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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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GEORGE YESKE, et al.,

Plaintiff(s),

v.

ALEX BENDETOV, et al.,

Defendant(s).

Case No. 2:14-CV-1177 JCM (VCF)

ORDER

Presently before the court is a motion to dismiss filed by defendants Alex Bendetov, James H. Eagan, Limestone Investments, LLC, Sunrise Trust, and Wendi Williams (hereinafter “defendants”). (Doc. # 7). Pro se plaintiffs Felicitas Yeske and George Yeske (hereinafter “plaintiffs”) filed a response, (doc. # 9), and defendants filed a reply, (doc. # 12).

Also before the court is plaintiffs’ motion for leave to amend their complaint. (Doc. # 10). Defendants filed a response. (Doc. # 13). Plaintiffs did not file a reply, and the deadline to reply has now passed.

Also before the court is plaintiffs’ motion to quash defendants’ response. (Doc. # 14). Defendants filed a response. (Doc. # 15). Plaintiff did not file a reply, and the deadline to reply has now passed.

**I. Background**

Plaintiffs contracted with defendant Bendetov to lease a home. The contract included an option to purchase. Plaintiffs allege that the remaining defendants participate in defendant Bendetov’s business and act as his agents. (Doc. # 1-1).

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...

1 Plaintiffs claim that defendants charged them unwarranted fees for repairs that were  
2 outside the scope of their contractual obligations. Plaintiffs also contend that defendant Eagan  
3 has attempted to defraud plaintiffs by misinterpreting the contract and refusing to allow them to  
4 exercise an option to purchase. Plaintiffs further state that defendant Williams improperly sent  
5 them an eviction notice on defendant Bendetov's behalf. Finally, plaintiffs allege that defendant  
6 Bendetov fraudulently provided the incorrect address for them to send their rent payments.

7 Plaintiffs filed the instant action based on the above conduct, alleging a federal RICO  
8 claim and violations of state law for racketeering, deceptive sales practices, and mortgage fraud.  
9 (Doc. # 1-1). On August 27, 2014, plaintiffs filed a motion for a preliminary injunction, (doc. #  
10 5), which the court denied. (Doc. # 11).

11 Defendants now move to dismiss the complaint under Federal Rule of Civil Procedure  
12 12(b)(1) for lack of jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
13 claim upon which relief can be granted. (Doc. # 7). Plaintiffs move for leave to amend their  
14 complaint, (doc. # 10), and move to quash defendants' response to their motion for leave to  
15 amend, (doc. # 14).

## 16 **II. Legal Standard**

### 17 i. 12(b)(1) dismissal

18 A court may dismiss a plaintiff's complaint for lack of subject-matter jurisdiction. Fed.  
19 R. Civ. P. 12(b)(1). Federal Rule of Civil Procedure 12(b)(1) permits a party to assert this  
20 defense by motion. *Id.* When presented as a factual challenge, a rule 12(b)(1) motion can be  
21 supported by affidavits or other evidence outside of the pleadings. *United States v. LSL*  
22 *Biotechs.*, 379 F.3d 672, 700 n.14 (9th Cir. 2004) (citing *St. Clair v. City of Chicago*, 880 F.2d  
23 199, 201 (9th Cir. 1989)).

24 "A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly,  
25 the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court,  
26 on having the defect called to its attention or on discovering the same, must dismiss the case."  
27 *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

1           ii.       12(b)(6) dismissal

2           A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief  
3 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short  
4 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.  
5 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not  
6 require detailed factual allegations, it demands “more than labels and conclusions” or a  
7 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
8 (2009) (citation omitted).

9           “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
10 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
11 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation  
12 omitted).

13           In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
14 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
15 allegations in the complaint; however, legal conclusions are not entitled to the assumption of  
16 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by  
17 conclusory statements, do not suffice. *Id.*

18           Second, the court must consider whether the factual allegations in the complaint allege a  
19 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint  
20 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for  
21 the alleged misconduct. *Id.* at 678.

22           Where the complaint does not permit the court to infer more than the mere possibility of  
23 misconduct, the complaint has “alleged – but it has not shown – that the pleader is entitled to  
24 relief.” *Id.* at 679 (internal quotations omitted). When the allegations in a complaint have not  
25 crossed the line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*,  
26 550 U.S. at 570.

27       ...

28       ...

1 The Ninth Circuit addressed post-Iqbal pleading standards in *Starr v. Baca*, 652 F.3d  
2 1202, 1216 (9th Cir. 2011). The Starr court stated,

3  
4 First, to be entitled to the presumption of truth, allegations in a complaint or  
5 counterclaim may not simply recite the elements of a cause of action, but must  
6 contain sufficient allegations of underlying facts to give fair notice and to enable  
7 the opposing party to defend itself effectively. Second, the factual allegations that  
8 are taken as true must plausibly suggest an entitlement to relief, such that it is not  
9 unfair to require the opposing party to be subjected to the expense of discovery  
10 and continued litigation.

11 Id.

12 iii. Motion to amend

13 Federal Rule of Civil Procedure 15(a) provides that leave to amend “shall be freely given  
14 when justice so requires.” Fed. R. Civ. P. 15(a). The Supreme Court has interpreted Rule 15(a)  
15 and confirmed the liberal standard district courts must apply when granting such leave.

16 In *Foman v. Davis*, 371 U.S. 178 (1962), the Court explained: “[i]n the absence of any  
17 apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the  
18 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
19 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
20 amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” Id. at 182.

21 Further, local rule 15-1(a) requires that a plaintiff submit a proposed, amended complaint  
22 along with its motion to amend. LR 15-1(a).

### 23 **III. Discussion**

24 i. 12(b)(1) dismissal

25 Defendants contend that the court lacks jurisdiction because the parties are not  
26 completely diverse. (Doc. # 7). While defendant Bendetov resides out-of-state, at least one  
27 other defendant is domiciled in Nevada. (Docs. # 1-1, 7).

28 Defendants are correct that diversity jurisdiction is not properly invoked in this case. See  
29 28 U.S.C. § 1332(a)(1). Plaintiffs acknowledge that diversity is non-existent here, but contend  
30 that the court possesses federal question jurisdiction. (Doc. # 9).

1 As defendants note, only three of plaintiff's claims arise under Nevada law. Plaintiff's  
2 complaint also includes a RICO allegation. (Doc. # 1-1). Because this claim arises under a  
3 federal statute, the court has federal question jurisdiction over it. See 28 U.S.C. § 1331 ("The  
4 district courts shall have original jurisdiction of all civil actions arising under the Constitution,  
5 laws, or treaties of the United States").

6 As a result, the court may also assert supplemental jurisdiction over plaintiffs' state law  
7 claims based on the same conduct. See 28 U.S.C. § 1367(a). Therefore, plaintiffs' motion to  
8 dismiss is not properly granted under Rule 12(b)(1). Notably, dismissal of plaintiffs' state law  
9 claims would be appropriate if plaintiff's federal claim were dismissed under Rule 12(b)(6).  
10 This will be addressed below.

11 ii. 12(b)(6) dismissal

12 Defendants also seek dismissal under Federal Rule of Civil Procedure 12(b)(6). (Doc. #  
13 7). Defendants claim that plaintiffs' RICO claim is insufficiently pled under the legal standard  
14 above.

15 Plaintiff's complaint alleges that defendants engaged "in a pattern of [r]acketeering in  
16 violation of the RICO act." (Doc. # 1-1). It states that defendants "regularly engage in the use of  
17 the US [m]ail and various forms of telephonic and electronic contact measures to further their  
18 case." Plaintiffs contend that defendants have a propensity "to attempt to engage the [p]laintiffs  
19 in a planned and organized method of fraud . . . ." (Doc. # 1-1). Plaintiffs cite the definition of  
20 an "enterprise" from the RICO Act and claim that defendants qualify. As such, plaintiffs claim  
21 that defendants "have clearly passed the legal mark for a pattern of activity as required to prove  
22 RICO."

23 In terms of factual assertions, plaintiffs' complaint alleges that defendants failed to abide  
24 by the terms of the parties' written contract. (Doc. # 1-1). The complaint further alleges that  
25 defendants attempted to collect unwarranted fees for repairs, refused to provide services required  
26 by the contract, and refused to allow plaintiffs to exercise their option to purchase. (Doc. # 1-1).  
27 Defendants claim that plaintiffs' complaint is insufficient because it "contains no specific  
28 allegations as to when, where, or how these alleged violations occurred." (Doc. # 12).

1           The relevant standard requires that plaintiffs’ complaint state “more than labels and  
2 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*,  
3 556 U.S. 662, 678 (2009) (citation omitted). Taking plaintiffs’ factual allegations as true, the  
4 court must conclude that plaintiffs’ complaint contains sufficient facts to “state a claim to relief  
5 that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation omitted).

6           Plaintiffs fail to meet this standard here. Plaintiffs’ asserted RICO cause of action is  
7 largely conclusory, and does not allege any particular conduct that qualifies as racketeering as  
8 defined by 18 U.S.C. § 1961. Plaintiffs’ contract claims do not meet this standard, and plaintiffs  
9 do not produce any facts supporting their claim that defendants are engaged in an “enterprise”  
10 sufficient to meet the statutory standard. Accordingly, dismissal under Rule 12(b)(6) is  
11 appropriate.

12           The court therefore declines to exercise supplemental jurisdiction over plaintiff’s  
13 remaining state law causes of action. *Wade v. Reg’l Credit Ass’n*, 87 F.3d 1098, 1101 (9th Cir.  
14 1996) (holding that “where a district court dismisses a federal claim, leaving only state claims for  
15 resolution, it should decline jurisdiction over the state claims and dismiss them without  
16 prejudice”). Based on this standard, the court will dismiss plaintiffs’ state law claims without  
17 prejudice.

18           iii.     Motion to amend

19           Plaintiffs seek leave to amend their complaint to correct typographical errors and clarify  
20 their claims. (Doc. # 10). Plaintiffs contend that they improperly cited the statute for diversity  
21 jurisdiction in their complaint, and that they should be allowed leave to amend to correct this  
22 misstatement. Defendants respond that “[w]hat type of jurisdiction Plaintiffs are claiming is  
23 unknown and is not mentioned in the Motion.” (Doc. # 13).

24           As addressed above, the court possesses federal question and supplemental jurisdiction  
25 over plaintiffs’ claims. However, the court finds that leave to amend would be futile, as  
26 plaintiffs have failed to identify any grounds for a RICO claim based on the facts of the instant  
27 case. Plaintiffs’ motion to amend addresses only the jurisdictional issue, without any argument  
28

1 as to the merits of plaintiffs' claims or proposed amended claims. Plaintiffs' other filings also  
2 fail to provide any evidence that amendment would cure the complaint's deficiencies.

3 Further, while plaintiffs state in their motion to amend that they are attaching an amended  
4 complaint, they fail to do so. Accordingly, under Local Rule 15-1(a), granting leave to amend is  
5 inappropriate. The court will deny plaintiffs' motion to amend their complaint on these grounds.

6 iv. Motion to quash

7 Plaintiffs also filed a "motion to quash" defendants' opposition to plaintiffs' motion to  
8 amend their complaint.<sup>1</sup> (Doc. # 14). Plaintiffs argue that the court should "quash" the  
9 defendants' motion for failure to comply with Local Rule 10-2(b), because defendants  
10 mistakenly titled their motion with the wrong court name.<sup>2</sup> Plaintiffs contend that this must  
11 mean that "[d]efendants are attempting to change venue on their own or lack respect for the  
12 judicial process on the Federal Level."

13 The court does not find reason to quash defendants' opposition. Defendants'  
14 typographical error has no bearing on the substance of the parties' filings and the court's  
15 resolution of the instant motions. As defendants note, "[t]he Court may sua sponte or on motion  
16 change, dispense with, or waive any of [the local rules] if the interests of justice so require." LR  
17 IA 3-1. The court finds that, to the extent defendants have violated any applicable local rule, this  
18 standard applies here. Accordingly, the court will deny plaintiffs' motion to quash.

19 **IV. Conclusion**

20 Accordingly,

21 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to  
22 dismiss, (doc. # 7), be, and the same hereby is, GRANTED. Plaintiff's fourth claim for relief is  
23 hereby DISMISSED.

24 \_\_\_\_\_  
25 <sup>1</sup> Motions to quash are appropriate in certain instances in response to subpoenas and  
26 improper service of process, under Federal Rules of Civil Procedure 12(b)(4), 12(b)(5), and  
27 45(d)(3). Because these standards are inapplicable here, the court will not discuss them.  
28 Plaintiffs appear to be asking the court to strike defendants' opposition. The court will address  
the merits of plaintiffs' motion regardless of its proper label.

<sup>2</sup> Defendants' response to plaintiffs' motion to amend is addressed to the Eighth Judicial  
District Court of Clark County, Nevada.

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IT IS FURTHER ORDERED that plaintiffs' first, second, and third claims for relief (the state law claims) be, and the same hereby are, DISMISSED without prejudice.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to amend complaint, (doc. # 10), be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion to quash, (doc. # 14), be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that the clerk shall enter judgment accordingly and close the case.

DATED November 14, 2014.

  
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UNITED STATES DISTRICT JUDGE