d 596, 601 (5th Cir. 1968)).

III. ANALYSIS

A. Filed Rate Doctrine

Defendants first assert that all of Plaintiffs' claims should be dismissed because they are precluded by the filed rate doctrine. Dkt. No. 25 at 4-14. The filed rate doctrine is a doctrine of deference that "bars judicial recourse against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair or unlawful." *Tex. Comm. Energy v. TXU Energy, Inc*., 413 F.3d 503, 507 (5th Cir. 2005). Whether a state agency has the authority to approve reasonable rates is critical to determining if the filed rate doctrine applies in any given case. Thus, in Texas, "[t]he application of the filed rate doctrine . . . is necessarily circumscribed by the legislative grant of authority" to the administrative agency. *Mid–Century Ins. Co. of Texas v. Ademaj*, 243 S.W.3d 618, 625 (Tex. 2007).

Defendants contend all of Plaintiffs' claims are barred by the filed rate doctrine as each of the claims would require the Court to "reevaluate the reasonableness of insurance rates filed with and approved by the Texas Department of Insurance." Dkt. No. 25 at 8. While Defendants are

correct that Tex. Ins. Code § 1701.057(c) "require[s] an insurer to file the rates charged by that insurer for individual accident and health insurance policies," the rates are not filed for any purpose having anything remotely to do with ratemaking or approval of rates. In fact, the Texas Insurance Code makes explicit that the authority granted to the TDI to require rate filings "does not grant the commissioner the authority to determine, fix, prescribe, or promulgate rates to be charged for an individual accident and health insurance policy." TEX. INS. CODE § 1701.057(e). Defendants cite to no authority that the filed rate doctrine is applicable where rates are filed with an agency that lacks authority to approve or reject them. As such, dismissal based on the filed rate doctrine is unwarranted. *See Harvey v. Centene Mgmt. Co. LLC*, 357 F. Supp. 3d 1073, 1084 (E.D. Wash. 2018) (rejecting application of the filed rate doctrine in suit against Centene with substantially similar claims); *Houston v. Centene Mgmt. Co., LLC*, 2019 WL 7971713, at *2 (S.D. Fla. Oct. 20, 2019) (same).

B. Breach of Contract Claim

Defendants next argue that Plaintiffs' breach of contract claims fail to state a claim by failing to identify a specific material breach of a contract provision and by relying on general and conclusory allegations. Dkt. No. 25 at 9. To state a claim for breach of contract under Texas law, a plaintiff must allege "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Harris v. Meridian Sec. Ins. Co.*, 2019 U.S. Dist. LEXIS 183727, at *7-9 (N.D. Tex. October 24, 2019).

Plaintiffs adequately plead each of these elements. Plaintiffs' Complaint identifies the Ambetter Contract as the signed contract between Plaintiffs and Defendants. Dkt. No. 19 at. ¶¶ 57,

60, 66. They identify specific promises and obligations Defendants made to Plaintiffs in the Ambetter Contract in exchange for their premium payments. Those promises include providing insureds with

- an accurate list of network providers;
- "Complete medical coverage that meets [their] medical needs and contains all of the Essential Health Benefits;"
- a QHP that Centene has certified meets ACA's network adequacy requirements; and
- adequate access to physicians and medical practitioners and treatments or services.

Id. at ¶¶ 12, 27-32, 37-41, 58-59, 91-92. Plaintiffs allege that Defendants failed to fulfill these obligations, and that as a result, Plaintiffs suffered damages. *Id.* ¶ 97, 108-110. These are adequate allegations to support a plausible breach of contract claim, and to overcome the 12(b)(6) motion. *See Rapid Tox Screen LLC v. Cigna Healthcare of Tex. Inc.*, 2017 U.S. Dist. LEXIS 136218 (N.D. Tex. August 24, 2017).

C. Breach of Express Warranty Claim

Defendants next argue Plaintiffs cannot state a claim for breach of express warranty because they do not allege that any"good" has been sold. Dkt. No. 25 at 13-14. Defendants further assert that Plaintiffs' breach of warranty claim merely repeats their breach of contract claim. *Id.* The Court agrees. Under Texas law, "[i]n order to preserve the distinction between contract and express warranty, breach of warranty claims must involve something more than a mere promise to perform under the contract." *Staton Holdings, Inc. v. Tatum, L.L.C.*, 2014 WL 2583668, at *3 (Tex. App. June 10, 2014). Here, Plaintiffs allege express warranties made by Defendants in the Ambetter Contract, including a promise to provide essential benefits under the ACA and a promise that insureds could access specific health care providers listed on the website as in-network. Dkt. No. 35

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