STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

FRONTIER ETHANOL, LLC, ET AL,
Plaintiffs,

v.

Case No. 14-143937-CB
Hon. James M. Alexander

VARILEASE FINANCE, INC, ET AL,
Defendants.
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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on motions for summary disposition filed by (1) Varilease, VFI-SPV, Somerset Capital Group, and CCA Financial (the "Varilease Defendants"), and (2) Sterling National Bank and Beverly Bank & Trust Company (the "Bank Defendants"). These Defendants also filed motions to strike the POET entities' jury demand.

The underlying dispute is fairly simple. According to their Complaint, the POET entities[1] are "one of the world's largest producers of ethanol." Their business includes fermenting sugars produced from corn starch. In order to do so, they leased certain corn oil extraction equipment through a series equipment leases from Varilease Finance.

The central issues to the current motions for summary disposition are: (1) the effect of an merger/integration clause on POET's fraud-based claims; and (2) whether POET has adequately pled a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).

[1] Frontier Ethanol, LLC; Horizon Ethanol, LLC; Missouri Ethanol, LLC; Iowa Ethanol, LLC; Fostoria Ethanol, LLC; POET Leasing, LLC; and Ultimate Ethanol, LLC.

The moving parties all seek summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. Wade v Dept of Corrections, 439 Mich 158 (1992). A motion under this subrule may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." Id. When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

1. The Varilease Defendants' Motions

The Varilease Defendants first move for summary disposition of POET's claims and counterclaims for: (1) violation of RICO (Count I), (2) fraudulent inducement (Count III), (3) fraudulent misrepresentation (Count IV), (4) innocent misrepresentation (Count V), (5) promissory estoppel (Count VI), and (6) civil conspiracy (Count VII).[2] These claims were identically pled in both POET's Complaint and Counterclaim.

A. <u>POET's fraud-based claims.</u>

POET's fraud-based claims are founded on allegations that they were told that they would have the ability to purchase the leased equipment at 8-10% of the amount financed under the master lease agreements. This alleged agreement, however, conflicts with the terms contained in the written leases. In an attempt to avoid the clear lease terms, POET argues that it was fraudulently induced to enter into the leases based on these verbal promises.

[2] The Varilease Defendants' motion, however, does not seek dismissal of POET's claims and counterclaims for breach of contract (Count II) or declaratory judgment (Count VIII).

The Varilease Defendants argue that they are entitled to summary disposition of these claims based on unambiguous lease terms that provided that POET could: (1) purchase all of the equipment "for a price to be agreed upon" by the parties, (2) extend the lease for an additional four quarters, or (3) return the equipment and pay a one-time fee equal to four quarterly payments. The master leases also included a merger/integration clause that provided, at section 19(c), that:

> This Master Agreement and the Lease constitute the entire and only agreement between Lessee and Lessor with respect to the lease of the Equipment, and the parties have only those rights and have incurred only those obligations as specifically set forth herein. The covenants, conditions, terms and provisions may not be waived or modified orally and shall supersede all previous proposals, both oral and written, negotiations, representations, commitments or agreements between the parties.

Despite acknowledging in writing that there were no other agreements, representations, or commitments between the parties, POET argues that it was promised that it could purchase the equipment at lease end for 8-10% of the amount financed. This argument serves as the foundation for its fraud-based claims.

Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." Holmes v Holmes, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing St Paul Fire & Marine Ins Co v Ingall, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." Holmes v Holmes, supra at 594; quoting Meagher v Wayne State Univ, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Michigan law is also clear that "to sustain a fraud claim, the party claiming fraud must reasonably rely on the material misrepresentation." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008) (emphasis in original), citing Foreman v Foreman, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); and Bergen v Baker, 264 Mich App 376, 389; 691 NW2d 770 (2004). The same is true for innocent misrepresentation claims. Zaremba, 280 Mich App at 39; citing Novak v Nationwide Mut Ins Co, 235 Mich App 675, 690-691; 599 NW2d 546 (1999).

The Varilease Defendants argue that "the Master Leases' merger provisions render unreasonable, as a matter of law, [POET's] disingenuous and retrospective assertion that they relied on a collateral agreement/understanding" where the Master Leases provide written proof that there was no other agreement.

Indeed, our appellate courts have reasoned:

> There is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract. It is only the latter that are eviscerated by a merger clause, even if such were the product of misrepresentation. It stretches the UAW-GM ruling too far to say that any pre-contractual factual misrepresentations made by a party to a contract are wiped away by simply including a merger clause in the final contract. Such a holding would provide protection for disreputable parties who knowingly submit false accountings, doctored credentials and/or already encumbered properties as security to unknowing parties as long as they were savvy enough to include a merger clause in their contracts. Barclae v Zarb, 300 Mich App 455, 481; 834 NW2d 100 (2013); quoting Star Ins Co v United Commercial Ins Agency, Inc, 392 F Supp 2d 927, 928-929 (ED Mich 2005).

In fact, the Barclae Court heavily relied on and extensively quoted Star Ins Co, 392 F Supp 2d 927. The Star Ins Co Court continued:

> The key element in cases involving a merger clause is whether one justifiably relied on the representations of another when the parties' written agreement clearly stated that by signing the document they were agreeing that the document made up the parties' entire agreement regarding the terms of the contract and its

> performance standards. The Michigan courts have said that, as it pertains to representations regarding additional agreements or contractual terms, a party would not be justified in relying on them where there is a merger clause. The reasoning behind this is clear, one should not be heard to complain that they relied on oral promises regarding additional or contrary contract terms when there is written proof, signed by both parties, to the contrary. Yet, a party could still justifiably rely upon representations made by another party regarding things outside the scope of the contractual terms, such as the other party's solvency, indebtedness, experience, clientele, client retention rate, business structure, etc. If these representations are false when they are made, not merely opinion and not future promises, they could constitute fraud in the inducement. Star Ins Co, 392 F Supp 2d at 929-930; citing Kamalnath v Mercy Memorial Hosp Corp, 194 Mich App 543, 554-555, 487 NW2d 499 (1992).

POET's position misunderstands the key distinction laid out in Barclae and Star Ins Co – that "[t]here is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract." Barclae, 300 Mich App at 481; quoting Star Ins Co, 392 F Supp 2d at 928-929. The latter of these two "are eviscerated by a merger clause, even if such were the product of misrepresentation." Id.

POET's misunderstanding can be illustrated by examining a case cited to in support of its argument. In Jenson v William B Gallagher Revocable Trust, an unpublished opinion per curiam of the Court of Appeals, issued February 18, 2014 (Docket No. 312739),[3] the seller of land represented that the property included fifty feet of lake frontage, which included a private beach. A year after closing, the buyers learned that there, in fact, was no lake frontage. The trial court granted summary disposition on the grounds that the buyers could not prove reasonable reliance based on a merger clause in the contract. The Court of Appeals reversed, holding that the nature of the fraud was actionable because the sellers "misrepresented what was being sold in order to induce plaintiffs to enter into the agreement in the first place."

[3] The Court will note that the Jenson panel also considered Barclae and Star Ins Co.

In other words, the Jenson panel concluded that the misrepresentation in that case involved a "**representation of fact** made by one party to another to induce that party to enter into a contract." Barclae, 300 Mich App at 481 (emphasis added); quoting Star Ins Co, 392 F Supp 2d at 928-929.

In our case, however, POET argues that the parties had a different **agreement** than the one specifically delineated in the written contract. Plaintiff claims that the parties agreed that the lease-end purchase price was 8-10% of the amount financed. The master lease agreements, however, provide that POET could purchase all of the equipment "for a price to be agreed upon" by the parties – not a price **already** agreed upon – but "**to be** agreed upon" (in the future). An end-of-term price is a **specific term of the agreement** and not a fact outside of said agreement.

As a result, the parties' written agreement directly conflicts with POET's claimed collateral agreement.[4] As a result, POET alleges a "collateral agreement[] or understanding[] between two parties that are not expressed in a written contract" that is "eviscerated by a merger clause, even if . . . the product of misrepresentation." Barclae, 300 Mich App at 481; quoting Star Ins Co, 392 F Supp 2d at 928-929.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that POET's fraud-based claims and counterclaims are so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, the Varilease Defendants' motions for summary disposition of said claims are GRANTED under (C)(8).

[4] Although not dispositive to the issue, it is worth noting that POET's argument that this agreement was **always only** a lease-end-buyout agreement also directly conflicts with the terms of the agreement that provided that POET had three options (not one) at lease end: (1) buy the equipment, (2) extend the lease, or (3) return the equipment. In a way, in order to buy POET's arguments about the true nature of the parties' agreement, the Court must find that two provisions of the master lease agreements were fraudulently misrepresented – the options at the end of the lease, and the buyout price. POET's arguments on both conflict with the leases' plain terms.

B. POET's RICO claims.

Next, the Varilease Defendants argue that they are entitled to summary disposition of POET's RICO claim (Count I). In order to state a RICO claim under 18 U.S.C. § 1962(c), "a plaintiff must plead the following elements: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" West Hills Farms, LLC v ClassicStar Farms, Inc, 727 F3d 473, 483 (CA 6 2013); quoting Moon v Harrison Piping Supply, 465 F3d 719, 723 (CA 6 2006).

A careful review of POET's Complaint and Counterclaim reveal nothing more than conclusory statements supporting their RICO claims. While the Court finds that POET fails to adequately plead any of the required elements to succeed on such a claim, it will briefly address the most lacking element – an "enterprise."[5]

In order to establish conduct that constitutes an "enterprise," the party leveling the claim must show that "defendants must have 'conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs.'" Ouwinga v Benistar 419 Plan Servs, 694 F3d 783, 792 (CA 6 2012); quoting Reves v Ernst & Young, 507 US 170, 185; 113 S Ct 1163; 122 L Ed 2d 525 (1993).

On this issue, POET directs the Court to paragraphs 140-41, and 144 of the Counterclaim, and 162-63, and 166 of the Complaint. But these paragraphs do not allege the required "enterprise" to support the claim. Rather, POET's allegations only allege that each entity participated solely by "purchasing the equipment from Varilease immediately after POET

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[5] An "enterprise" must be more than a business and its own agents. West Hills Farms, 727 F.3d at 490; quoting Begala v PNC Bank, Ohio, NA, 214 F3d 776, 781 (CA 6 2000), reasoning:

> "Under RICO, a corporation cannot be both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise." As we explained in Begala:
> Under the "non-identity" or "distinctness" requirement, a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members. An organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself.

received funding and installed the equipment." But this allegation only goes to each entity conducting its own affairs.

Although POET alleges facts that relate to Varilease's actions, when it comes to the alleged co-conspirators in the alleged enterprise, POET alleges legal conclusions (rather than factual allegations) that said entities are members of an enterprise. While a (C)(8) motion requires the Court to accept "all well-pled allegations" as true, it does not require the Court accept all pled legal conclusions as true.

In paragraph 4 of its Counterclaim, POET simply concludes that the Assignee parties "had knowledge of, encouraged, and/or participated" in a scheme to defraud POET and other customers out of millions of dollars. But there are no specific allegations beyond POET's simple conclusions.[6]

A careful review of POET's Complaint, Counterclaim, and arguments presented in its responses to summary and at oral argument leads the Court to a single conclusion – POET's RICO claim is one alleged solely for an improper purpose – to strengthen its position in this lawsuit. This case is an ordinary business-contract dispute, and the Court will not permit it to be transformed into a RICO case based on POET's thin allegations.[7]

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[6] POET also fails to adequately allege a "pattern" of racketeering activity. On this element, POET attaches a Complaint from a prior lawsuit and a newspaper article that generally speaks of similar types of lease agreements. These things do not sufficiently allege a "pattern" of racketeering activity. POET only sufficiently alleges a single "victim" of the alleged enterprise – itself.

[7] The Court is persuaded that this case is one worthy of the 4th Circuit's warning in Flip Mortgage Corp v McElhone, 841 F2d 531 (CA 4 1988):

> [T]his circuit will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims. Bearing in mind that "the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine," we believe that the scheme in the present case does not rise above the routine, and does not resemble the sort of extended, widespread, or particularly dangerous pattern of racketeering which Congress intended to combat with federal penalties. Flip Mortgage Corp, 841 F2d at 538 (CA 4 1988); quoting HMK Corporation v Walsey, 828 F2d 1071, 1074 (CA 4 1987).

For the foregoing reasons, the Court finds that POET's RICO claims fail as a matter of law under (C)(8), and said claims are DISMISSED.

C. POET's promissory estoppel claims.

The Varilease Defendants next argue that they are entitled to summary disposition of POET's promissory estoppel claim because there exists an express contract covering the disputed subject matter. With respect to this claim, it is well settled that, "A contract will be implied **only where no express contract exists**. There cannot be an express and implied contract covering the same subject matter at the same time." Campbell v Troy, 42 Mich App 534, 537; 202 NW2d 547 (1972), citing Superior Ambulance Service v Lincoln Park, 19 Mich App 655; 173 NW2d 236 (1969).

In this case, POET's remaining claims rest solely on express contracts – the master lease agreements. Because there are express contracts that cover the subject matter of the dispute, POET is prohibited from pursuing a promissory estoppel claim, and the same is DISMISSED under (C)(8).

D. POET's civil conspiracy claims.

Finally, the Varilease Defendants argue that they are entitled to summary disposition of POET's civil conspiracy claim because such a claim must be based on a separate actionable tort. Because POET identifies no **valid** underlying tort, Defendants argue that Plaintiff's civil conspiracy claims must also fail.

Indeed, Michigan law is well settled that "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." Advocacy Org for Patients &

Providers v Auto Club Ins Ass'n, 257 Mich App 365, 384; 670 NW2d 569 (2003); quoting Early Detection Center, PC v New York Life Ins Co, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Because the Court has dismissed all underlying tort claims, POET's civil conspiracy claim must also be dismissed under (C)(8).

2. The Bank Defendants' Motion.

Next, the Bank Defendants move for summary disposition of all claims alleged against them in Plaintiffs' Complaint. The Court will note that POET's eight-count Complaint alleged claims against the Bank Defendants of (1) violation of RICO, (2) breach of contract, (3) fraudulent inducement, (4) fraudulent misrepresentation, (5) innocent misrepresentation, (6) promissory estoppel, (7) conspiracy, and (8) declaratory judgment. But in their Response to the Bank Defendants' motion, Plaintiffs agreed to "dismiss without prejudice Counts II-VI and VIII" against the Bank Defendants – leaving only the RICO and Conspiracy claims.

For the same reasons as outlined in the Varilease Defendants' motion relative to RICO, the Court finds that POET's RICO claim fails as a matter of law. Additionally, the Court notes that, with respect to the Bank Defendants, there is also caselaw that stands for the proposition that a bank cannot be liable under a RICO theory when it simply acts as a bank – absent any special role specifically vital to the success of the alleged scheme. See *Dahlgren v First Nat'l* Bank, 533 F3d 681, 690 (CA 8 2008) (reasoning "Bankers do not become racketeers by acting like bankers."). For this additional reason, POET's RICO claim fails as to the Bank Defendants.

Finally, the Bank Defendants move for summary disposition of POET's civil conspiracy claims. For the same reason as above, because the Court has dismissed all underlying tort claims

and a civil conspiracy claim cannot exist in the air, POET's civil conspiracy claim must also be dismissed under (C)(8).

3. Motion to Strike Jury Demand.

Both the Bank and Varilease Defendants also move to strike POET's jury demand. Under Section 19(a) of the master lease agreements, the parties agreed that any claims or disputes would be "tried by Judge alone" and the parties "waive their rights to a trial by jury in any matter relating to this master agreement or any documents related thereto."

POET's argument in support of its jury demand is identical to its argument responding to the Varilease Defendants' motion for summary – that they were fraudulently induced to enter into the contracts, and therefore, the jury waiver provision is void. But POET does not allege any fraud specifically with respect to the jury waiver provision.

But, as stated, the Court has rejected POET's argument that any fraud exists that could invalidate either the entire contract or the jury waiver provision. Therefore, the Bank and Varilease Defendants' motions to strike POET's jury demand are GRANTED, and POET's jury demand is stricken.

4. Summary

To summarize, the Varilease Defendants' motions for summary disposition are GRANTED and POET's claims **and** counterclaims for: (1) violation of RICO (Count I), (2) fraudulent inducement (Count III), (3) fraudulent misrepresentation (Count IV), (4) innocent misrepresentation (Count V), (5) promissory estoppel (Count VI), and (6) civil conspiracy (Count VII) are DISMISSED.

The Bank Defendants' motion for summary disposition is also GRANTED, and POET's remaining claims for (1) violation of RICO (Count I), and (2) civil conspiracy (Count VII) are also DISMISSED as to the Bank Defendants. Because these were the final remaining claims against these Defendants, Sterling National Bank and Beverly Bank & Trust Company are DISMISSED from this lawsuit.

IT IS SO ORDERED.

March 12, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge