IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOHAMMAD GONDEL, et al.	:	
v.	:	
PMIG 1020, LLC, et al.	:	Civil Action No. CCB-08-1768

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MEMORANDUM

Now pending before the court is a motion to dismiss for improper venue and failure to state a claim upon which relief can be granted, filed by defendants PMIG 1020, LLC ("PMIG 1020"), E & C Enterprises, Inc. ("E & C"), and Petroleum Marketing Group, Inc. ("PMG") against plaintiffs Mohammad Gondel and Saleem Iqbal Gondel ("plaintiffs"). Plaintiffs are suing the defendants for breach of contract, fraud, and credit card fraud, as well as for violation of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq*. The issues in this case have been fully briefed and no hearing is necessary. For the reasons stated below, the defendants' motion to dismiss will be granted.

BACKGROUND

Plaintiffs Mohammad Gondel and Saleem Iqbal Gondel, father and son, are residents of Virginia. Defendant PMG is a Virginia corporation with offices in both Maryland and Virginia, and its president and majority owner is Mr. Abdol Hossein Ejtemai. Defendant PMIG 1020 is a Virginia limited liability company that owns several parcels of land in Virginia. Mr. Ejtemai is at least a part owner of PMIG 1020 and manages its affairs through PMG. (*See* Pls.' Resp. at Ex. B-1, Notice of Default.) Defendant E & C is a Virginia corporation that, until May 2006,

operated a retail gasoline service station ("gas station") located in Virginia Beach, Virginia that was owned by PMIG 1020. Plaintiffs contend that E & C is under common ownership and control with PMG and PMIG 1020. (Amend. Comp. ¶ 19.)

In spring of 2006, plaintiffs, through their broker Maninder Sedhi, entered into discussions with PMG about potentially purchasing the Virginia Beach gas station. Their main point of contact appears to have been Jeff Bucaro, PMG's property manager. Throughout these discussions, plaintiffs allege that Mr. Bucaro represented to them and their broker – verbally and in writing via phone and email – that this gas station was a profitable enterprise, with an average profit margin of $0.10 per gallon sold. In one such communication, Mr. Bucaro sent Mr. Sedhi an e-mail containing E & C's financial statement for 2005, showing that E & C made a profit of $45,586.30 from the gas station that year. Based upon the representations made in this email and several other communications about profitability, plaintiffs agreed to purchase the gas station. On May 31, 2006, they entered into an Installment Sale Contract with PMIG 1020 for the purchase of the property, as well as a Motor Fuel Supply Agreement with PMG for the provision of wholesale gasoline to the station. The Installment Sale Contract obliged the plaintiffs, among other things, to process their credit card sales through PMIG, and the Motor Fuel Supply Agreement bound the plaintiffs to an annual minimum purchase of 572,000 gallons of motor fuel from PMG.

During its first year of operation, the gas station proved to be unprofitable to the plaintiffs. Plaintiffs allege this is because the wholesale price at which they were contractually obligated to buy gasoline from PMG was regularly higher than the retail price of gasoline charged by competing gas stations in the vicinity. Plaintiffs further allege that the wholesale

price charged to them was substantially higher than the price charged to E & C, a fact not disclosed to them by any of the defendants, and one that explains why E & C was able to turn a profit when it operated the gas station.

Despite the unprofitability of the gas station under the plaintiffs' arrangement with PMG, plaintiffs contend that Mr. Ejtemai, Mr. Bucaro, and others "repeatedly encouraged" them, in "numerous conversations," to continue to operate the station, saying that the price discrepancies would resolve themselves and the station would become profitable. (Amend. Compl. ¶ 53.) The gas station did not become profitable, however, and on April 25, 2007, plaintiffs delivered to the defendants a notice of rescission, ceased operations of the gas station, and vacated the premises. By that time, they had already paid $200,000 to PMG pursuant to the Motor Fuel Supply Agreement, and had expended over $249,000 in investments in the gas station aimed at making it more profitable. On April 30, PMIG sent a notice of default to the plaintiffs, seeking $26,272.40 in unpaid debt, a sum which has yet to be paid.

Plaintiffs filed suit in this court on July 8, 2008, seeking compensatory damages for losses incurred in operating the business and lost profits, punitive damages, and attorney's fees.[1] In the suit they claim that all named defendants knew that the gas station would be unprofitable without the uniquely low wholesale gasoline arrangement E &C enjoyed, but nonetheless made deliberate representations to the contrary in order to induce the plaintiffs to purchase and operate the gas station. This series of misrepresentations, they claim, amounts to common law fraud and

[1] Other than the location of the plaintiffs' attorney and one of the individuals not named as a defendant, Mr. Ejtemai, it is not clear why suit was filed in Maryland rather than Virginia. Reference is made to a potential suit involving the same defendants and Ziggraut Enterprises, Inc., a Maryland corporation, but this appears to be a separate claim that has not yet been filed.

breach of contract due to fraudulent inducement. Because they contend that this fraudulent conduct is part of a pattern of activity, they claim it amounts to a violation of RICO as well. Finally they claim that the named defendants "systematically underpaid" them for the proceeds on credit card purchases at the gas station.

ANALYSIS

A. Venue under 18 U.S.C. § 1965 ("RICO venue")

This court will consider first whether venue is proper in this matter. *See* 14D Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Fed. Prac. & Proc. § 3801 (3d ed. 2008) ("if the statutory rules on venue are not followed, and objection is made on the ground of improper venue, the action cannot be heard in that federal district"). Defendants contest the propriety of venue as to all counts, but plaintiffs insist that venue is proper here under 18 U.S.C. § 1965.[2]

[2] In their amended complaint, plaintiffs also claim that venue is proper under 28 U.S.C. § 1391, which allows for venue in "a judicial district where any defendant resides, if all defendants reside in the same State" in cases where, as here, jurisdiction is not based solely on diversity of citizenship." 28 U.S.C. § 1391(b)(1). However, in their opposition to defendants' motion to dismiss, they appear to have relinquished that claim. (*See* Pls.' Opp. at 2.)

Regardless, this claim doubtless would fail, because plaintiffs cannot establish that venue is proper as to defendant PMIG 1020 – a Virginia corporation that only conducts business in Virginia – and plaintiffs must establish the propriety of venue for all defendants in order to proceed under § 1391. *See Hickey v. St. Martin's Press, Inc.*, 978 F. Supp. 230, 240 (D. Md. 1997) ("It is well established that in a case involving multiple defendants and multiple claims, the plaintiff bears the burden of showing that venue is appropriate as to each claim and as to each defendant."). In order to claim that PMIG 1020 "resides" in Maryland for venue purposes, plaintiffs would have to show that it is subject to personal jurisdiction in Maryland. 28 U.S.C. § 1391(c) (stating that, for purposes of venue under § 1391, corporations "reside"in any judicial district in which they are subject to personal jurisdiction); *see Equal Rights Ctr. v. Equity Residential*, 483 F. Supp. 2d 482, 488 (D. Md. 2007). Since PMIG 1020 is not located in Maryland, personal jurisdiction could only be shown through appeal to Maryland's long-arm statute, which extends personal jurisdiction to nonresident persons, including corporate persons, under certain enumerated conditions. Md. Code Ann., Cts. & Jud. Proc. § 6-103(b). None of

Section 1965(a) provides for venue in cases involving RICO claims in any federal judicial district "in which such person resides, is found, has an agent, or transacts his affairs," and § 1965(b) empowers the district court to hale parties from other judicial districts before it in a particular RICO case if "the ends of justice require."[3] These two provisions may allow venue and personal jurisdiction to be proper in one judicial district for multiple RICO defendants where venue and personal jurisdiction are proper in that district for at least one defendant.[4] *See Magic Toyota, Inc. v. Se. Toyota Distrib., Inc.*, 784 F. Supp. 306, 319-21 (D. S.C. 1992); *Medoil Corp. v. Clark*, 753 F. Supp. 592, 599 (W.D. N.C. 1990) ("In order to invoke the provisions of § 1965(b), at least one defendant must be before the court pursuant to the venue provisions of . . . 18 U.S.C. § 1965(a)."). If this court finds personal jurisdiction to be proper under § 1965, it has the ability to exercise supplemental jurisdiction over the related state law claims. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997); *cf.* 28 U.S.C. § 1367(a).

Here, the evidence before this court shows that venue is proper at least as to defendant PMG under § 1965(a). Plaintiffs have submitted a copy of a Maryland State Department of Assessments and Taxation change of address form showing that PMG is at least partly organized under the laws of Maryland and has a principal office in Maryland. (Pls.' Opp. at Ex. B-2, Change of Address Form.) These facts sufficiently illustrate that PMG "reside[s]" and "is

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these conditions have been shown to apply here, and so personal jurisdiction does not exist in Maryland for PMIG 1020. Therefore, venue is not proper in Maryland under § 1391.

[3] Section 1965 is therefore a more liberal venue statute than the general federal venue statute, 28 U.S.C. § 1391, which only allows venue to lie in those judicial districts where venue is proper for each and every named defendant. *See supra* note 2.

[4] Personal jurisdiction and venue, while related, are subject to separate analysis. *See ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997).

found" in Maryland for purposes of venue under § 1965(a). *See Wood v. Barnette, Inc.*, 648 F. Supp. 936, 939 (E.D. Va. 1986) (finding a corporate defendant to "reside" in the district where it was incorporated, even though it transacted no business there); *Gatz v. Ponsoldt*, 271 F. Supp. 2d 1143, 1161 (D. Neb. 2003) (finding defendant corporations to "reside" and be "found" in a district for purposes of venue under § 1965(a) where they were organized under the laws of that district and had registered agents there). Accordingly, venue is proper for PMG in Maryland under § 1965(a). *See ESAB*, 126 F.3d at 626 ("The RICO statute authorizes venue for civil actions in any district in which the defendant 'resides, is found, has an agent, or transacts his affairs.'").

Because RICO venue is proper for PMG in this district, it may be possible for this court to exercise personal jurisdiction over defendants PMIG 1020 and E & C if the court finds that the "ends of justice require" it. 18 U.S.C. § 1965(b); *see Magic Toyota*, 784 F. Supp. at 311 (discussing the § 1965(b) "ends of justice" inquiry). I decline to reach this "ends of justice" inquiry, however, because in this case, for reasons to be discussed below, plaintiffs have failed to state a RICO claim upon which relief can be granted, making any consideration of whether other RICO defendants should be brought before this court unnecessary.[5]

B. Sufficiency of RICO Claims under Fed. R. Civ. P. 12(b)(6)

Defendants assert that, even assuming RICO venue is proper, dismissal is warranted because plaintiffs have failed to state a RICO claim upon which relief can be granted. Fed. R.

[5] If the "ends of justice" inquiry were reached, however, it seems likely that Virginia rather than Maryland would be the better choice of venue. *See Barnette*, 648 F. Supp. at 939.

Civ. Pro. 12(b)(6). Courts test the sufficiency of RICO claims by looking to their elements. *D'Addario v. Geller*, 264 F. Supp. 2d 367, 396 (E.D. Va. 2003). Although not specified by the plaintiffs in their complaint, their RICO claims apparently arise out of § 1962(c), which makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 28 U.S.C. § 1962(c). Thus, in order to make out a *prima facie* RICO case under this provision, a plaintiff must show the existence of the following elements: "(1)conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," and (5) a resulting "injur[y] in his business or property (6) by reason of the RICO violation." *D'Addario*, 264 F. Supp. 2d at 388 (citing *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 496-97 (1985)) (internal quotations omitted). The plaintiff must also show a "person"[6] separate from the alleged "enterprise."[7] *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 158 (2001); *Myers v. Finkle*, 758 F. Supp. 1102, 1111 (E.D. Va. 1990). Where, as here, the alleged racketeering activities center around fraud, plaintiffs asserting RICO claims must comply with the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. *See Robinson v. Fountainhead Title Group Corp.*, 252 F.R.D. 275, 279-80 (D. Md. 2008). This means that plaintiffs must "state with particularity the circumstances constituting [the] fraud" involved in

[6] Under RICO, a "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3).

[7] Under RICO, an "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

the racketeering activities if they are to survive dismissal. Fed. R. Civ. P. 9(b); *see Robinson*, 252 F.R.D. at 280.

The gravamen of the plaintiffs' RICO claim is that the three named corporate defendants conspired together to dupe the plaintiffs, through a series of fraudulent email and telephone communications by their agents, into purchasing a gas station they knew would be unprofitable and enter into an accompanying Motor Fuel Supply Agreement they knew would only benefit themselves as fuel suppliers. Plaintiffs have failed, however, to articulate an "enterprise" in their amended complaint. Nowhere in that complaint do plaintiffs mention a distinct enterprise with which the corporate defendants associated in order to carry out their alleged racketeering scheme. Accordingly, plaintiffs have failed to sufficiently plead that element of their RICO claim.

In their response to the defendants' reply, plaintiffs identify for the first time what they understand to be the "enterprises" involved in their RICO claim, asserting that they are the same three corporate defendants named in the complaint as the "persons" involved.[8] (Pls.' Resp. at 2.)

[8] In their response, plaintiffs also express their understanding that the "persons" involved include the natural persons identified in the complaint but not named as defendants. These are Abdol Hossein Ejtemai, president and majority owner of PMG and member of PMIG 1020, David Noland, minority owner of PMG, and Jeff Bucaro, property manager of PMG. However, nowhere in their amended complaint do plaintiffs state that these three individuals were the defendants they accuse of "engaging in a pattern of racketeering." (Amend. Compl. ¶ 79.) Indeed, they make clear elsewhere in their amended complaint that these individuals were persons *through whom* the named defendants carried out their alleged fraud scheme. (*See, e.g.*, Amend. Compl. ¶ 10 ("All of the Defendants, through their employees, owners and agents, made, and/or conspired to make materially false and misleading representations to the Plaintiffs.").) Indeed, even in their response they describe the RICO count as involving "three distinct business enterprises . . . which are alleged to be operating a racketeering enterprise to use the mails and the wires to defraud the Plaintiffs." (Pls.' Resp. at 2.) Therefore, for purposes of the present analysis and consistent with the amended complaint, the court will continue to recognize only the named corporate defendants as the "persons" involved in the alleged RICO

Assuming without deciding that the plaintiffs would be allowed to further amend their complaint to reflect this assertion, these "enterprises" are not sufficiently distinct from the alleged "persons" to be considered separate entities for purposes of § 1962(c). The Supreme Court has made clear that, "to establish liability under § 1962(c), one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Kushner*, 533 U.S. at 158. This "non-identity" rule requires that the alleged "enterprise" be something other than an association of a corporate defendant with its own employees. *Thomas v. Ross & Hardies*, 9 F. Supp. 2d 547, 556 (D. Md. 1998); *see New Beckley Min. Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1163 (4th Cir. 1994); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *overruled on other grounds by Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (holding that the non-identity rule does not also apply to § 1962(a)); *see also Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented"). By naming PMIG 1020, E & C, and PMG as the defendants, and alleging only that these corporate defendants – through themselves and their agents – engaged in racketeering activity, plaintiffs make precisely the type of RICO allegation that fails to sufficiently differentiate between "person" and "enterprise." Therefore, plaintiffs have failed to make out a *prima facie* case under § 1962(c). *See New Beckley*, 18 F.3d at 1163 (affirming dismissal of RICO claim where plaintiffs failed to sufficiently allege a distinction between the

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scheme.

"person" – an international union and some of its members – and the "enterprise" – regional subgroups of that union); *Computer Sciences Corp.*, 689 F.2d at 1190-91 (affirming dismissal of RICO claim where "person" was corporation and "enterprise" was a division of that corporation).[9]

Plaintiffs also argue that, because their group of purported "persons" consists of three separate corporations with different functions in the alleged racketeering scheme, the non-identity rule should not apply to bar their claim. This is a misreading of the non-identity rule, which operates only to ensure a sufficient distinction between the alleged "person" or group of "persons" and the alleged "enterprise." Thus, while it is true that PMIG 1020, E & C, and PMG are not identical to each other, as a group of "persons" they are identical to the "enterprises" identified by plaintiffs, and so the non-identity rule applies.

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[9] The court notes that the result might be different if the plaintiffs had alleged that the "persons" were individuals and the "enterprises" were corporations created by and/or controlled by those individuals. In *Kushner*, the Supreme Court found that the non-identity rule was met where the "person" was the president and sole shareholder of the "enterprise" involved in the alleged RICO violation. 533 U.S. at 163 ("The corporate owner/employee, a natural person, is distinct from the corporation itself . . . [a]nd we can find nothing in the [RICO] statute that requires more 'separateness' than that."). Likewise, in *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002), the Fourth Circuit held that there was sufficient distinctness by virtue of the fact that the accused "person" was a natural person, unlike the "enterprise" he formed to carry out his racketeering scheme. 300 F.3d at 484-85. Here, however, the "persons" were themselves corporations, making this case legally distinct from cases like *Kushner* and *Najjar*. *See Kushner* 533 U.S. at 164 (discussing this distinction).

Simply put, the plaintiffs did not sue Ejtemai, Noland, and Bucaro for conducting the affairs of PMIG 1020, E & C, and PMG through a pattern of racketeering activity; rather, they accused PMIG 1020, E & C, and PMG of committing fraudulent acts against the plaintiffs through the corporations' agents.

CONCLUSION

Because plaintiffs have failed to state a claim upon which relief can be granted under 18 U.S.C. § 1962(c), this claim will be dismissed. As there is no other basis for jurisdiction over the remaining state law claims, *see ESAB*, 126 F.3d at 628; *D'Addario*, 268 F. Supp. 2d at 387-88; *cf.* 28 U.S.C. § 1367(c)(3), they will be dismissed as well.[10] A separate Order follows.

January 22, 2009
Date

/s/
Catherine C. Blake
United States District Judge

[10] The plaintiffs requested transfer to the Eastern District of Virginia or the Fairfax Circuit Court in Virginia as an alternative to dismissal. As there is no valid federal claim, transfer to the Eastern District of Virginia is not warranted, and this court has no jurisdiction to transfer to a state court a case originally brought in federal court.

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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. The defendant's motion to dismiss (docket entry no. 25) is **GRANTED**;

2. The plaintiffs' RICO claim is **DISMISSED** with prejudice;

3. The plaintiffs' state law claims are **DISMISSED** without prejudice; and

4. The clerk shall **CLOSE** this case.

January 22, 2009
Date

/s/
Catherine C. Blake
United States District Judge