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ENTERED
CLERK, U.S. DISTRICT COURT
SEP 21 2004
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
SEP 17 2004
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY [Signature]
SCANNED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE EXECUTIVE COMMITTEE
REPRESENTING THE SIGNING
PETITIONERS OF THE
ARCHDIOCESE OF THE
WESTERN UNITED STATES;
SAMIR ANZ, an individual;
SERGE SHAMMAS, an individual;
MUTIH ABDULHAI, an
individual; WILLIAM
DORGHALLI, an individual;
SULEIMAN MUSHMEL,
individually and dba NELSON'S
LIQUOR; JACK HAROUN,
individually and dba VAN RO
NEWSSTAND,

CV 03-8947 FMC (MANx)

**ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED
COMPLAINT PURSUANT TO
RULE 12(b)(6) OF DEFENDANT
ARCHBISHOP C. EUGENE
KAPLAN**

Plaintiffs,

vs.

ARCHBISHOP C. EUGENE
KAPLAN, an individual,
PATRIARCH MAR IGANTIUS
ZAKKA I, an individual, AND
DOES 1-5, INCLUSIVE,

Defendants.

DOCKETED ON CM
SEP 21 2004
BY [Signature] 004

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This matter is before the Court on Defendant Archbishop Kaplan's Motion to Dismiss (docket no. 35) filed on July 16, 2004. The Court has read and considered the moving, opposition and reply documents submitted in connection with this motion. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7.11. Accordingly, the hearing set for September 20, 2004, is removed from the

SCANNED

1 Court's calendar. For the reasons set forth below, the Court hereby
2 **GRANTS AND DENIES THE MOTION IN PART.**

3 **I. Background**

4 **A. Factual Background**

5 Plaintiffs include the Executive Committee Representing the Signing
6 Petitioners of the Archdiocese of the Western United States, an
7 unincorporated association (the "Executive Committee") comprised of
8 certain members of the Syrian Orthodox Church (the "Church"), as well as
9 several church member individuals ("Individual Plaintiffs"). Defendants are
10 C. Eugene Kaplan, Archbishop of the Church ("Moving Defendant"), and
11 Mar Ignatius Zakka I, Patriarch of the Church. Plaintiffs' action arises out of
12 its dealings with Defendants through the Church. Plaintiffs assert that by
13 and through the authority of the Church, Defendants improperly solicited
14 and used said funds for personal benefit.

15 Plaintiff Executive Committee filed a similar action against
16 Defendants in the Los Angeles Superior Court of California, seeking
17 declaratory relief and an injunction.

18 **B. Procedural History**

19 Plaintiff Executive Committee filed the present action on December 9,
20 2003, alleging the following causes of action: (1) Violation of RICO, 18
21 U.S.C. §§ 1961, *et. seq.*; (2) Unfair Business Practices in Violation of Cal.
22 Corp. Code §§ 17200, *et. seq.*; (3) Embezzlement and Conversion; (4) Breach
23 of Fiduciary Duty; and (5) Constructive Trust. Plaintiff filed a First
24 Amended Complaint on February 4, 2004. Moving Defendant filed a Motion
25 to Dismiss Pursuant to Rule 12(b)(6) on February 23, 2004. The Court
26 dismissed Plaintiff's action without prejudice on March 24, 2004 based on,
27 *inter alia*, Plaintiff's failure to establish standing. Plaintiff filed a Second
28 Amended Complaint ("SAC") on April 15, 2004. Moving Defendant filed a

1 Motion to Dismiss the SAC pursuant to Rule 12(b)(6) on April 29, 2004.
2 The Court dismissed Plaintiff's action without prejudice on June 7, 2004,
3 again based on Plaintiff's failure to establish standing. Plaintiffs filed a
4 Third Amended Complaint ("TAC") on June 28, 2004, adding three
5 additional causes of action for fraud. Moving Defendant filed a Motion to
6 Dismiss the TAC pursuant to Rule 12(b)(6) on July 16, 2004.

7 **II. Standard for Motion to Dismiss**

8 The present Motion to Dismiss requires the Court to determine
9 whether the TAC states any claim upon which relief may be granted. *See*
10 Fed R. Civ. P. 12(b)(6). The Court will not dismiss claims for relief unless
11 the plaintiff cannot prove any set of facts in support of the claims that would
12 entitle it to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295
13 (9th Cir. 1998). In limiting its inquiry to the content of the TAC, the Court
14 must take the allegations of material fact as true and construe them in the
15 light most favorable to the plaintiff. *See Western Reserve Oil & Gas Co. v.*
16 *New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Additionally, the Court "is not
17 required to accept legal conclusions cast in the form of factual allegations if
18 those conclusions cannot be reasonably drawn from the facts alleged." *Clegg*
19 *v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

20 **III. Standing**

21 **A. The Executive Committee**

22 The Court granted Moving Defendant's two previous motions to dismiss
23 because Plaintiff, the Executive Committee, had not shown it had standing
24 to bring this action. In the TAC, in addition to the Executive Committee,
25 there are six new Plaintiffs. The Court will examine whether the Plaintiff
26 the Executive Committee has established standing; the Court examines the
27 new allegations in the TAC, which include: (1) Defendants conducted an
28 unlawful scheme to solicit donations for various Church funds (including

1 included the "9/11/01 terror relief fund," the "Orphanage Fund", and the
2 "Poor Family Fund") through personal pleas to the Church membership and
3 through the maintenance of "collection boxes" in various churches and retail
4 stores owned and operated by church members; (2) the newly added
5 Plaintiffs donated specific amounts of money to one or more of the particular
6 funds; (3) Defendants did not use the donated money for the purposes for
7 which they solicited it, but rather transferred those collected funds, using
8 mail and/or interstate and international wire facilities, from the Church to
9 themselves for personal use.

10 The Court has, in its previous Orders, addressed the need of Plaintiffs to
11 establish general standing to sue. A party may sue on its own behalf, or, if
12 the party satisfies the requirements of associational standing, on behalf of
13 another. As part of the minimum showing required to establish standing, a
14 plaintiff must show it suffered an "injury in fact," which is an "invasion of a
15 legally protected interest," and that such injury is "actual or imminent, not
16 conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-
17 61 (1992).

18 An association is entitled to sue on its own behalf for injuries it has
19 sustained. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19, 102
20 S.Ct. 1114 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975)).
21 To determine if an association has standing to sue on its own behalf, the
22 Court conducts the same inquiry as it would for an individual: has the
23 plaintiff suffered an "injury in fact?" Demonstrable and concrete injury to
24 the organization's resources, such as when a defendant's practices impair a
25 plaintiff's ability to conduct its business, constitute an appropriate injury to
26 allow an association standing to assert a violation of its rights. *See Havens*,
27 455 U.S. at 379.

28 Plaintiff the Executive Committee has still not established that it has

1 standing to bring this action on its own behalf. It has not identified that it
2 has any resources, that such resources were injured, or that it was unable to
3 conduct its business. Nor has it made clear exactly what its business or
4 purpose is. The only injury Plaintiff alleges is to its members as individuals.

5 An association has standing, in a representational capacity, to assert
6 claims on behalf of its members if "(a) its members would otherwise have
7 standing to sue in their own right; (b) the interests it seeks to protect are
8 germane to the organization's purpose; and (c) neither the claim asserted nor
9 the relief requested requires the participation of individual members in the
10 lawsuit." *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 798
11 (9th Cir. 2001) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S.
12 333, 343, 97 S.Ct. 2434 (1977)).

13 The Executive Committee may meet the first requirement for
14 associational standing in a representational capacity because its members
15 have standing to sue in their own right. The Executive Committee has
16 alleged that their members made donations to the Church as a direct result of
17 Defendants' actions, and that those donations were not used for the purposes
18 for which Defendants solicited the donations. Rather, the Defendants used
19 member donations for their own individual purposes. This is a sufficient
20 injury to the individual members to meet the constitutional requirements for
21 standing.

22 However, as to the second requirement, the Executive Committee has not
23 provided any additional information in the TAC. The Executive Committee
24 still has not identified how the interests of its members whom it seeks to
25 protect are germane to its purposes, or even what its organizational purposes
26 are. The Executive Committee asserts that it and its members' interests are
27 germane to the Church's existence because the Church relies upon their
28 charitable contributions in order to maintain its existence. However, as the

1 Court previously held, the Executive Committee does not represent the
2 Church, nor does it allege any interest in the Church other than the effect of
3 the Church's tax-exempt status on the Executive Committee's members. The
4 Executive Committee does not clarify upon what basis it claims the right to
5 the associational representation of its members, nor how its members'
6 interests relate to the Executive Committee's purpose.

7 Absent a showing the Executive Committee itself sustained injuries or,
8 alternatively, how the interests of its members are germane to its purpose,
9 this Court finds the Executive Committee has not met its burden of
10 establishing standing. Therefore, the Court hereby dismisses the Executive
11 Committee from this lawsuit with prejudice.

12 **B. The Individual Plaintiff's Standing under RICO**

13 As Individual Plaintiffs' RICO cause of action is the only basis upon
14 which this Court may hear this suit, Individual Plaintiffs must satisfy the
15 heightened pleading standard to establish standing under RICO. Individual
16 Plaintiffs allege that Defendants' actions violate the Racketeer Influenced
17 and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et. seq.* RICO
18 creates a civil cause of action for any person injured in his business or
19 property by racketeering activity. 18 U.S.C. § 1964(c); *see Beck v. Prupis*, 529
20 U.S. 494, 496, 120 S.Ct. 1611 (2000). Under RICO, a plaintiff must suffer
21 injury to its business or property in order to have standing. 18 U.S.C. §
22 1964(c); *Resolution Trust*, 186 F.3d at 1117. Additionally, "[t]he causation
23 element requires a showing that the conduct constituting the violation both
24 directly and proximately caused the alleged injury." *Resolution Trust*, 186
25 F.3d at 1117.

26 Here, Individual Plaintiffs have properly pleaded the requirements for
27 standing under RICO. They have alleged that they donated money to the
28 church funds on the premise that it would be used for charitable purposes,

1 and that the money was not used for those purposes. This is an injury to
2 their property because Defendants allegedly gained ownership of Individual
3 Plaintiffs' money through false pretenses: but for Defendants' allegedly false
4 representations regarding the use of the money, Plaintiffs would not have
5 donated the money.¹

6 The causation requirement is also adequately pleaded. In order to state a
7 claim under RICO, a plaintiff must allege that the defendant engaged in (1)
8 conduct of an (2) enterprise (3) through a pattern of (4) racketeering activity.
9 18 U.S.C. §1962(c); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496
10 (1985). In order to satisfy the "racketeering activity" requirement, the
11 plaintiff must allege that the defendant committed two or more or so-called
12 "predicate offenses." *See Sedima*, 473 U.S. at 497. The plaintiff's injury must
13 be caused by the predicate offenses committed. *Id.*

14 This does not mean, however, that the injury must come directly *after* the
15 predicate acts. *Maiz v. Virani*, 253 F.3d 641, 674 (11th Cir. 2001) (money
16 laundering after the plaintiffs made investments satisfied causation). To the
17 extent the predicate acts further the scheme of the defendant, the defendant's
18 actions are said to have caused the injury. *Id.* (predicate acts used to conceal
19 the scheme); *see also United States v. Rude*, 88 F.3d 1538 (9th Cir. 1996) (wire
20 transfer is "step in [the] plot").

21 Here, Individual Plaintiffs allege predicate acts of mail and wire fraud,
22 which qualify as racketeering activity under RICO. 18 U.S.C. §1961(a); 18
23 U.S.C. §§ 1341, 1343. Individual Plaintiffs allege that Defendants transferred
24 money from an account belonging to the church to their personal accounts

25
26 ¹ Individual Plaintiffs also allege that they have an interest in the tax-exempt status of the
27 Church, and that this interest is threatened by Defendants' actions. Moving Defendant rightly argues
28 that this claim is too speculative to constitute an injury in fact for purposes of standing. Plaintiffs
have not alleged any actions by the IRS that would suggest the status of the church is currently being
threatened or that such a threat is imminent.

1 after Individual Plaintiffs had donated money to various charitable funds. In
2 the traditional sense, therefore, the transfer of funds did not “cause”
3 Individual Plaintiffs’ injuries because the Plaintiffs had already been
4 induced to donate the money. However, it was the transfer of funds that
5 made Individual Plaintiffs’ injuries complete. It was not until the money
6 was transferred that Defendants allegedly asserted control over the money in
7 a manner inconsistent with the purposes for which it was donated. Until
8 that point, the money had not been misused and Individual Plaintiffs had
9 suffered no injury by donating the money. Therefore, Individual Plaintiffs
10 adequately allege an injury to their property caused by Defendants. The
11 Individual Plaintiffs therefore have standing to sue under RICO.

12 IV. Discussion of the Merits

13 A. RICO

14 As noted above, in order to state a claim under RICO, a plaintiff must
15 allege that the defendant engaged in conduct of an (1) enterprise (2) through
16 a pattern of (3) racketeering activity. 18 U.S.C. §1962(c); *Sedima, S.P.R.L. v.*
17 *Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). Individual Plaintiffs have
18 adequately pleaded these requirements.

19 1. Enterprise Requirement

20 “Enterprise” is defined as “any individual, partnership, corporation,
21 association, or other legal entity, and any union or group of individuals
22 associated in fact although not a legal entity.” 18 U.S.C. §1961(4); *United*
23 *States v. Turkette*, 452 U.S. 576, 580 (1981). The definition addresses the
24 “infiltration by organized crime of legitimate businesses” as well as
25 associations that exist only for criminal purposes. *Turkette*, 452 U.S. at 584.
26 Here, the Individual Plaintiffs have properly pleaded the enterprise
27 requirement. They allege that the Church, a legitimate organization existing
28 independently from the Defendants, was used by the Defendants to conduct

1 a pattern of racketeering activity. This satisfies the first part of the
2 enterprise definition.

3 2. Pattern

4 To satisfy the pattern requirement, the plaintiff must plead as least two
5 acts of racketeering activity. 18 U.S.C. §1961(5). Two isolated acts, however,
6 do not form a pattern. *Sedima*, 473 U.S. at 497 n.14. Rather, there must be
7 continuity and relationship among the predicate acts. *Id.*; see also David B.
8 Smith & Terrance G. Reed, *Civil Rico*, ¶4.01 (2004).

9 While the continuity requirement is fact sensitive, it is generally satisfied
10 when there is more than one victim. See Smith & Reed, ¶4.04[3] (collecting
11 Ninth Circuit cases that found continuity when there were multiple victims).
12 The key test is whether there is a “threat of continuing activity.” *Medllion*
13 *TV Enters., Inc. v. SelecTV*, 134 F.3d 1321 (9th Cir. 1987). Here, there are
14 multiple plaintiffs who have alleged that they were victims of fraud
15 perpetrated by Defendants. Additionally, they allege that Defendants
16 committed hundreds, if not thousands of separate instances of wire fraud in
17 furtherance of their scheme to solicit donations from multiple individuals.
18 Each of these instances were similar: the funds were solicited and then
19 transferred to the Archbishop’s personal account. This is sufficient to show
20 a threat of continuing activity. Therefore, the continuity requirement is met.

21 The predicate acts are related if there is a “common scheme, plan, or
22 motive.” *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d
23 1393, 1399 (9th Cir. 1986) (quoting *United States v. Broolier*, 685 F.2d 1208
24 (9th Cir. 1982)). Here, the Individual Plaintiffs sufficiently plead a common
25 scheme, plan or motive between the predicate acts. Each act of alleged mail
26 or wire fraud involved soliciting funds from church members for charitable
27 purposes, placing the money in a church account, and then transferring the
28 money to a private account. This is a sufficient relationship. Therefore, the

1 Individual Plaintiffs have adequately alleged the pattern requirement.

2 3. *Racketeering Activity*

3 "Racketeering Activity" is an act "indictable" under certain federal
4 statutes, including wire and mail fraud. 18 U.S.C. §1961(1)(B); 18 U.S.C.
5 §§1341, 1343. Here, the Individual Plaintiffs allege that Defendants
6 committed mail and wire fraud in a pattern of racketeering activity.² Wire
7 fraud consists of (1) formation of a scheme or artifice to defraud; (2) use of
8 interstate/international wire facilities or causing use of such in furtherance of
9 the scheme; (3) specific intent to deceive or defraud. *Schreiber*, 806 F.2d at
10 1400. Mail fraud is a (1) scheme or artifice to defraud; (2) use of the mails in
11 furtherance of that scheme; (3) done with the specific intent to defraud. *Id.*
12 "The requirement of specific intent under these statutes is satisfied by the
13 'existence of a scheme which was reasonably calculated to deceive persons of
14 ordinary prudence and comprehension, and this intention is shown by
15 examining the scheme itself.'" *Id.* Fraud must be pleaded with particularity.
16 *Id.*

17 Here, Individual Plaintiffs pleaded that Defendants used the mails and/or
18 interstate and international wire facilities in furtherance of a scheme in order
19 to solicit donations for three specific funds. Individual Plaintiffs allege that
20 Defendants made representations to church members, including Individual
21 Plaintiffs, to solicit donations and transferred those funds into their personal
22 accounts. Individual Plaintiffs identify the specific days on which they
23 donated money, what representations were made by Defendants, where
24 Defendants solicited the money, and the amount of money each Plaintiff
25 donated. A specific intent to defraud is evident from the Individual

26 _____
27 ²The Individual Plaintiffs also allege that the Defendants committed immigration fraud,
28 money laundering, and violations of the Currency and Foreign Transactions Reporting Act.
However, the factual allegations to support these claims are not in the TAC.

1 Plaintiffs' accounts of the Defendants' scheme. The Individual Plaintiffs
2 allege that the Defendants promised to use money for a specific purpose and
3 instead used it for personal purposes. The Individual Plaintiffs further
4 allege that the Defendants took steps to cover their scheme, which is
5 consistent with an intent to defraud. The Individual Plaintiffs have
6 adequately pleaded both mail and wire fraud as predicate acts under RICO.

7 The Individual Plaintiffs have therefore adequately pleaded a claim under
8 RICO. Moving Defendant's motion to dismiss the RICO claim is therefore
9 denied.

10 **B. State Law Claims**

11 The Court now turns to the Individual Plaintiffs' state law claims, which
12 are also challenged in Moving Defendant's motion to dismiss.³

13 *1. Cal. Bus. & Prof. Code § 17200*

14 California Business and Professions Code §17200 prohibits acts of unfair
15 competition, including "any [1] unlawful, [2] unfair or [3] fraudulent
16 business practice." Unlawful practices are any activities that are forbidden
17 by law. *Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App. 4th 1284,
18 1292 (1992). Unfair acts are those that "offend[] established public policy" or
19 are "immoral, unethical, oppressive, unscrupulous, or substantially injurious
20 to consumers." *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632 (1996).
21 Fraudulent acts are those that are likely to deceive the public. *Committee on*
22 *Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983).
23 The solicitation activities of charities come within the purview of §17200.
24 *People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054, 1075-76
25 (1999).

26 Individual Plaintiffs have adequately pleaded that Defendants engaged in
27

28 ³The RICO conspiracy and fraud claims are not challenged, and therefore may go forward.

1 unlawful practices. “Virtually any state, federal or local law can serve as the
2 predicate for an action under” §1700. *Podolsky*, 50 Cal. App. 4th at 647.
3 Here, Individual Plaintiffs properly allege violations of RICO. Therefore,
4 they have properly stated a claim for unlawful business practices.

5 Individual Plaintiffs have also pleaded unfair business practices. They
6 allege that Defendants used their “positions of authority and influence
7 within the church to solicit charitable donations for worthy charitable
8 causes,” and that they then used the money for personal purposes. They
9 allege that these actions offend public policy and are immoral and unethical.
10 Because the test for “unfair” practices is broad, *see id.*, these allegations are
11 sufficient to state a claim for unfair business practices under §17200.

12 Finally, Individual Plaintiffs allege fraudulent business practices. They
13 allege that Defendants claimed that the funds would be used for certain
14 purposes, and that the funds were not used for those purposes. Those
15 solicited, therefore, were likely to be deceived as to the intention of
16 Defendants and the use of their money. This is sufficient to state a claim for
17 fraudulent business practices under §17200.

18 Moving Defendant’s motion to dismiss the unfair competition claim is
19 therefore denied.

20 2. Conversion

21 Individual Plaintiffs assert conversion and embezzlement. Embezzlement
22 is a crime, not a tort, and so cannot be maintained as a private cause of
23 action. *See* Cal. Penal Code §503 (2004). Additionally, “[m]oney cannot be
24 the subject of conversion unless a *specific, identifiable sum* is involved.” 5
25 Witkin Summary of Cal. Law (9th ed. 1990) *Torts*, §614, at 710.

26 A specific sum may be involved, for example, when an agent fails to turn
27 over a commission to the plaintiff. In *Fischer v. Machado*, 50 Cal. App. 4th
28 1069 (1996), the plaintiffs sold a farm through a commission merchant. The

1 merchant never paid the proceeds of the sale to the plaintiffs. *Id.* When the
2 plaintiffs sued for conversion, the court cited the general rule that money
3 could not be the subject of conversion, but allowed the action to go forward
4 because in this case, the money was “capable of identification” and was a
5 “definite sum.” *Id.* In *Vu v. California Commerce Club*, 58 Cal. App. 4th 229
6 (1997), on the other hand, the plaintiffs sued a casino for amounts lost,
7 allegedly due to cheating by the other players. The court dismissed the
8 action, explaining that the money was not identified. *Id.* at 236. The money
9 the plaintiffs lost, in other words, was not separate from the money any
10 player would lose.

11 Here, Individual Plaintiffs do not allege any particular amount of money
12 lost. They claim money was lost from approximately 1,350 individuals and
13 do not identify any particular money belonging to the Individual Plaintiffs.
14 While Individual Plaintiffs allege that “property and assets” were converted,
15 they fail to allege what these property and assets were. Based on the other
16 allegations in the complaint, Individual Plaintiffs only lost money. While
17 they may be able to ascertain the *amount* they lost, this money is still not
18 identifiable. Individual Plaintiffs make various allegations as to what has
19 happened to the money that they and other church members donated. Some
20 of the money was evidently used to acquire a shopping center; some money
21 is in accounts of the Church, and other money has been placed in
22 Defendants’ personal accounts. It is not alleged which Defendant came into
23 possession of the fund donated by Individual Plaintiffs. Nor is it alleged
24 whether the particular money belonging to Individual Plaintiffs is still in
25 an account or has been spent by Defendants. Because the donations of
26 Individual Plaintiffs cannot be identified, they cannot state an action for
27
28

1 conversion.⁴ Moving Defendant's motion to dismiss the
2 embezzlement/conversion claim is therefore granted with prejudice.

3 3. *Breach of Fiduciary Duty*

4 Individual Plaintiffs allege a breach of fiduciary duty by Defendants.
5 California Business & Professions Code §17510.8 states that a fiduciary
6 relationship exists between a charity or a person soliciting on behalf of a
7 charity and the person from whom the charity is soliciting. The "acceptance
8 of charitable contributions by a charity or any person soliciting on behalf of
9 a charity establishes a charitable trust and duty on the part of the charity and
10 the person soliciting on behalf of the charity to use those charitable
11 contributions for the declared charitable purposes for which they are
12 sought." Cal. Bus. & Prof. Code §17510.8. However, a charitable trust may
13 only be enforced by an action brought by the Attorney General or an
14 authorized relator. "Other persons, including donors, cannot maintain such
15 actions." *American Ctr. for Educ., Inc. v. Cavnar*, 80 Cal. App. 3d 476 (1978);
16 *Marin Hosp. Dist. v. Dep't of Health*, 92 Cal. App. 3d 442 (1979).

17 Individual Plaintiffs allege a fiduciary duty arising from their donation of
18 funds for charitable purposes. This fiduciary duty, therefore, arises from the
19 charitable trust that was created when Individual Plaintiffs donated money.
20 Therefore, the claim for breach of fiduciary duty is in effect an attempt to
21 enforce a charitable trust, a prerogative left solely to the
22 Attorney General. As such, Individual Plaintiffs have no standing to bring
23 this action. Moving Defendant's motion to dismiss the claim for breach of
24 fiduciary duty is therefore granted.

25
26 ⁴Moving Defendant asserts that the Individual Plaintiffs' claim for conversion should be
27 dismissed because they had no ownership interest in the money; the money belonged to the church.
28 However, according to Individual Plaintiffs' allegations, the money was donated to the church based
on false pretenses. This would preclude the church from having any legitimate ownership interest
in the money.

1 4. *Constructive Trust*

2 A constructive trust is an equitable remedy available to a plaintiff seeking
3 recovery of specific property. 5 Witkin Cal. Proc. (4th ed. 1997) *Pleading*,
4 §796, at 252. "Because a constructive trust is a remedy to compel transfer of
5 specific property, title to which is in the defendant, the complaint must show
6 the existence of that property." *Id.* As discussed above regarding Individual
7 Plaintiffs' claim for conversion, there is no specific, identifiable property at
8 issue in this action. Therefore, Individual Plaintiffs have not alleged facts
9 that would entitle them to a constructive trust.

10 **V. First Amendment**

11 Moving Defendant argues that because this action involves the use of
12 church funds, the Court should abstain from hearing it on First Amendment
13 grounds. Moving Defendant argues that in order to resolve this dispute, the
14 Court must necessarily delve into questions of church doctrine and
15 administration. "The Free Exercise Clause restricts the government's ability
16 to intrude into ecclesiastical matters or to interfere with a church's
17 governance of its own affairs." *Bollard v. California Province of Society of*
18 *Jesus*, 196 F.3d 940 (9th Cir. 1999). Courts weigh three factors to determine
19 if the Free Exercise clause is implicated: (1) "the magnitude of the statute's
20 impact upon the exercise of the religious belief, (2) the existence of a
21 compelling state interest justifying the burden imposed upon the exercise of
22 the religious belief, and (3) the extent to which recognition of an exemption
23 from the statute would impede the objectives sought to be advanced by the
24 state." *Id.* (quoting *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1279
25 (9th Cir. 1982)).

26 Here, the magnitude on the impact on the exercise of religious belief is
27 relatively small. While Moving Defendant claims that the church's bylaws
28 and constitution will be relevant to this dispute, he does not identify any

1 particular provisions of those documents that will come into play. Nor does
2 he identify doctrines or practices that will be relevant to the question of
3 whether or not Defendants committed RICO violations, fraud, or unfair
4 competition. Defendants identify no church practices or beliefs that will be
5 interrupted by this litigation. Furthermore, the Individual Plaintiffs allege
6 that resolution of this controversy will not require reference to church
7 bylaws or doctrine, a factual statement that must be taken as true at this stage
8 in the litigation. As the same time, statutes such as RICO and §17200 and
9 prohibitions on fraud serve important public functions that will be impeded
10 if they cannot be enforced against leaders of religious organizations. There is
11 little here to show that this is an ecclesiastical dispute, other than the
12 allegation that a church was being used by Defendants for the actions that
13 are the subject of this suit.

14 Each of the cases upon which Defendants rely is distinguishable. In
15 *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), the issue was who had
16 the right to use and occupy a cathedral, a question that ultimately depended
17 on whether an archbishop was properly appointed. Questions of how clergy
18 are selected are clearly ecclesiastical in nature. *Id.*; see also *Kreshik v. St.*
19 *Nicholas Cathedral*, 363 U.S. 190 (1960) (same issue); *Serbian Eastern Orthodox*
20 *Diocese v. Canada*, 426 U.S. 696 (1976) (same). This case does not address
21 Defendants' right to govern the church.

22 In *Bollard v. California Province of Society of Jesus*, 196 F.3d 940 (9th Cir.
23 1999), the court held that allowing a Title VII sexual harassment claim to
24 proceed *did not* violate Free Exercise rights. Its reasoning is instructive here:
25 neither the church's right to select its clergy or behavior constituting a
26 religious practice was at issue.

27 Finally, in *Presbyterian Church v. Mary Elizabeth Blue Hill Memorial*
28 *Presbyterian Church*, 393 U.S. 440 (1969), a dispute arose over ownership of

1 property. The Court held that the resolution of the dispute could not depend
2 on whether or not a particular group adhered to church doctrine. Here
3 there is no dispute over church doctrine. The question is purely whether
4 Defendants misled Individual Plaintiffs as to the use of the funds, and
5 whether the funds were in fact misappropriated.

6 Perhaps the outcome would be different if the funds were donated for any
7 church purpose, and a dispute arose as to whether the leaders of the church
8 were properly exercising judgment as to how the funds should be used. But
9 here, there were specific representations as to what the funds would be used
10 for and Individual Plaintiffs donated on that basis. Accordingly, the Court
11 need not examine questions of church doctrine or ecclesiastical authority in
12 order to resolve this dispute.

13 **VI. Pending State Action**

14 Finally, Moving Defendant asks the Court to abstain because there is an
15 action pending in state court that arose from the same set of facts. In
16 *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817
17 (1976), the Court held that, consistent with “wise judicial administration,” a
18 federal court had the discretion to refuse to hear a case when a case
19 addressing the same subject matter is pending in state court. Federal courts
20 have a “virtually unflagging obligation to exercise the jurisdiction given
21 them,” so the circumstances under which a court would invoke its discretion
22 are “considerably more limited than the circumstances appropriate for
23 abstention.” *Id.* at 817-818. Therefore, “[o]nly the clearest of justifications
24 will warrant dismissal.” *Id.* at 819.

25 There are several factors a court must consider in determining whether
26 jurisdiction should be exercised: (1) inconvenience of the federal forum; (2)
27 desirability of avoiding piecemeal litigation; and (3) the order in which
28 jurisdiction was obtained by each forum. *Id.* at 818-19. Additionally, courts

1 consider (4) whether “federal law provides the rule of decision on the
2 merits;” and (5) whether the state court proceedings are adequate to protect
3 the federal litigant’s rights. *Moses H. Cone Memorial Hospital v. Mercury*
4 *Construction Corp.*, 460 U.S. 1 (1983); *Travelers Indemnity Co. v. Madonna*, 914
5 F.2d 1364, 1367-68 (9th 1990).⁵

6 The first factor, inconvenience of the federal forum, adds little to the
7 analysis. The state court action is pending in Los Angeles, where this Court
8 is sitting. See *Madonna*, 914 F.2d at 1368. Therefore, neither forum is more
9 or less convenient than the other.

10 In considering the second factor, the court must consider whether
11 “exceptional circumstances exist which justify special concern about
12 piecemeal litigation.” *Id.* Here, the Defendants have not identified any
13 exceptional circumstances; they have only argued that the suits involve the
14 same subject matter. While this may necessarily entail duplicative fact-
15 finding by the courts, the legal issues are different. While the state court
16 action is for declaratory relief and an injunction, this action is for damages,
17 asserting claims not addressed in the state court action. Additionally, the
18 state court action is considering the rights of the Executive Committee, not
19 Individual Plaintiffs. Therefore, while there is some overlap between the
20 two suits, there is no compelling reason why the suits should be heard
21 together.

22 The third factor weighs in favor of dismissal because the state court action
23 was filed first. However, the Court must also consider the progress that has
24 been made in the first suit. *Cone*, 460 U.S. at 21, *Madonna*, 914 F.2d at 1370.
25 “The mere existence of a case on the state docket” does not create a waste of
26

27 ⁵The *Colorado River* Court also considered whether either court had assumed jurisdiction
28 over the *res*, a factor inapplicable here. *Colorado River*, 424 U.S. at 1246.

1 judicial resources. *Madonna*, 914 F.2d at 1370. The only progress this court
2 has been made aware of is the issuance of a preliminary injunction on
3 January 20, 2004. Without more, the Court has no reason to conclude that
4 allowing this litigation to go forward would necessarily be disruptive to the
5 state court litigation.

6 The “rule of decision” factor weighs against dismissal. This factor
7 addresses the state court’s adequacy to protect federal rights. *Id.* Here, the
8 Individual Plaintiffs have asserted a federal cause of action in this suit that
9 they did not allege in state court.⁶ Therefore, the state court will not be
10 considering the Individual Plaintiff’s federal rights. Necessarily then, it will
11 not be an adequate forum to protect them.

12 The fifth factor to consider is forum shopping. The court must consider
13 whether the plaintiff “seeks to avoid adverse rulings made by the state court
14 or to gain tactical advantage from the application of federal court rules.” *Id.*
15 at 1371; *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). It is not
16 entirely clear why Individual Plaintiffs elected to file two separate suits.
17 However, the state court has ruled *in favor* of the Plaintiffs by issuing a
18 preliminary injunction, so it is unlikely Individual Plaintiffs filed here to
19 avoid adverse rulings. Additionally, Moving Defendant has failed to identify
20 any tactical advantage that the Individual Plaintiffs have gained by
21 application of federal court rules. If anything, the heightened standing
22 requirements have made application of federal law *more* difficult for
23 Plaintiffs. The Court sees no compelling evidence that Individual Plaintiffs
24 have engaged in forum shopping.

25 The balance of the factors weighs against dismissal.

26 _____
27 ⁶Defendants assert in their moving papers that the state court action was also brought under
28 RICO. This statement is not supported by the copy of the state court complaint supplied by
Defendants at Request for Judicial Notice, Exhibit D.

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VII. Conclusion

For the reasons stated above, Moving Defendant's Motion to Dismiss (docket no. 35) is hereby granted in part with prejudice, and denied in part. The motion is granted with prejudice with regard to the Executive Committee, the claim for conversion, for breach of fiduciary duty, and constructive trust. It is denied with regard to the RICO and unfair competition claims.

SIGNED

Dated: September 16, 2004



FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT