

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

MATTHEW DICKSON and JENNIFER	§	
DICKSON, individually and on behalf of all	§	
others similarly situated,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CASE NO. 5:16-CV-5027 PKH
	§	
GOSPEL FOR ASIA, INC., GOSPEL FOR	§	
ASIA-INTERNATIONAL, K.P.	§	
YOHANNAN, GISELA PUNNOSE, DANIEL	§	
PUNNOSE, DAVID CARROLL, and PAT	§	
EMERICK	§	
	§	
	§	
Defendants.	§	

**DEFENDANT GOSPEL FOR ASIA, INC.’S BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS’ CLAIMS**

Subject to the Motion to Compel Arbitration and pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), Defendant Gospel for Asia, Inc. (“GFA”) hereby files this *Brief in Support of GFA’s Motion to Dismiss Plaintiffs’ Claims*.¹

INTRODUCTION

Plaintiffs’ claims should be dismissed because their claims fail as a matter of law or are insufficiently pled. Plaintiffs’ claim arising out of the Racketeer Influenced and Corrupt Organizations (“RICO”) Act fails as a matter of law because GFA, as a named Defendant,

¹ Contemporaneously with the filing of the Motion to Dismiss that this Brief supports, Defendants Gospel for Asia-International (“GFA-International”), K.P. Yohannan, Gisela Punnose, Daniel Punnose, David Carroll, and Pat Emerick (collectively, the “Individual Defendants”) are filing a Motion to Dismiss and Brief in Support that demonstrates additional, independent reasons each of the claims should be dismissed.

cannot also be the RICO “enterprise.” Plaintiffs’ common law fraud and Arkansas Deceptive Trade Practices Act (“ADTPA”) claims also fail because Plaintiffs have not met Rule 9(b)’s heightened pleading standard. Finally, Plaintiffs’ unjust enrichment claim fails because it rests on the same insufficiently pled fraud and misrepresentation allegations.

ARGUMENTS AND AUTHORITIES

I. Pleading Standards

The Dicksons must allege sufficient facts about their own claims (not alleged wrongs done to other people) to state a claim upon which relief may be granted. And their Complaint is tested against the pleading requirements of Rule 12(b)(6) and Rule 9(b). It fails.

A. Rule 12(b)(6)

When considering a motion to dismiss a putative class representative’s claims under Rule 12(b)(6), courts need only look at the plaintiff’s individual allegations—not those that might be made by other members of the purported class—to determine whether a motion to dismiss for failure to state a claim should be granted. *Browe v. Evenflo Co., Inc.*, No. 14-4690 ADM/JJK, 2015 WL 3915868, at *4 n.1 (D. Minn. June 25, 2015) (“For purposes of this motion [to dismiss], only [plaintiff’s] claims, and not those of any potential class member, are considered); *see also Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999) (affirming, in putative class action, district court’s dismissal of plaintiffs’ claims because, among other things, “Plaintiffs failed to allege that any defect had actually manifested itself in their vehicles”). Indeed, “a named plaintiff must have a valid cause of action against each defendant, and cannot rely on the allegations of putative class members if he or she does not also have a claim against that defendant.” *Crissen v. Gupta*, 994 F. Supp. 2d 937, 946 (S.D. Ind. 2014). Thus, when a party moves to dismiss a plaintiff’s individual claims, the claims are assessed under Rule

12(b)(6) without consideration of the putative class nature of the litigation. *See, e.g., Evans v. Taco Bell Corp.*, No. Civ. 04CV103JD, 2005 WL 2333841, at *4 (D.N.H. Sept. 23, 2005) (“unless and until the court certifies such a class, the potential claims of putative class members other than the named plaintiff are simply not before the court.”) (citing 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.3, at 19–20 (4th ed. 2002)).²

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 635 n.11 (8th Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Demonstrating the facial plausibility of a claim requires a plaintiff to establish “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is not enough that a plaintiff allege the mere possibility of misconduct; it is incumbent to show “that the [plaintiff] is entitled to relief.” FED. R. CIV. P. 8(a)(2); *see also Iqbal*, 556 U.S. at 678. The complaint must “contain factual allegations sufficient to raise a right to relief above the speculative level.” *Williams v. Hobbs*, 658 F.3d 842, 848 (8th Cir. 2011) (citing *Parkhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009)); *see also NanoMech, Inc. v. Suresh*, No. 5:13-CV-05094, 2013 WL 4805692, at *3 (W.D. Ark. Sept. 9, 2013). Surviving dismissal “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citations and internal quotation marks omitted). “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” *Id.* (citations and internal quotation marks omitted). Additionally, a court is not required to “blindly accept the legal conclusions drawn by the pleader from the facts.” *Suresh*, 2013 WL 4805692, at *3 (quotation marks omitted).

² Defendants reserve the right to file a comprehensive Rule 23 and/or Rule 12 motion as to the class allegations.

B. Rule 9(b)

In addition, claims alleging fraud or a fraudulent scheme must meet the heightened pleading standards of Rule 9(b). *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 439 (8th Cir. 2013). In alleging fraud, a party must state with particularity the circumstances constituting the fraud. *Id.* (citing FED. R. CIV. P. 9(b)). “In other words, Rule 9(b) requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story.” *Freitas*, 703 F.3d at 439 (quoting *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011)). Plaintiffs have not done so.

II. Plaintiffs’ RICO Claim Fails as a Matter of Law.

Plaintiffs’ RICO claim fails as a matter of law. To allege a RICO violation under section 1962(c), a plaintiff must show: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 428 (8th Cir. 2009) (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). Significantly, failure to show evidence of any one element of a RICO claim means the entire claim fails. *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1028 (8th Cir. 2008).

Here, Plaintiffs’ entire RICO claim fails as a matter of law because Plaintiffs have named GFA as an alleged RICO “person” as well as the alleged RICO “enterprise,” thereby failing to satisfy the “enterprise” element.³ “[T]he person named as the defendant cannot also be the entity identified as the enterprise.” *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989). The United States Supreme Court has recognized and approved that principle: “We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege

³ Because at the outset Plaintiffs do not satisfy the “enterprise” element as a matter of law, GFA need not address the remaining RICO elements or whether they have been sufficiently pled. GFA reserves the right to challenge the other RICO elements should Plaintiffs file an amended, supplemental, and/or additional pleading.

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.” *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

Here, Plaintiffs squarely name GFA as a Defendant, thereby seeking to hold it liable as a RICO person under Section 1962(c). Complaint ¶5. Plaintiffs also squarely identify GFA as the RICO enterprise (yet without any factual detail as to why it qualifies). Complaint ¶56 (“Defendant [GFA] is an enterprise engaged in and whose activities affect interstate commerce.”). It is an elemental tenet of a RICO claim that as an alleged RICO person, a defendant (here, GFA) cannot *also* be the alleged RICO enterprise, and thus Plaintiffs have not pled a proper RICO claim. Because Plaintiffs cannot, at the outset, establish this essential element of their claim, Plaintiffs’ RICO claim must be dismissed (as to all Defendants). *Craig Outdoor Adver.*, 528 F.3d at 1028.⁴

III. Plaintiffs’ Fraud Claim Fails

Plaintiffs’ common law fraud claim fails. Rule 9(b) explicitly requires that a plaintiff allege facts with particularity in support of a fraud claim. FED. R. CIV. P. 9(b). Fraud consists of five elements: “(1) a false representation of a material fact; (2) knowledge or belief that the representation was false; (3) intent to induce reliance on the part of the plaintiffs; (4) justifiable reliance by plaintiffs; and (5) resulting damage to plaintiffs.” *Colonia Ins. Co. v. City Nat’l*

⁴ In *King*, the United States Supreme Court reasoned that this conclusion was supported by the express language of the statute: “The statute’s language, read as ordinary English, suggests that principle. The Act says that it applies to ‘person[s]’ who are ‘employed by or associated with’ the ‘enterprise.’ § 1962(c). In ordinary English one speaks of employing, being employed by, or associating with others, not oneself. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 132 (1993) (defining ‘associate’); *id.*, at 743 (defining ‘employ’).” 533 U.S. at 161–62. The Court also said “We agree with [the requirement of some distinctness between the RICO defendant and the RICO enterprise], particularly in light of the fact that 12 Courts of Appeals have interpreted the statute as embodying some such distinctness requirement without creating discernible mischief in the administration of RICO.” *Id.* (citations omitted).

Bank, 988 F. Supp. 1242, 1251 (W.D. Ark. 1997) (Waters, J.) (citing *Sexton Law Firm, P.A. v. Milligan*, 948 S.W.2d 388, 395–96 (Ark. 1997)). “The plaintiff must plead ‘such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.’” *Freitas*, 703 F.3d at 439 (quoting *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001)).

Plaintiffs allege common law fraud based on representations they claim induced them to make their donations, but not with the specificity required. Plaintiffs generally allege that they made “several donations” to GFA. Complaint ¶¶42–43. Plaintiffs’ individual claims apparently rest on a \$25 gift made on May 12, 2013 to “widows and abandoned children.” *Id.* ¶44. Additional gifts to “National Missionary” and “Bridge of Hope” are listed on a “2013 annual receipt.” *Id.* and Ex. 4. These other two types of donations were monthly gifts starting in January 2013. *Id.* ¶¶43–44 and Ex. 4. Plaintiffs, however, do not address those gifts in any substantive paragraph of the Complaint.

Plaintiffs’ Complaint references a number of graphics and exhibits to assert that these gifts were fraudulently induced. The vast majority of these are from 2015 or 2016, well after the 2013 donations that the Dickson claim were fraudulently induced. For example, much of the Complaint discusses the 2015 Christmas catalog, which obviously has nothing to do with 2013 gifts. Complaint ¶¶18, 20, 21, 22, 23 and Ex. 2. Similarly, a May 2015 “Emergency Gram” received by the Dicksons to which they did not respond cannot form the basis for a claim. *Id.* ¶19 and Ex. 3. Therefore, such information is temporally (and topically) irrelevant.

Plaintiffs include a few pre-2015 references, but they do not supply a basis for Plaintiffs’ alleged fraud claims. Plaintiffs present a GFA webpage from May 14, 2013, but it does not pre-date the May 12, 2013 gift. *Id.* ¶43. The Complaint does not even state that the Dicksons

viewed this webpage in advance of making the gift or that they relied upon it. *Id.* ¶¶43–44. Nor do the Dicksons allege that they viewed or relied on a 2012 web page in the Complaint. *Id.* ¶34. Nor does the substance of either web page support a fraud claim. The Dicksons claim that they made donations based on the 100% guarantee language (*id.* ¶45), but these two web pages do not have that information. The May 14, 2013 web page with “Give to Widows and Abandoned Children” at the bottom simply states: “Your donation will provide Gospel for Asia-supported missionaries with the means to help these precious women and children of God;” “Your gift will also give them the chance to hear about their Creator and a Savior that loves them so much that he died for their sins;” and “[b]y giving to the widows and abandoned children of South Asia, you ensure that they’re taken care of and shown love.” *Id.* ¶43. The 2012 webpage says even less. *Id.* ¶34. Plaintiffs do not allege that anything therein constitutes a false representation of material fact.

If Plaintiffs are attempting to base their claims on the receipt the Dicksons received, this December 31, 2013 thank-you letter and receipt came after the gifts. Complaint ¶¶43–44 and Ex. 4. This cannot support Plaintiffs’ alleged “understanding that GFA *would* apply 100% of their \$25 donation to the ‘Widows and Abandoned Children’ fund in the Field” at the time the donation was made. *Id.* (emphasis added).⁵

⁵ Furthermore, the very receipt on which Plaintiffs’ seek to establish reliance expressly states: “All contributions to Gospel for Asia ... are made with the understanding that GFA has complete discretion and control over the use of all donated funds.” Complaint ¶44 and Ex. 4. And the Christmas catalog attached to the Complaint includes similar language: “we promise to honor the Lord and your generosity by using your gift in the most effective way possible. The items reflected in this catalog highlight current needs on the mission field at the time of writing and suggested donation amounts are based upon pricing in the countries where they will be distributed. Your donation will be used for your specific designation or to provide for a similar need.” Complaint Ex. 2 at p. 3.

In short, Plaintiffs' allegation of their "understanding" is unsupported by a factually specific allegation of any representation made by GFA *prior* to the Dickson's gifts, much less alleging what they have to show, the what, when, where and how facts. Moreover, Plaintiffs have not even alleged how, when, or under what circumstances they discovered the alleged fraud. To survive scrutiny under Rule 12(b)(6), Plaintiffs' fraud claim requires allegations of detrimental reliance induced by *affirmative* misrepresentations, not subjective beliefs. *Colonia Ins. Co.*, 988 F. Supp. at 1251.

Finally, to the extent Plaintiffs seek to rely on the *other* contributions made in 2013 (to National Missionary or Bridge of Hope), but not discussed in any substantive paragraph of the Complaint with respect to the Dicksons, Plaintiffs' individual fraud claims would *still* fail under Rules 12(b)(6) and 9(b). Plaintiffs fail to allege any predicate representation by GFA to Plaintiffs, prior to 2013, which they allege was materially false or misleading, and which Plaintiffs claim induced them to contribute to Bridge of Hope or National Missionary gifts.

In short, Plaintiffs fail to plead with particularity any misrepresentation by GFA prior to the Dicksons' 2013 gifts, and accordingly, Plaintiffs' individual fraud claims fail.

IV. Plaintiffs' Arkansas Deceptive Trade Practices Act (ADTPA) Claim Also Fails

For the same reasons that Plaintiffs' alleged common law fraud claim fails, so too does their ADTPA claim. Plaintiffs' ADTPA claim arises out of the same allegedly fraudulent representations as its fraud count. Complaint ¶71 ("As described in detail in the factual allegations above, Defendants made false representations . . . in direct violation of Ark. Code Ann. § 4-88-107(a)(7)."). Plaintiffs state this conclusion because Section 4-88-107(a)(7) applies to "[m]aking a *false representation*." ARK. CODE ANN. § 4-88-107(a)(7) (emphasis added). Thus Rule 9(b) applies to this claim. *See Lavalla v. Caliber Home Loans, Inc.*, No. 4:13CV00522 BSM, 2014 WL 297700, at *1–2 (E.D. Ark. Jan. 28, 2014) (holding that

plaintiffs' ADTPA claim was subject to Rule 9(b)'s heightened pleading standard, and dismissing plaintiffs' ADTPA claim because it did not specify the time, manner, or content of the false representations, failed to identify the person making the false representations, and provided no information as to the content of the false representations, or when or how these representations occurred). Plaintiffs must provide factual allegations as to how each Defendant violated this statute. Because Plaintiffs' fraud claims fail as a matter of law, their ADTPA claim, which rests on those same allegations, should be dismissed as well.

V. Plaintiffs' Unjust Enrichment Claim Also Fails

Plaintiffs' unjust enrichment claim also arises out of the same alleged misrepresentations as Plaintiffs' fraud claims. Complaint ¶75 ("Defendants intentionally made *material false representations* to Plaintiffs . . ."). Under Arkansas law, the elements of an unjust enrichment claim are: (1) that the plaintiff suffered a detriment; (2) that the defendant received money from the plaintiff to which it was not entitled and which should be restored to the plaintiff; (3) there was some operative act, intent, or situation that made the alleged enrichment of the defendant unjust and inequitable; and (4) the amount by which the defendant was unjustly enriched. *Hall v. David H. Arrington Oil and Gas, Inc.*, NO. 2-09-CV-0091 BSM, 2010 WL 1253383, at *2 (E.D. Ark. Mar. 25, 2010). Because unjust enrichment must rest on an underlying act, it is not enough to establish a benefit received by another party—the benefitted party must have acted or intended “to make the enrichment unjust and compensable.” *Friedman v. Farmer*, 788 F.3d 862, 866 (8th Cir. 2015) (quoting *Campbell v. Asbury Auto., Inc.*, 381 S.W.3d 21, 36 (Ark. 2011)). Plaintiffs' unjust enrichment claim is necessarily tied to the same alleged misrepresentations on which Plaintiffs rest their alleged fraud claim; therefore, it too is subject to Rule 9(b)'s heightened pleading standard, under which Plaintiffs' unjust enrichment claim (like their other claims) fails as a matter of law and should be dismissed.

CONCLUSION

GFA respectfully requests that the Court grant its Motion to Dismiss and dismiss Plaintiffs' claims, and prays that the Court grant it all such other and further relief, in law or in equity, to which it may be justly entitled.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 15, 2016, I electronically filed the foregoing document with the Clerk of the Court, to be served by operation of the Court's electronic filing system on the attorneys of record.

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