SUPREME COURT OF THE UNITED STATES

BIBIJI INDERJIT KAUR PURI, RANBIR SINGH BHAI, KAMALJIT KAUR KOHLI and KULBIR SINGH PURI
Petitioners,
vs.
SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; SIRI KARM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; ROY LAMBERT; SCHWABE, WILLIAMSON & WYATT, an Oregon Professional Corporation; LEWIS M. HOROWITZ; LANE POWELL, an Oregon Professional Corporation; UNTO INFINITY, LLC, an Oregon Limited Liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon nonprofit Corporation; GURUDHAN SINGH KHALSA; GURU HARI SINGH KHASLSA; AJEET SINGH KHALSA; EWTC MANAGEMENT, LLC and DOES 1 through 5
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, the widow and three adult children of Siri Singh Sahib Harbhajan Singh Khalsa Yogiji, aka Yogi Bhajan, brought this lawsuit to require two corporations established and exclusively controlled by Yogi Bhajan to comply with their Articles and Operating Agreements and appoint Petitioners to their Boards, as is required by Oregon Corporate Laws. Yogi Bhajan's trusted assistants who served on the Boards of the two entities when he died did not implement his plan of succession so that they could convert assets from those entities, and improperly withheld documents and information from Petitioners.

The District Court ruled on summary judgment that Petitioners' claims were barred under the First Amendment by the Ministerial Exception and Ecclesiastical Abstention doctrine and did not rule on any other issue. The Ninth Circuit Court of Appeals, on *de novo* review, eschewed the First Amendment issues and instead ruled Petitioners' claims were time-barred under the statute of limitations, weighing the evidence on disputed facts and making findings of fact at odds with the underlying evidence.

1. May a Court of Appeals on *de novo* review of summary judgment refuse to decide a claim predicated on a failure of two non-religious corporations, with religious affiliates, to comply with neutral principles of corporate law, when the sole basis for the District Court's decision was that the Ministerial Exception and Ecclesiastical Abstention Doctrine barred the claim?

2. May the Court of Appeals, on *de novo* review of a summary judgment, *sua sponte* weigh the evidence on disputed fact issues and make findings not supported by the record, in direct conflict with this Court's ruling in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559, 94 S. Ct. 756, 769 (1974), to affirm on the ground of statute of limitations which was not granted by the District Court, to avoid deciding First Amendment issues properly before it?

STATEMENT OF RELATED CASES

The following Federal District Court and Ninth Circuit Court of Appeals Cases are related to the matter before this Court:

1. *Bibiji Inderjit Kaur Puri, et al. vs. Sopurkh Kaur Khalsa, et al*., U.S.D.C., Dist. Or., Case No. 3:10-cv-01532 MO. Judgment entered April 26, 2018.
2. *Bibiji Inderjit Kaur Puri, et al. vs. Sopurkh Kaur Khalsa, et al*., Ninth Circuit Court of Appeals, Appeal No. 18-35479, Memorandum Opinion issued December 23, 2019.
3. *Bibiji Inderjit Kaur Puri, et al. vs. Sopurkh Kaur Khalsa, et al*., Ninth Circuit Court of Appeals, Appeal No. 13-36024, Opinion issued January 6, 2017.

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The opinion of the Court of Appeals (App. A, *infra*) is available at 788 Fed.Appx. 563. The opinion of the District Court (App. B, *infra*) is reported at 321 F.Supp.3d 1233. The published portion of the prior opinion of the Court of Appeals (App. C, *infra*) is reported at 844 F.3d 1152 and the unpublished portion (App. D, *infra*) is available at 674 Fed.Appx. 679. The prior opinion of the District Court is set forth in Appendix E (App. E, *infra*).

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2019. A petition for rehearing was denied on February 3, 2020 (App. F, *infra*). On March 19, 2020, due to the COVID-19 crisis, this Court extended the time within which to file a petition for a writ of certiorari by 150 days from the date of the order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ***." U.S. Const. Amend. I. is reproduced in the appendix to this petition. Oregon Revised Statutes provide, in relevant part,

"An action . . . shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit." O.R.S. §12.110(1).

STATEMENT

This case involves important issues regarding the proper application of the Ministerial Exception and the Ecclesiastical Abstention doctrine under the First Amendment, as well as the Court of Appeals' *sua sponte* determination on *de novo* review of a summary judgment determining when Petitioners "*should have known*" a fraud has been perpetrated against them such that the statute of limitations bars their claim for fraud under the discovery rule.

The Court of Appeals in this instance sidestepped the First Amendment issues and, Petitioners believe, improperly determined that Petitioners "*should have known*" a fraud had been perpetrated against them *in 2004*. To reach that conclusion it relied on statements that the Petitioners "*believed*" they should have been appointed to the boards of Siri Singh Sahib Corporation ("SSSC") and Unto Infinity, LLC ("UI") upon the death of Yogi Bhajan *without being able to know or confirm that Yogi Bhajan had taken the appropriate measures to appoint them to the Boards*. The Court of Appeals' reliance on the statement that "the family obtained a lawyer in 2004 to represent their interests in obtaining the board

positions" was improper because it was unsupported argument by Respondents and was denied and disputed by the Family. The lawyer was not hired to represent Petitioners' interests in obtaining the board positions but to assist Petitioners in probate matters arising from Yogi Bhajan's death in October 2004. **[ER 625]**

Dismissal of Petitioners' claims on statute of limitations grounds was unfounded, contrary to law and was unjust. The Court of Appeals should have addressed the First Amendment issues which are necessary to clarify that non-religious entities, even those with religious affiliates, must comply with neutral principles of corporate law with respect to appointment of Board members not employed by a church and whom do not minister to the faithful in that capacity and that do not implicate religious doctrine, and that the Ministerial Exception and Ecclesiastical Abstention Doctrine are inapplicable in these circumstances.

REASONS FOR GRANTING THE PETITION

This petition should be granted because:

(a) the Ninth Circuit "United States Court of Appeals has entered a decision in conflict with the decision of other United States courts of appeals on the same important matter [i.e. the proper review of summary judgment determinations and the applicability of First Amendment principles to non-church entities]" and "has so far departed from the accepted and usual course of judicial proceedings, or

sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"; and

(b) applicability of the Ministerial Exception and the Ecclesiastical Abstention Doctrine to non-church entities' duty to comply with their recorded governance documents under neutral principles of state law are important questions of federal law that should be settled by this Court."

The Ninth Circuit Court of Appeals held that:

> The record reflects that Appellants knew, or should have known, of the alleged acts giving rise to their claims by 2004. Bibiji confirmed in her deposition that she knew that she should have occupied a board seat shortly after her husband's death in 2004. Kamaljit and Kulbir testified to similar knowledge. And the family obtained a lawyer in 2004 to represent their interests in obtaining the board positions."

The holding of the Court of Appeals is incorrect and warrants this Court's review, because the alleged "facts" on the statute of limitations issue cited in support of the Court of Appeal's Opinion were disputed by Petitioners on summary judgment, as the Court of Appeals itself recognized, requiring a trial by jury. The Court of Appeals improperly sought to resolve the disputed issues of fact and made findings that are inconsistent with the evidence of record in contravention to the teachings of this Court and well-established precedents.

The Ninth Circuit "United States Court of Appeals has entered a decision in conflict with the decision of other United States courts of appeals on the …

important matter" of the consistent application of summary judgment standards and the appropriate limits of appellate review and "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power The exercise of this Court's supervisory powers is required.

This Court also needs to provide guidance that the Ministerial Exception and Ecclesiastical Abstention Doctrine are inapplicable to non-church entities such as SSSC and UI, and in cases where the relief sought does not implicate church employees or involve religious doctrine and merely requires compliance with neutral principles of state law which sanction the existence of those entities and require adherence to their governance documents.

I. *DE NOVO* REVIEW DOES NOT ENTITLE THE COURT OF APPEALS TO WEIGH THE EVIDENCE TO RESOLVE DISPUTED FACTS, OR TO MAKE FINDINGS THAT ARE NOT SUPPORTED BY THE EVIDENCE ON SUMMARY JUDGMENT

The Court of Appeals' factual findings are incorrect. The record does not reflect that Appellants knew, or should have known, of the alleged acts giving rise to their claims by 2004. Bibiji, Kamaljit and Kulbir's deposition testimony only confirmed their *expectations* that they *should have* occupied a board seat shortly after Yogi Bhajan's death in 2004 based on Yogi Bhajan's statements to them, *not that they knew* Yogi Bhajan had made the designations he promised or that those

designations were self-executing and that the Boards were without discretion to not implement them. The lawyer the family retained in 2004 was tasked solely to represent their interests in connection with the probate issues and not with respect to obtaining the board positions. **[ER 625; 662; 666; 857-58]**

It is not proper for a reviewing court on summary judgment to impute knowledge to a nonmoving party, in applying the statute of limitations, particularly where the evidence shows Defendants fraudulently concealed the facts necessary to support essential elements for Petitioners' claims. See, e.g., M*erck & Co. v. Reynolds*, 559 U.S. 633, 644–45, 130 S.Ct. 1784, 1794 (2010) "where (a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.") (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582 (1946). *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422–23, 135 S.Ct. 907, 911 (2015) ("[W]hen the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.") (citing *United States v. Gaudin*, 515 U.S. 506, 512, 115 S.Ct. 2310 (1995).) See also *Hamling v. United States*, 418 U.S. 87, 104–105, 94 S.Ct. 2887 (1974) (emphasizing "the ability of the juror to ascertain the sense of the 'average person' " by drawing upon "his own knowledge

of the views of the average person in the community or vicinage from which he comes" and his "knowledge of the propensities of a 'reasonable' person").

It was improper for the Court of Appeals to weigh the evidence to resolve disputed facts or rule on questions of *scienter.* The District Court realized factual findings about *scienter* must be reserved to the jury; he did not grant Defendants' motion for summary judgment on statute of limitations. *T.R. v. Boy Scouts of Am*., 344 Or. 282, 296, 181 P.3d 758, 765 (2008). The Court of Appeals could not have concluded that no reasonable jury could have found Petitioners did not know that *Yogi Bhajan had given the appropriate instructions to appoint Petitioners to the SSSC and UI Boards or that their governing documents required Petitioners' appointment in 2004*, when the undisputed evidence established Plaintiffs did not have that knowledge until mid-2009. **[ER 662; 666]**

The Court of Appeals decision is premised on an erroneous understanding of the facts regarding what Petitioners knew and when. The Court of Appeals failed to recognize Plaintiffs could not have asserted their claims until they discovered the Bylaws and Operating Agreements of SSSC and UI established a succession plan allowing Yogi Bhajan to designate successor Directors and that he had made such a designation including them. Merely believing they should be installed on the Boards because Yogi Bhajan had told them *he would appoint them* is

insufficient to sue without also knowing *he had made a designation* and *his designation was self-executing upon his death to install Plaintiffs to the Boards.*

The Memorandum Opinion improperly focuses on Bibiji, Kamaljit and Kulbir's *beliefs* that they *should have occupied board seats* rather than recognizing their lack of knowledge about what the governing documents of those entities established as a succession plan and that they had a right to be installed under those plans because Yogi Bhajan had made the required designations, especially when the evidence showed the Defendants deliberately deceived Plaintiffs and strung them along. **[ER 625-26; 634-35]**

The Court of Appeals was also misled into believing that Petitioners had retained a lawyer in 2004 to secure their board positions; that was just legal argument by Respondents without factual support. The undisputed evidence shows Plaintiffs did not retain counsel on this issue until mid-2009 after receipt of the Bylaws. **[ER 637; 662; 666]**

These disputed issues of fact must be viewed in a light most favorable to Petitioners on summary judgment and require a trial by jury on the statute of limitations issue. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S.Ct. 2505 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). The Court of Appeals did not do that.

A. The Court Of Appeals Reviews Summary Judgment *De Novo* And Must Apply The Same Legal Standards As The District Court

A summary judgment is reviewed *de novo,* using the same standard as the trial court. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017); *Suzuki Motor Corp. v. Consumers Union, Inc*., 330 F.3d 1110, 1131 (9th Cir. 2003). The evidence and inferences therefrom must be viewed in the light most favorable to the nonmoving party and summary judgment must be denied if there are any genuine issues of material fact. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2, 125 S. Ct. 596, 597 n.2 (2004). The purpose of summary judgment is to identify whether material fact questions exist, not to resolve them. *Korff v. City of Phoenix*, 700 F. App'x 573, (Mem)–574, 2017 WL 4947414 (9th Cir. 2017).

> *Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts upon the point must be resolved against the moving party. … This procedure is not, and of right ought not to be, a substitute for a trial* by jury or judge.

Griffeth v. Utah Power & Light Co., 226 F.2d 661, 669 (9th Cir. 1955) (footnotes omitted, emphasis added).

On *de novo* review the Court of Appeals affirmed Summary Judgment on grounds the District Court did not rely upon below; perhaps a strong signal the District Court realized disputed facts on the issue of *scienter* precluded summary judgment. Even though the Panel agreed the discovery rule applies, and the

evidence unequivocally established Defendants engaged in deception and deliberate coverup, the Court of Appeals somehow concluded that Petitioners "should have known" they had justiciable claims in 2004. The facts and the law do not support such a finding.

B. Petitioners Were Not Aware Of Facts Sufficient To State A Cause Of Action For Fraud Under Rule 11 Until 2010

Fed.R.Civ.P. 11 requires all pleadings be based on "actual knowledge" or "information, and belief, formed after an inquiry reasonable under the circumstances" that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" and that "factual contentions have evidentiary support" and will have evidentiary support after a reasonable opportunity for further investigation or discovery Fed.R.Civ.P. 11(b).

A fraud claim must allege: "the defendant made a material misrepresentation that was false; the defendant did so knowing that the representation was false; the defendant intended the plaintiff to rely on the misrepresentation; the plaintiff justifiably relied on the misrepresentation; and the plaintiff was damaged as a result of that reliance." *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or. 336, 352, 258 P.3d 1199, 1209, adhered to on reconsideration, 350 Or. 521, 256 P.3d 100 (2011).

Petitioners did not know Defendants' representations were false until 2010 and therefore could not have in good faith pled Defendants had knowingly made false representations until then. *Dental v. City of Salem*, No. 3:13-CV-1659-HU, 2014 WL 4243777, at *5 (D. Or. Aug. 20, 2014) citing *Hohri v. United States*, 847 F.2d 779, 783 n. 6 (Fed.Cir.1988) (Baldwin, J., dissenting in part) (Rule 11 is a judicial weapon against claims that do not have a good faith basis, and noting the ***"****emphasis on developing a good faith basis for complaints before they are filed****"*** as well as ***"****the concomitant distaste for using discovery for unknowing fishing expeditions****"***). .

Petitioners' belief in 2004 through 2010 that they were entitled to be placed on SSSC and other boards was based on oral communications with Yogi Bhajan and his assurances to them. They did not know the governing documents of SSSC required installation of the persons identified in Yogi Bhajan's written designations, or that Yogi Bhajan had in fact included them in his designation. Defendants concealed the Bylaws and Yogi Bhajan's designations from Petitioners.

Petitioners only received copies of SSSC's Articles and Bylaws on March 27, 2009 in connection with a separate matter, and learned Yogi Bhajan was to make a written designation of board members of SSSC. **[ER666]** Petitioners still did not have possession of the designations and could not assert they had been in

fact included. Petitioners only discovered Defendants' lies in or about March 2010 after the Consent Minutes appointing Bibiji to the UI board were filed in the State Court Action. **[ER627, 636-37, 648-49, 661, 669-709]**

The vast majority of the documents and information known to Petitioners was gathered from the State Court Action. However, Petitioners were not parties to that action and discovery conducted in that case was shielded by a protective order. Testimony from the attorney for SSSC and UI only came to be known by Petitioners after it was filed in a pleading in open court. **[ER665;706-09]** Defendants' involvement and activities were not known until much later.

C. The Court Of Appeals Failed To View The Facts And Draw Inferences Most Favorably To Petitioners

On review of a summary judgment the Court of Appeals should not have disregarded evidence that Petitioners relied upon statements by the persons then in charge of SSSC, UI, and the attorney for those entities, that Petitioners were not entitled to be immediately appointed to the governing boards of those entities. **[ER665-66]** The Court of Appeals should not have inferred that Petitioners had sufficient factual knowledge to state a claim for fraud under Rule 11, in 2004.

The Court of Appeals should not have engaged in weighing of the evidence, ruling on credibility or inherently factual issues such as *scienter* and accrual of knowledge.

This is not a case where a reasonable jury could ONLY reach the conclusion that Petitioners "knew or should have known" the critical facts on any particular date and did not file suit. Quite the contrary. Central to resolution of whether Petitioners' claims are barred is a *necessary determination of each of the facts about when they knew Yogi Bhajan had executed a written designation placing them on the boards of SSSC and UI,* and *that those entities were bound by that designation*. The proof of those facts was in the hands of Defendants who kept the information secret.

Under the discovery rule, the period of limitations is deemed to have commenced from the earlier of two possible events: "(1) the date of the plaintiff's *actual discovery* of injury; or (2) the date when a person exercising reasonable care *should have discovered* the injury, including learning facts that an inquiry would have disclosed." *Greene v. Legacy Emanuel Hospital*, 335 Or. 115, 123, 60 P.3d 535 (2002) (emphasis in original); see also *Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or. 270, 278, 265 P.3d 777 (2011) ("The discovery rule applies an objective standard").

> As to the claims based on fraud, … *On summary judgment, the date of the discovery of the fraud is a disputed fact to be resolved by the trier of fact.*

Ogan v. Ellison, 297 Or. 25, 35, 682 P.2d 760, 766 (1984) (emphasis added).

The Court of Appeals acknowledged the applicability of the discovery rule

which tolls statutes under certain circumstances but failed to recognize the "*application of the discovery accrual rule is a factual issue for the jury unless the only conclusion a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter.*" *T.R. v. Boy Scouts of Am.*, 344 Or. 282, 296, 181 P.3d 758, 765 (2008) (emphasis added). +

Yet, without any specific citation to the record or viewing the facts most favorably to Petitioners, the Court of Appeals concluded "Appellants knew, or should have known, of the alleged acts giving rise to their claims by 2004." Bibiji's deposition testimony was only that, sitting there as she was, she knew she should have occupied a board seat shortly after her husband's death in 2004, not that she knew in 2004 she was entitled to that seat.

The Court of Appeals improperly relied on the fact that the Family had retained counsel to address estate issues relating to Yogi Bhajan's death in 2004 to conclude that counsel was also charged pursuing with Petitioners' interests in obtaining the board positions.

The Court of Appeals' suggestion that believing "key material facts were not as they had been represented" is enough to file a fraud claim urges filing first and developing a factual and legal basis for the claims later through discovery is contrary to long standing countless precedent from courts throughout the United

States, including this Court, and including by codifying Rule 11 of the Federal Rules of Civil Procedure, that such claims are insufficient and such tactics will not be tolerated. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 393, 110 S.CT. 2447, 2454 (1990) ("Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and 'not interposed for any improper purpose.' an attorney who signs the paper without such a substantiated belief 'shall' be penalized by 'an appropriate sanction.' "

The Court of Appeals gave no citation to the specific portions of the depositions or the exact statements made or the context in which the testimony was given. The Court of Appeals fails to explain how Petitioners could have known or should have known they were being done dirty when Defendants were lulling Petitioners into inaction by representing they were working to get Petitioners on the boards but they needed security clearances, and using other delay tactics.

Unlike in as *Oregon Life & Health Ins. Guar. Ass'n v. Inter-Reg'l Fin. Grp., Inc*., 156 Or. App. 485, 967 P.2d 880 (1998), Defendants continually assured Petitioners they were doing all they could to get them on the boards, but their hands were tied by outside forces and legal requirements. Petitioners did not know Defendants were deliberately lying to them and hiding relevant documents. Nor did Petitioners know that the Boards of SSSC and UI had no discretion in regard to

turning over control to those designated by Yogi Bhajan or that he had made the required designations or that the Petitioners were included in those designations.

Plaintiffs' testimony, when viewed in proper context, does not support the Court of Appeals' ruling. For example, in *Sears, Roebuck & Co. v. Metro. Engravers, Ltd*., 245 F.2d 67, 70 (9th Cir. 1956) the District Court assumed that Sears should have discovered they had made overpayments for engraving services for over 15 years and ruled that laches or the statute of limitations barred the plaintiff's claim. The Court of Appeals reversed, stating:

> While the motion for summary judgment is not before this Court because the trial court did not rule upon it, the following discussion will indicate in our opinion, *whatever the state of the record, there were material questions of disputed fact* arising on the face of the amended complaint *which could be settled only by trial*.
>
> …
>
> *But the complaint explicitly alleges Sears had no knowledge of any of the matter set out in the complaint until December 10, 1951, since it only started an investigation upon receiving an anonymous letter July 6, 1951.* It was error to sustain a motion to dismiss when the clear allegation of the complaint was to the contrary. *There was a question of fact to be tried.* …But here there was a question of fact as to the knowledge of Sears which could not be thud decided [sic] without evidence.

Sears, 245 F.2d at 70.

> *Summary judgment is generally inappropriate when mental state is an issue*, unless no reasonable inference supports the adverse party's claim. *Id*. at 1298–99.

Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 739 F.2d 1434, 1436 (9th Cir. 1984).

Petitioners' state of mind was most certainly in issue here. Petitioners had expectations based on conversations with Yogi Bhajan but they did not know Yogi Bhajan had taken all necessary actions for their appointment nor that Defendants had been lying about their entitlements. Defendants also induced delay by assuring Petitioners they were going to be installed in due course and then trying to spin those promises as merely written acknowledgement of Petitioners' desires to be placed on the boards of SSSC and UI.

Nor is summary judgment appropriate where credibility is at issue. Credibility issues are appropriately resolved only after an evidentiary hearing or full trial. *SEC v. Koracorp Indus.,* 575 F.2d 692, 699 (9th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 348 (1978). See also *S.E. C. v. M & A W., Inc.,* 538 F.3d at 1054–55 (9th Cir.2008). Petitioners testified they were unaware of their appointment to the SSSC and UI boards until 2010. **[ER 627; 636; 648; 661]** The credibility of Petitioners' testimony is directly at issue. In such circumstances, it is inappropriate to rule against Petitioners on summary judgment.

The Court of Appeals believed Petitioners should have been on inquiry notice. However, even when a duty to investigate exists, the statute only begins to run if the investigation *would have disclosed* the necessary facts. *Greene v. Legacy Emanuel Hospital*, 335 Or. at 123. See also Dobbs, 1 THE LAW OF TORTS § 218. It is the party asserting the statute of limitations defense that must prove that an

investigation would have disclosed those facts. *Doe*, 322 Or. at 514–15, 910 P.2d 364. They did not prove that in this case.

Defendants deliberately misrepresented the facts. Petitioners only discovered Defendants' lies in or about March 2010. **[*Id.*]** Petitioners were not parties to the State Court Action and the discovery in that case was shielded by a protective order. Petitioners only learned of the testimony of SSSC and UI's attorney concerning events after it was filed in a pleading in open court. Other Defendants' involvement and activities were not known until much later. Petitioners acted promptly when they became aware of the documents which supported their claims**.** Without documents showing Petitioners were appointed to the SSSC and UI Boards by Yogi Bhajan, Petitioners could not establish their exclusion was unlawful.

There are no facts which establish as a matter of law Petitioners knew or should have known of the liability of Defendants more than two years before the filing of the Complaint. At most, Defendants have raised an issue which must be adjudicated by a jury – it could not be resolved on a motion for summary judgment.

D. Statutes Of Limitations Are Tolled Where, As Here, Facts Supporting A Plaintiffs' Claims Were Deliberately Concealed

This Court has held that federal courts have the unrestricted power to toll the statute of limitations in circumstances such as this, where Petitioners were induced through fraudulent concealment not to file suit. *American Pipe, supra*, 414 U.S. at 559, 94 S.Ct. at 769. See also. *Hennegan v. Pacifico Creative Serv., Inc*., 787 F.2d 1299, 1302 (9th Cir.1986). "A fraudulent concealment defense requires a showing both that the defendant used fraudulent means to keep the plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the existence of his cause of action." *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir.1983). Both are met here.

In fact, the Court of Appeals itself, applying Oregon law, has held that equitable estoppel serves to bar a statute of limitations defense when: (1) the defendant "lulled the plaintiff, by affirmative inducement, into delaying the filing of a cause of action, or similarly, ... he lulled the plaintiff into believe he had no cause of action against the defendant[.]" or (2) "there has been fraud on the part of a fiduciary in concealing material facts evincing a cause of action." *Philpott v. A.H. Robbins Co., Inc*., 710 F.2d 1422, 1425 (9th Cir. 1983). Both situations exist in this case.

Oregon courts have held that where, as here, "plaintiffs have specifically and precisely alleged how they made repeated inquiries, but were provided with vague

answers and misrepresentations, which is sufficient to allege that a reasonably diligent inquiry would not have uncovered the fraud. Nothing more is needed." *Brooks v. BC Custom Constr., Inc*., No. 3:18-CV-00717-YY, 2019 WL 3763769, at *20 (D. Or. May 21, 2019), report and recommendation adopted, No. 3:18-CV-00717-YY, 2019 WL 3502907 (D. Or. Aug. 1, 2019).

In the State Court Action, Judge Roberts found "Unto Infinity and KITT, and the majority of their boards, assisted by Roy Lambert acted consistently and knowingly . . . to mislead and misinform persons and organizations . . .." Judge Roberts also found, "[t]he indirection and misleading communications that characterized communications by and in behalf of Unto Infinity and KIIT boards to the community for which the Yogi Bhajan enterprises existed, carried over, lamentably, to sworn trial testimony." **[ER 855; 2039]** Petitioners were given constant reassurance that Defendants were working to place Petitioners on the Boards and were told to be patient. Plaintiffs' investigation would have led to dead end since all of the pertinent documents needed to establish Petitioners' claims were in the hands of Defendants, who were actively lying and concealing the truth from Petitioners and others.

Petitioners did not discover Bibiji's exclusion from the UI Board until Mr. McGrory attached Consent Minutes placing Bibiji on the UI Board to his March 10, 2010 Declaration in the State Court case. The facts and exhibits, including

deposition excerpts had hitherto not been public information, making it impossible for Petitioners to have previously discovered that information.

Bibiji subpoenaed the articles for SSSC in a separate lawsuit to determine whether SSSC should be identified as an asset of Yogi Bhajan's personal estate for probate and distribution purposes. Defendants caused SSSC to resist the subpoena. Peitioners ultimately received copies of SSSC's Articles and Bylaws on March 27, 2009. **[ER 666]** The Articles revealed Yogi Bhajan was to designate his successor Board in writing provided to Yogi Bhajan's attorney. On December 21, 2009, Judge Roberts in a pending State Court case ordered SSSC's Articles and Bylaws be produced to the Private Plaintiffs represented by counsel for Defendants here, after Defendants in the State Court action had resisted and refused to produce them.

Bibiji's deposition testimony was misconstrued; she did not testify she knew in 2004, only that *at the time of her deposition* she knew she was to be appointed in 2004.

E. The Purpose Of The Statute Of Limitations Is Not Served By Barring Petitioners' Claims

This Petition seeks to correct a Court of Appeals decision that conflicts with this Court's ruling in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559, 94 S.Ct. 756, 769 (1974). This Court has stated: "statutory limitation periods are

'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. …' " *American Pipe*, 414 U.S. at 554, 94 S. Ct. at 766 (quoting *Order of Railroad Telegraphers v Railway Express Agency*, 321 U.S. 342, 348-49, 64 S.Ct. 582 (1944).)

Barring Petitioners from pursuing their claims would not further the underlying purpose of the statute of limitations. No evidence was lost, no witnesses have disappeared, and memories have not faded to a prejudicial extent as the facts have been litigated in the State Court Action against several of the Defendants and deposition and trial testimony plus existing documents would sufficiently refresh memories which may have faded (which is extremely doubtful given the circumstances of this case since the issues have been ongoing for many years).

The purpose of a statute of limitations is to require a claim to be adjudicated while evidence is still available so that a defendant may prepare a proper defense. Defendants were always in possession of all the evidence and were keeping it from the Petitioners. In such situations all doubt should be weighed heavily in favor of Plaintiffs. Moreover, Defendants deliberately deceived Petitioners and withheld documents to prevent Petitioners from exercising their rights.

Barring Petitioners' just claims in such circumstances would subvert the purposes of the statute of limitations and allow Defendants to use it as a sword instead of a shield. That would be a totally inequitable and unjust result.

This Court in *American Pipe* ruled federal courts have the unrestricted power to toll the statute of limitations under certain circumstances. *American Pipe* explained, by an example that precisely mirrors this case, that when the delay in filing was induced by the defendant, "or because of fraudulent concealment, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." *Id*. 414 U.S. at 559, 94 S. Ct. at 769 (citing *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S.Ct. 760 (1959), and *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582 (1946).) That is what happened here and the Court of Appeals' decision that Petitioners' claims are time barred conflicts with the teachings of *American Pipe*.

This Petition implicates exceptionally important questions that affects all cases of every vein. The Court of Appeals did not apply the rules set forth by this Court relating to proper application of statutes of limitation.

II. THE COURT OF APPEALS SHOULD HAVE CORRECTED THE DISTRICT COURT'S ERRONEOUS APPLICATION OF THE MINISTERIAL EXCEPTION AND ECCLESIATICAL ABSTENTION DOCTRINE TO EXCUSE COMPLIANCE BY NON-CHURCH CORPORATE ENTITIES WITH THEIR OWN ARTICLES AND OPERATING AGREEMENT AS IS REQUIRED BY NEUTRAL PROVISIONS OF STATE LAW

Oregon, like every other state, requires entities formed under its laws to comply with the terms set forth in their Articles and Operating Agreement. *Rosekrans v. Class Harbor Ass' n, Inc*., 228 Or. App. 621, 209 P.3d 411 (2009) (enforcing bylaws). Petitioners in this case sought application of neutral state law to implement the succession of control provisions of SSSC and UI, which were not themselves churches, but which own Sikh Dharma International ("SDI") which engages in church activities.

A. The Ministerial Exception Does Not Apply On The Facts Of This Case

In ruling on Defendants' motion for summary judgment the District Court improperly applied this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) regarding the applicability of the Ministerial Exception under the First Amendment.

This Court held in *Hosanna-Tabor* that judicial review of a religious group's ministerial employment decisions would constitute "government interference with an internal church decision that affects the faith and mission of the church itself"

(*Hosanna-Tabor*, 565 U.S. at 190), and that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id*. at 188. That is not what this case is about and the concerns of *Hosanna-Tabor* are not implicated here.

The plaintiff in *Hosanna-Tabor,* was a minister "Called" as a teacher of a school operated by a member congregation of the Lutheran Church. The congregation issued the teacher a "diploma of vocation" according her the title "Minister of Religion, Commissioned" reflecting a significant degree of religious training, followed by a formal process of commissioning, and the teacher held herself out as a minister by accepting the formal call to religious service, claiming a special housing allowance on her taxes, and her job duties reflected a role in conveying the Church's message and carrying out its mission. By contrast, Petitioners were appointed to the Boards of SSSC and UI by Yogi Bhajan and their positions and duties on those Boards do not require them to conduct any religious activities.

The indisputable evidence confirms that ***no*** SSSC Board Member, as Board Member, is involved in "how the members of Sikh Dharma worship, the requirements for attending worship services, the number of active members in the

religion and the forms of sacraments, including baptisms, weddings and funerals"; all of those functions are performed by SDI without SSSC's involvement or participation.

As the Court of Appeals noted when it took up the case from the District Court's grant of a Motion to Dismiss the Complaint with prejudice, "*this case appears to concern board members who, in that capacity, are neither employed by a church nor employed to minister to the faithful.*" *Puri v Khalsa*, 844 F.3d 1152, 1162 (9th Cir. 2017). "*UI and SSSC are not churches*," even though the organizations have some religious purposes. *Id* at 1160-61 (noting that "the complaint alleges that a 'mission and purpose' of SSSC and UI is 'to benefit the Sikh Dharma community and to advance and promote [Yogi Bhajan's] teachings'").

Notably, the Court of Appeal recognized in that earlier appeal that "it is not clear that the ministerial exception could ever apply to the type of positions at issue here. This is a dispute over seats on the boards of corporate entities that are apparently affiliated with a church, but are not themselves churches." *Id*. at 1159.

Nevertheless, despite this statement by the Court of Appeals the District Court after remand ruled:

> I conclude the application of the ministerial exception is a close call. On one hand, the board members of SSSC did not appear to need a religious title at the time of the employment decision in question. And neither board appeared to require religious training. Furthermore, this

> case falls outside the typical cases in which the ministerial exception applies, which tend to involve religious educators. On the other hand, the Supreme Court suggested "a fairly broad application of the exception" in *Hosanna-Tabor*. *Puri*, 844 F.3d at 1159 (citing *Hosanna-Tabor*, 565 U.S. at 188-89). ***I conclude the importance of each board in the religious hierarchy of Sikh Dharma at the time Plaintiffs allege they were appointed to the board is particularly relevant. And there were significant religious duties involved in these leadership positions, including choosing and firing religious leaders, approving the governing documents of SDI, and approving the actions of SDI's board of directors***.

Puri v. Khalsa, 321 F.Supp.3d 1233, 1248 (D. Or. 2018)(emphasis added). App. B *infra*.

The evidence of record does not establish that the SSSC or UI Boards had any involvement in the "*the religious hierarchy of Sikh Dharma at the time Plaintiffs allege they were appointed to the board" or that the Board Members had any religious duties or any role in "approving the governing documents of SDI, and approving the actions of SDI's board of directors."* To the contrary, an affiliate of ministers, Khalsa Council, which is neither owned nor controlled by SSSC or UI was responsible for appointing religious leaders, ministers and ensuring religious doctrine was followed.

The relief Petitioners seek would not implicate the decision by SDI, the only church entity or religious organization involved. Nor was the decision one to employ or not employ a minister; those decisions belong to SDI. This is a dispute over seats on the boards of corporate entities that incidentally own a church but are

not themselves churches. Defendants contend the evidence establishes SSSC and UI are inherently religious, but the facts prove otherwise.

The relevant facts are undisputed and unequivocally relate to the provisions of the corporate governance documents for SSSC in place prior to October 2004 that establish the means and methods for succession of control over SSSC after the death of Yogi Bhajan and his instructions to appoint Petitioners to the Boards of SSSC, UI and other entities of their choosing; nothing else matters.

We need look no further than the public statements and acknowledgements by SSSC on its own website (https://www.ssscorp.org/history--nonprofit-status.html), through the Office of the Chancellor (SSSC and UI refer to their Chief Legal Counsel, as "Chancellor") and cannot be disclaimed or disavowed:

> It is universally acknowledged that the Siri Singh Sahib prepared a list containing the names of 13 qualified persons, including the Siri Sikdar Sahib/a and the Bhai Sahib/a as ex-officio members, to sit on the initial Siri Singh Sahib Corporation Board following his death, and that he delivered said list in trust to Roy Lambert, the then attorney for the Siri Singh Sahib Corporation and Unto Infinity.
>
> On October 3, 2004, an Articles of Restatement of Siri Singh Sahib Corporation was adopted by the then sitting board of directors, which was subsequently filed with the State of Oregon on January 11, 2005. In that document, the board members of Unto Infinity, the then existing executive board of the organization, were given far reaching powers in the organization, essentially giving them complete control not only of Unto Infinity, but the Siri Singh Sahib Corporation itself.
>
> As we know, the Siri Singh Sahib left his body on October 6, 2004. In short*, the members of the Unto Infinity Board were able to effectuate their plan to take over complete control of the organization by having*

> *their attorney, Roy Lambert, withhold the list of the names of the 15 persons the Siri Singh Sahib had appointed to serve on the initial Siri Singh Sahib Corporation Board of Directors following his death and to which he had entrusted Mr. Lambert*. Essentially the Unto Infinity board members filled that void in authority that they themselves had created.
>
> HARI NAM SINGH KHALSA
> ASSISTANT CHANCELLOR OF
> SIRI SINGH SAHIB CORPORATION

(Emphasis added.) If you can't believe a corporate entities' Assistant Chancellor (i.e. Assistant General Counsel) and the entities' own public pronouncements, who can you believe? This is certainly an admission against interest if Respondents are taking positions contrary to these public statements.

Enforcement of the governing documents does not invoke or implicate any ministerial, religious or ecclesiastical doctrines or evaluation. It simply directs installation of a slate of designees that Yogi Bhajan identified to Sopurkh, SSSC's President, and to his and SSSC's, lawyers, Lambert/Schwabe. Yogi Bhajan made his designations but, as indicated on SSSC's own website, that act was kept secret by the then sitting Board and SSSC and UI's lawyer to subvert Yogi Bhajan's intentions and to allow them to convert company assets and pillage the companies. These are not merely accusations; these are adjudicated facts Lambert/Schwabe and the UI Defendants had possession of Yogi Bhajan's designations but

intentionally concealed them and refused to comply with SSSC's governance documents.

As evidenced by the organizational chart of the various entities created by Yogi Bhajan, it is only SDI which is the ecclesiastical entity, assisted and advised by the Khalsa Council which is a council of Sikh ministers. **[ER 2189-91]** While SSSC owns SDI, it does not ordain Sikh ministers or directly control the religious activities or operations of SDI, which has its own Bylaws by which it operates.

SSSC sits atop of all other organizations created by Yogi Bhajan that furthered his educational and charitable interests as well as his entrepreneurial aspirations, including the Dharmic organizations, which are but a small percentage. SSSC does not embody the church, in the form of its leadership body, for the followers of Sikh Dharma in the Western Hemisphere, the church is SDI.

Defendants cited no evidence proving either SSSC or UI are a "Church" or exercise ecclesiastical authority over the Sikh religion. In fact, that is the role of SDI and the Khalsa Council, which have separate governing documents to guide such ecclesiastical functions. According to Attorney Roy Lambert Yogi Bhajan did not intend for any of the entities he created to exercise any religious authority, but merely administrative authority.[1]

---

[1] The following is testimony from Roy Lambert, the attorney who formed the entities for Yogi Bhajan:

The MacMillan Dictionary identifies numerous religious activities. See https://www.macmillandictionary.com/thesaurus-category/british/religious-ceremonies-and-practices. Defendants failed to show that SSSC or UI Board Members are involved in any of those activities. Those activities are all under the aegis of SDI and Khalsa Council.

Petitioners seek enforcement of the charters of SSSC and UI and Yogi Bhajan's dying directives. Petitioners seek implementation of the directives of the last lawful authority over SSSC and UI, namely Yogi Bhajan, and not to effect any change of religious personnel or doctrine. This does not implicate "matters of

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Q. . . . is it your understanding the Siri Singh Sahib Corporation primary goal, then, was to promote the, use its assets to promote the religious aspect of the community, of the entities?

A. I would say no. And the reason I would say no is simply because I know that YB wanted to benefit the entire community, and the entire community encompasses the Yoga part of his loves, in addition to the Sikhism part of it. So in that sense I say no.

* * *

A. So what he wanted to do is recreate in a legal form the kind of organization that he had created and controlled on a purely individual force of personality level. And he did that by creating a sole member for each of these non-profits that would exercise that kind of administrative authority. And it was very clear that what he wanted was administrative authority. He was not looking for an entity to exercise, in the case of Sikh Dharma, for example, any authority with respect to how it conducted itself on a religious level. . . .

church government" or those of "faith and doctrine." Thus, the "ministerial exception" does not apply.

B. The Ecclesiastical Abstention Doctrine Was Not Properly Applied By The District Court

The District Court ruled the Ecclesiastical Abstention Doctrine bars Plaintiffs' claims by crediting disputed evidence in favor of the moving party rather than in favor of the nonmoving party as required, and improperly characterizing the issue as a "church leadership dispute." Furthermore, the District Court's ruling on the Ecclesiastical Abstention Doctrine is dependent upon its findings under the Ministerial Exception. Its Order granting summary judgment to Defendants stated:

> *Given my conclusions that UI and SSSC are religious organizations, and that board membership constitutes a religious leadership role in SDI*, I look to see how the case law that the Ninth Circuit previously distinguished from this case may now apply to the facts of this case. *… To grant Plaintiffs' requested relief, this Court would have to determine the legitimacy of Yogi Bhajan's succession. Additionally, this relief would place Plaintiffs at the helm of religious institutions, thus displacing board members chosen by other methods*. In my view, this raises a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs."

Puri, supra, 321 F.Supp.3d at 1249, 1251(emphasis added) (citing this Court's rulings in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 73 S.Ct. 143 (1952) and *Serbian Eastern Orthodox Diocese*

for the United States of America and Canada v. Milivojevich, 426 U.S. 696, 96 S.Ct. 2372 (1976) along with the Court of Appeals' ruling in *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999).)(emphasis added)

No religious decision is required to determine *the legitimacy of Yogi Bhajan's succession.* Its simply a question of whether yogi Bhajan made a designation of his successor Board members. The relief sought by Petitioners *would not place Plaintiffs at the helm of religious institutions, nor displace board members lawfully chosen by other methods*. Petitioners would be only four (4) of fifteen (15) Board members [two additional designations to the SSSC Board by Yogi Bhajan beyond the original thirteen (13); that hardly gives Petitioners any control. The governance documents are unequivocally clear – the successor Board is to be the persons designated by Yogi Bhajan and no one else. There are no other lawful means to appoint Board members on Yogi Bhajan's death. The Board members who held the Board positions at the time of Yogi Bhajan's death ceased to have any lawful authority to act; nobody was displaced. Moreover, most to the Board members in place when Yogi Bhajan died were to continue to serve in the new enlarged Board Yogi Bhajan had designated.

The cases relied upon by the District Court are inapposite here. All concerned interference with church doctrine. None of the remedies sought by Petitioners invoke any church doctrine, religious or ecclesiastical principles or

controversies; they merely seek compliance with neutral tenets of corporate law in connection with appointment of successor directors consistent with the operating agreements and bylaws of those organizations. Thus, the Ecclesiastical Abstention Doctrine does not apply. *Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc*., 684 F.3d 413, 418-19 (3d Cir. 2012) cert. denied, 133 S. Ct. 947, 184 L. Ed. 2d 728 (U.S. 2013).

Moreover, Ecclesiastical Abstention should not be applied in cases like this, which implicate fraud or collusion. See, e.g., *Askew, supra*, 684 F.3d at 418 (citing *Milivojevich*, 426 U.S. 696, 713; *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).)

The District Court's erroneous finding regarding the Ministerial Exception infected its analysis under the Ecclesiastical Abstention doctrine and led to a perverse result. SSSC and UI are not religious organizations whose membership constitutes a religious leadership role. As such there was no requirement to abstain from enforcing neutral principles of corporate law to implement Yogi Bhajan's plan of succession for the various corporations and organizations he created during his lifetime.

The Court of Appeals improperly sought to avoid the "thicket" of the District Court's flawed analysis which it had already once before reviewed and found lacking and it already had a roadmap to follow. Neither the Ministerial

Exception nor the Ecclesiastical Abstention doctrine applies under the facts of this case.

THE QUESTION PRESENTED IS IMPORTANT

Where, as here, disputed issues of material fact are present regarding the application of the discovery rule under the statute of limitations for fraud and deceit, which include whether a plaintiff knew, or had sufficient evidence to establish they should have known, a claim for fraud sufficient to comply with the requirements of Fed.R.Civ.P. 11 exists, summary judgment is not an option and the factual issues must be adjudicated by a jury.

Guidance is also required regarding the application of neutral principles of law in circumstances such as this where the application of neutral legal principles will not impinge upon religious liberty but will uphold the rule of law and correct the injustice visited upon Petitioners through Defendants' corrupt use of corporate positions of power to deprive them of their rightful appointed positions on the Boards of the various entities designated by Yogi Bhajan, their husband and father.

The Court of Appeals did not follow this Court's teachings regarding the application of Ministerial Exception and the Ecclesiastical Abstention doctrine to First Amendment law. First Amendment law simply does not apply to these non-church entities or to the appointments sought. Ministerial Exception and the

Ecclesiastical Abstention doctrine also do not apply under these circumstances. The compliance sought by Petitioners merely requires SSSC and UI's adherence and implementation of their own governance provisions which they adopted when the prepared and filed their Articles and Operating Agreement. This Court's decision in this case should make clear the proper application of those legal concepts.

Hundreds, if not thousands of religious organizations operate in the United States under charters from each and every state. Are they all free to simply ignore their charters and the requirements of the States that authorize and recognize their existence? Tens of thousands, and probably much more, of non-religious entities operate under state laws that require they adhere to their Articles and Operating Agreements. Are they all exempt from compliance with corporate state laws under First Amendment doctrines simply because they have religious affiliates when no religious decision or doctrine is impacted by adherence to neutral principles of state law? Summary judgments are filed in a large percentage of cases in Federal courts throughout the country. Are courts of appeals reviewing those decisions free to ignore the teachings of this Court that disputed facts cannot be resolved on summary judgment, that facts must not be contrary to the evidence and that inherently factual determinations about scienter and credibility must be reserved to

the jury? This Court needs to provide guidance and bring order to the application of these Federal laws.

III. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 2, 2020 THE SONI LAW FIRM

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APPENDIX

APPENDIX A

FILED

DEC 23 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIBIJI INDERJIT KAUR PURI; RANBIR SINGH BHAI; KAMALJIT KAUR KOHLI; KULBIR SINGH PURI,

Plaintiffs-Appellants,

v.

SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; UNTO INFINITY, LLC, an Oregon Limited Liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon non-profit corporation; SIRI KARM KAUR KHALSA; LANE POWELL PC, an Oregon Professional Corporation; LEWIS M. HOROWITZ; GURUDHAN SINGH KHALSA; GURU HARI SINGH KHASLSA; EWTC MANAGEMENT, LLC; AJEET SINGH KHALSA,

Defendants-Appellees.

No. 18-35479

D.C. No. 3:10-cv-01532-MO

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

BIBIJI INDERJIT KAUR PURI; RANBIR SINGH BHAI; KAMALJIT KAUR KOHLI; KULBIR SINGH PURI,

Plaintiffs-Appellants,

v.

SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; SIRI KARM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; LEWIS M. HOROWITZ; LANE POWELL PC, an Oregon Professional Corporation; UNTO INFINITY, LLC, an Oregon Limited Liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon non-profit corporation,

Defendants-Appellees.

No. 18-35658

D.C. No. 3:10-cv-01532-MO

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief District Judge, Presiding

Argued and Submitted November 8, 2019
Portland, Oregon

Before: GILMAN,** PAEZ, and RAWLINSON, Circuit Judges.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appellants challenge the district court's order granting summary judgment, in favor of Appellees. Appellants also take issue with the district court's award of $46,164.53 in costs to Appellees. We have jurisdiction under 28 U.S.C. § 1291 and review *de novo* the district court's summary judgment order. *See Weber v. Allergan, Inc.*, 940 F.3d 1106, 1110 (9th Cir. 2019). The district court's award of costs is reviewed for abuse of discretion. *See Draper v. Rosario*, 836 F.3d 1072, 1087 (9th Cir. 2016). This court may affirm on any basis supported by the record. *See United States v. Mixon*, 930 F.3d 1107, 1110 (9th Cir. 2019).

1. Rather than venture into the thicket of the ministerial exception to judicial review of business decisions made by religious organizations, or the ecclesiastical abstention doctrine, we affirm on the alternative basis that the claims are time-barred. Appellants brought claims for declaratory relief, fraud, negligent misrepresentation, tortious interference with prospective economic advantage, and claims under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act and the Oregon RICO statute (ORICO).[1] Declaratory relief claims are subject to the statute of limitations that applies to the underlying claim. *See Doyle v. City of Medford*, 351 P.3d 768, 771 (Or. Ct. App. 2015). Therefore, if the underlying

[1] Appellants voluntarily dismissed their ORICO claim.

claims are barred by the limitations period, so is the claim for declaratory relief. *See Brooks v. Dierker*, 552 P.2d 533, 535 (Or. 1976).

Oregon law provides that claims for fraud, negligent misrepresentation, and tortious interference must generally be commenced within two years. *See* Or. Rev. Stat. § 12.110(1); *see also Spirit Partners, LP v. Stoel Rives LLP*, 157 P.3d 1194, 1201 (Or. Ct. App. 2007) (fraud and negligent misrepresentation); *Butcher v. McClain*, 260 P.3d 611, 614 (Or. Ct. App. 2011) (tortious interference). "The statute of limitations for RICO is four years . . ." *Scott v. Boos,* 215 F.3d 940, 950 (9th Cir. 2000). The statute incorporates a discovery rule, whereby the claims accrue "when the plaintiff has discovered facts *or*, in the exercise of reasonable diligence, should have discovered facts that would alert a reasonable person to the existence of . . . the alleged fraud." *Murphy v. Allstate Ins. Co.*, 284 P.3d 524, 528 (Or. Ct. App. 2012).

The record reflects that Appellants knew, or should have known, of the alleged acts giving rise to their claims by 2004. Bibiji confirmed in her deposition that she knew that she should have occupied a board seat shortly after her husband's death in 2004. Kamaljit and Kulbir testified to similar knowledge. And the family obtained a lawyer in 2004 to represent their interests in obtaining the board positions.

Appellants protest that they could not obtain specific evidence of Appellees' actions until the Multnomah County case was initiated in 2009. But Appellants' exclusion from the boards, along with their belief that Yogi Bhajan had appointed them to the positions, was enough to demonstrate that "key material facts were not as they had been represented." *Oregon Life & Health Ins. Guar. Ass'n v. Inter-Reg'l Fin. Grp., Inc.*, 967 P.2d 880, 885 (OR. Ct. App. 1998). There is no reason Appellants could not have filed an action long before 2010 to obtain internal governance documents identifying board appointments. Accordingly, their claims were properly determined to be time-barred.

2. The district court acted within its discretion in awarding costs to Appellees. Appellees' 80-page spreadsheet described the services performed and expenses incurred with sufficient "specificity, particularity, and clarity." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 928 (9th Cir. 2015)*; see also Save Our Valley v. Sound Transit*, 335 F.3d 932, 945-46 (9th Cir. 2003) (discussing the presumption in favor of awarding costs).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

BIBIJI INDERJIT KAUR PURI; RANBIR SINGH BHAI; KAMALJIT KAUR KOHLI; KULBIR SINGH PURI,

Plaintiffs,

v.

SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; SIRI KARM KAUR KHALSA; ROY LAMBERT; SCHWABE, WILLIAMSON & WYATT, an Oregon Professional Corporation; **LEWIS M. HOROWITZ; LANE POWELL PC**, an Oregon Professional Corporation; **UNTO INFINITY, LLC**, an Oregon Limited Liability Company; **SIRI SINGH SAHIB CORPORATION**, an Oregon non-profit corporation; **GURUDHAN SINGH KHALSA; GURU HARI SINGH KHALSA; AJEET SINGH KHALSA; EWTC MANAGEMENT, LLC; DOES, 1–5,**

Defendants.

No. 3:10-cv-01532-MO

OPINION AND ORDER

MOSMAN, J.,

This matter comes before me on Plaintiffs' Motion for Partial Summary Judgment [389] and Defendants' Motion for Summary Judgment [390]. The parties also filed several motions to

strike. [418, 424, 428]. For the reasons below, I GRANT Defendants' Motion for Summary Judgment [390], DENY Plaintiffs' Motion for Partial Summary Judgment [389], and DENY or DENY as moot the parties' Motions to Strike [418, 424, 428].

BACKGROUND

I. Factual Background

This dispute revolves around the now deceased Siri Singh Sahib Bhai Sahib Harbhajan Singh Khalsa Yogiji, aka Yogi Bhajan. Yogi Bhajan was a Sikh Dharma spiritual leader who helped promulgate the Sikh religion and Kundalini Yoga in the United States until his death in 2004. In 1971, Yogi Bhajan became "Siri Singh Sahib," or the Chief Religious and Administrative Authority for the Ordained Ministry of Sikh Dharma in the Western Hemisphere. Gurujot Decl. [396], ¶¶ 6, 8. Pursuant to his role as Siri Singh Sahib, Yogi Bhajan established numerous non-profit organizations and for-profit businesses. This case involves three of these organizations: Sikh Dharma International (SDI), Siri Singh Sahib Corporation (SSSC), and Unto Infinity, LLC (UI).

The Plaintiffs in this case are Bibiji Inderjit Kaur Puri, Ranbir Singh Bhai, Kamaljit Kaur Kohli, and Kulbir Singh Puri, the widow and three children of Yogi Bhajan.[1] The Defendants remaining in this case are UI, SSSC, Sopurkh Kaur Khalsa, the President and a member of the UI Board of Managers and a member of the SSSC Board of Trustees, and Kartar Singh Khalsa, a member of the UI and SSSC boards. Plaintiffs allege in the operative Second Amended Complaint (SAC) that after Yogi Bhajan's death on October 6, 2004, the individual Defendants conspired to exclude them from management of UI and SSSC. SAC [234] ¶¶ 24–29. They seek declaratory relief placing them on the boards and monetary damages.

[1] This opinion will refer to certain individuals in this case by their first names to distinguish from others who have the same last name.

A. SDI

SDI is a California nonprofit religious corporation. Gurujot Decl. [396], ¶ 13; *id.* Ex. 1. It is undisputed that SDI is a religious organization. SDI, which was originally named Sikh Dharma Brotherhood, was formed in 1973 for the following primary purposes:

> [T]o operate for the advancement of education, science and religion and for charitable purposes by the distribution of its funds for such purposes by operating as a religious organization and as association of religious organizations, by teaching the principles of the Sikh Dharma, or way of life, in the Western Hemisphere and including, but not limited to, the creation and operation of places of worship, the ordination of ministers of divinity, the creation and operation of educational centers and associated and supportive activities related to these primary purposes.

Gurujot Decl. [396], Ex. 1 (SDI Articles of Incorporation). SDI's 2003 Bylaws, which were in effect at the time of the events underlying this case, stated:

> [SDI] is organized and shall be operated exclusively for the purposes of operating as a religious organization and as an association of religious organizations by teaching the principles of the Sikh Dharma, or way of life; by creation and operation of places of worship; by ordination of ministers of divinity; by creation and operation of educational centers; and by the conduct of associated and supportive activities related to these purposes; and to do all things necessary, expedient or appropriate to the accomplishment of the purposes for which this corporation is formed.

See Gurujot Decl. [396], Ex. 9 at 1. And SDI receives a tax exemption as "a church or a convention or association of churches" under 26 U.S.C. § 501(c)(3) and § 170(b)(1)(A)(i). Gurujot Decl. [396], Ex. 4.

Prior to Yogi Bhajan's death, there were two individual religious positions in SDI: the Siri Singh Sahib and the Bhai Sahiba. Yogi Bhajan, in his role as Siri Singh Sahib, served as the chief religious authority of SDI, and the Bhai Sahiba "over[saw] religious protocol." Gurojodha Decl. [395], Ex. 3 at 31. Following Yogi Bhajan's death, the "Siri Sikdar Sahib/a and the Bhai Sahib or Bhai Sahiba [are] together . . . the chief authority on the teachings of Siri Singh Sahib

Harbhajan Singh Khalsa Yogiji on the practice of Sikh Dharma." Gurojot Decl. [396], Ex. 9 at 10. The Bhai Sahiba advises SDI, the Khalsa Council, and UI on religious matters. Gurojot Decl. [396], Ex. 9 at 13. The Siri Sikdar Sahib/a "shall champion the spiritual and secular education of the children of Sikh Dharma" and "shall devote time daily for meditation and prayer on behalf of the congregations of Sikh Dharma, shall be responsible through the office of the Bhai Sahib/a for maintaining and improving the quality of spiritual practice in Western hemisphere communities and for inspiring and promoting devotion to Shabd Guru." Gurojot Decl. [396], Ex. 9 at 12. Additionally, the 2003 SDI Bylaws call for the Siri Sikdar Sahib/a to lead annual pilgrimages and perform outreach to other Sikh religious leaders. Gurojot Decl. [396], Ex. 9 at 12.

SDI's bylaws also outlined several governing boards, including an advisory board of SDI ministers called the Khalsa Council, which advises UI "on matters of significance" to SDI, and a board of directors called the Khalsa Council Adh Kari. Gurojot Decl. [396], Ex. 9 at 8.

B. SSSC

SSSC is an Oregon nonprofit religious corporation formed in 1997 "to take over the leadership function of [Yogi Bhajan] after his death." Gurojodha Decl. [395], Ex. 3 at 30. SSSC's purposes include overseeing the "administration and program services" of SDI and "conduct[ing] and/or facilitat[ing] religious, charitable, and educational activities." Gurojodha Decl. [395], Ex. 3 at 17, 20; Soni Decl. [394], Ex. C, Art. VI. Like SDI, SSSC receives a tax exemption as "a church or a convention or association of churches." Gurojodha Decl. [395], Ex. 3 at 2, 25.

During his lifetime, Yogi Bhajan was the sole director of SSSC. Soni Decl. [394], Ex. B (SSSC Articles of Incorporation), at 3. Following his death, a board of trustees/directors was to govern SSSC. According to the original SSSC Articles of Incorporation, following Yogi

Bhajan's death or incapacity, "the directors shall be those persons designated in writing by [Yogi Bhajan]. The written designation; and any amendment, or supplement to it, shall be dated upon execution and shall be delivered to, and held in confidence by the attorney for the corporation and Sikh Dharma designated in the corporation's Bylaws." Soni Decl. [394], Ex. B at 3. The original SSSC Bylaws designated Roy Lambert (who was a Defendant in this case until Plaintiffs settled their claims against him) as the attorney for SSSC. Soni Decl. [394], Ex. C, Art. VI. These disputed designations that are at the core of Plaintiff's claims in this case.

The Bylaws also outline certain job duties for the trustees:

> A trustee shall perform his or her duties as a trustee including his or her duties as a member of any committee of the board upon which the trustee may serve, in good faith, in a manner the trustee believes to be in or not opposed to the best interests of the corporation and with such care as an ordinarily prudent person would use under similar circumstances in a like position.

Soni Decl. [394], Ex. C, Art. 2 (Bylaws). The SSSC Articles outline an additional job duty for the board: the Articles state that Yogi Bhajan would designate an individual to succeed to the office of Siri Sikdar Sahib/a, who would also serve as a director of the SSSC board. Soni Decl. [394], Ex. B at 4. But if Yogi Bhajan failed to designate such an individual, the SSSC board was to choose a new Siri Sikdar Sahib/a, with the advice of the Khalsa Council. Soni Decl. [394], Ex. B at 4–5.

Additionally, later amended versions of the Articles of Restatement of SSSC and the Restated Articles of Incorporation required that SSSC board members be qualified as ministers of Sikh Dharma and live "in a manner consistent with the teachings and values of [Yogi Bhajan]." Soni Decl. [394], Ex. E. Although some of these documents were dated October 1–3, 2004, prior to Yogi Bhajan's death, it appears that the documents were actually created in November 2004, after his death. Soni Decl. [394], Ex. DD.

After Yogi Bhajan's death and the subsequent 2012 settlement agreement, SSSC's role within the Sikh Dharma hierarchy changed. The current SSSC board "has the authority to appoint and remove the board members of Sikh Dharma International (SDI), which, among other things, contains the Sikh Dharma Ministry and, through the Ministry, carries out the function of ordaining Sikh Ministers." Gurojodha Decl. [395] ¶ 28. The current mission statement of SSSC[2] reads:

> With the guidance of God and the grace of the Guru it is the mission of the SSSC to protect, preserve and cultivate the prosperity of the constituent community and its assets; listen to, serve and elevate the constituent community; support the non-profit and for profit entities and the family of constituent communities; and live to and hold the values of the teachings of the Siri Guru Granth Sahib and the Siri Singh Sahib Bhai Sahib Harbhajan Singh Khalsa Yogi Ji: selfless service, compassion, kindness, honesty, integrity, trustworthiness and Guru inspired consciousness.

Gurojodha Decl. [395] ¶ 25. The current president of the SSSC board stated that board members "act as representatives and ambassadors of Sikh Dharma. SSSC Board members, myself included, regularly participate in outreach, interfaith, mission building, and Sikh awareness events." Gurojodha Decl. [395] ¶ 39. Finally, the SSSC board president describes the current election process for SSSC as following:

> For the 2012, 2015, and 2017 SSSC Board elections, the elected SSSC Board members were elected by fellow Sikh Dharma ministers, active Khalsa Council members, and members of the Sikh Dharma community pursuant to the terms of the SSSC Board Election Policy. For future elections, and pursuant to a change in the SSSC Board Election Policy, only Sikh Dharma ministers who are in good standing will be eligible to vote for SSSC Board members.

Gurojodha Decl. [395] ¶ 16.

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[2] Plaintiffs move to strike Defendants' declarations as they pertain to the current status of SSSC, arguing they are irrelevant. I disagree, because I conclude the current status of the boards is pertinent to the question whether relief may be granted in this case without violating the First Amendment, as it pertains to the ecclesiastical abstention doctrine. I therefore DENY Plaintiffs' Motion [424] on these grounds.

C. UI

Following the death of Yogi Bhajan, SSSC became the sole member of UI, an Oregon nonprofit LLC formed in 2003. UI was the sole member of SDI until 2012, when SSSC assumed this role.[3] Gurujot Decl. [396], ¶ 13; *id.* Ex. 3. Former attorney for Defendants (and former Defendant) Roy Lambert testified that UI was intended to be the "ultimate decision-maker with respect to the . . . [Yogi Bhajan] community" after Yogi Bhajan's death, because Yogi Bhajan felt that the board of SSSC was too large. Soni Decl. [394], Exh. WW at 138. To this end, Yogi Bhajan issued a proclamation on June 30, 2004 stating:

> I hereby proclaim that Unto Infinity, LLC, is the entity authorized by me to continue to exercise the administrative authority of the office of the Siri Singh Sahib of Sikh Dharma, once I no longer occupy that office, in all those cases where authorization by the Siri Singh Sahib is required in the articles, bylaws, or any contractual commitment of a Sikh Dharma affiliated organization.

Southwick Decl. [398], Ex. 44.

A board of managers governs UI. The original operating agreement for UI outlined that Yogi Bhajan would appoint the first UI board. Southwick Decl. [398], Ex. 21 at 1. The original operating agreement for UI also stated that the original agreement would be superseded upon Yogi Bhajan's death by the "Amended and Restated Operating Agreement." Southwick Decl. [398], Ex. 21 at 3. The "Amended and Restated Operating Agreement" outlines certain eligibility standards, including that a board member had to be: (1) qualified as a minister of Sikh Dharma; (2) a member in good standing of the Khalsa Council of the Sikh Dharma; and (3) living, practicing, and participating in the affairs of the Sikh community in a manner consistent with the teachings and values of Yogi Bhajan. Southwick Decl. [398], Ex. 22 at 3–4.

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[3] I note that Yogi Bhajan appeared to change his mind regarding the intended roles of SSSC and UI, and their relationships to SDI. As of 1997, SSSC was to play the key leadership role in SDI and act as SDI's sole member. UI then took this role in 2003. And following the settlement agreements in 2012, SSSC took over this leadership role yet again.

According to the Bylaws of SDI established in December 2003, as the sole member of SDI, UI was to perform a number of duties related to SDI and the Khalsa Council, including: (1) approving all actions of the Khalsa Council Adh Kari; (2) electing the directors of the Khalsa Council Adh Kari, other than the Siri Sikdar Sahib/a; (3) amending the Articles and Bylaws of SDI; (4) approving the Executive Officers of SDI; (5) choosing the Secretary General of SDI, who would become the new Siri Sikdar Sahib/a if the Siri Sikdar Sahib/a died or was incapacitated; (6) approving the removal of employees, including the Siri Sikdar Sahib/a if the Siri Sikdar Sahib/a died or was incapacitated; (7) appointing the members of the Khalsa Council; and (8) "designat[ing] such other religious or administrative officials of [SDI] as it deems appropriate; . . . defin[ing] or redefin[ing] the function and scope of authority of each such official from time to time; and . . . appoint[ing] and . . . remov[ing] any person from any official position designated by it." Gurojot Decl. [396], Ex. 9 at 2–14. Additionally, UI played a role in determining whether and how a new Siri Sikdar Sahib/a would assume his or her position through a particular type of religious ceremony. *See* Gurojot Decl. [396], Ex. 9 at 10.

D. State Court Litigation

On September 21, 2009, several Sikh Dharma ministers and board members of Sikh Dharma entities sued Sopurkh, Kartar, UI, SSSC, and several other defendants derivatively, on behalf of the Sikh Dharma Community. The State of Oregon subsequently sued the same parties, and the state court consolidated these cases. McGrory Decl. [177] Exs. 2 & 3. The state court plaintiffs asserted numerous claims against the UI defendants, EWTC Management, and its owners, including claims for breach of fiduciary duty, fraud, and unjust enrichment. This litigation culminated in a four week trial, and the state court plaintiffs prevailed on all claims.

McGrory Decl. [177] Ex. 4. The parties eventually reached several settlement agreements, after which SSSC assumed UI's role as sole member of SDI. Gurojot Decl. [396], Ex. 3.

E. Plaintiffs' Claims to Board Membership

Plaintiffs allege that Bibiji and the three children should be on the SSSC Board and that Bibiji should be on the UI Board. SAC [234] ¶¶ 24–29. They assert that, before Yogi Bhajan's death, they expressed to him that they wished to become more involved in the management of the various business entities that he controlled. *See, e.g.*, Soni Decl. [394], Ex. NN (Ranbir Dep.) at 60. Plaintiffs assert that Yogi Bhajan instructed defendant Sopurkh, both orally and in writing, to add plaintiffs to the management boards of whatever business entities the family wanted. Soni Decl. [394], Ex. NN (Ranbir Dep.) at 60–61. Sopurkh testified that Yogi Bhajan asked her to talk to the family members about which boards they were interested in participating in. Soni Decl. [394], Ex. RR (Sopurkh Dep.) at 40–41.

There are several documents in the record that might indicate who Yogi Bhajan intended to be on the UI and SSSC boards. On July 10, 1997, Sopurkh emailed Yogi Bhajan and referred to "the listing of the [SSSC] board members as [Yogi Bhajan] gave them to me." Soni Decl. [394], Ex. I. This list of 13 names included Plaintiffs Bibiji and Kulbir, Defendant Sopurkh, four dismissed defendants, and seven others. *Id.* This list was faxed to Lambert on October 12, 2004, just after Yogi Bhajan died. *Id.* On October 7, 1997, Yogi Bhajan signed a separate list naming 14 individuals to the SSSC board. Southwick Decl. [398], Ex. 29. This list included the 13 names from the July 1997 email and added the name Harijot Kaur Khalsa. *Id.* There is also an undated, handwritten note that was signed by Yogi Bhajan and stated "Ranbit, Kamaljit, Kulbir will be added to SSS board." Southwick Decl. [398], Ex. 30. This note was faxed to Lambert on October 12, 2004, just after Yogi Bhajan died. *Id.* Finally, there are "Consent Minutes" from a

July 2004 UI Board of Managers meeting indicating that Bibiji was elected as manager of UI, "effective immediately." Soni Decl. [394], Ex. M.

II. Procedural Background

A. 2013 Motions to Dismiss and 2017 Ninth Circuit Decision

Plaintiffs originally brought claims for: (1) declaratory relief; (2) breach of fiduciary duty; (3) fraud; (4) negligent misrepresentation; (5) tortious interference with prospective economic advantage; (6) conversion; (7) unjust enrichment; (8) RICO; (9) legal malpractice; and (1) aiding and abetting. FAC [102]. After a 2012 round of motions to dismiss and a First Amended Complaint (FAC), I granted Defendants' four motions to dismiss [125, 172, 178, 180] the FAC in full on October 11, 2013, concluding that Plaintiffs lacked standing to bring derivative claims and that the direct claims failed based on res judicata, mootness, the First Amendment's ministerial exception, Rule 9(b)'s heightened fraud standard, and/or failure to state a claim. Minutes of Proceedings [215]; Transcript of Proceedings [220]. Plaintiffs appealed. The Ninth Circuit affirmed in part, vacated in part, and remanded. In a published opinion, the Ninth Circuit concluded that dismissal pursuant to the ministerial exception or the ecclesiastical abstention doctrine was not warranted at the pleadings stage. *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017). In an accompanying unpublished memorandum disposition, the Ninth Circuit dismissed some of Plaintiffs' claims on other grounds. *Puri v. Khalsa*, 674 F. App'x 679 (9th Cir. 2017).

B. 2017 Motions to Dismiss, Motion for Reconsideration, and Partial Settlement

In the SAC, Plaintiffs brought five claims for declaratory relief, fraud, negligent misrepresentation, tortious interference with prospective economic advantage, and RICO/ORICO. SAC [234]. Defendants filed several Motions to Dismiss. I issued an Opinion

and Order granting in part and denying in part Defendants' Motions to Dismiss. [296]. I then denied Plaintiffs' related Motion for Reconsideration and for Entry of Judgment Pursuant to Rule 54(b) [305], and granted in part and denied in part Plaintiffs' Motion for Leave to Amend [301]. [338]. Following these Opinions and the subsequent settlement of the claims between Plaintiffs, Lambert, and Schwabe, the following claims remain in this case:

- Claim One (declaratory relief): direct claims against UI and SSSC by all Plaintiffs (relief of having Bibiji placed on UI board and all Plaintiffs placed on SSSC board).
- Claim Two (fraud): claim by all Plaintiffs against Sopurkh and Kartar,
- Claim Four (tortious interference): claim by all Plaintiffs against Sopurkh

C. Motions for Summary Judgment

Defendants move for summary judgment, arguing Plaintiffs' claims are barred by the ministerial exception, the ecclesiastical abstention doctrine, the statute of limitations, and because they cannot show damages. [390]. Defendants also argue that certain of Plaintiffs' claims are moot and that the Plaintiffs seek relief not included in the SAC. Plaintiffs move for partial summary judgment on Claim One for Declaratory Relief and against each of Defendants' affirmative defenses.[4] [389].

LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The initial burden for a motion for summary judgment is on the moving party to identify the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that burden is satisfied, the burden shifts to the non-moving party to demonstrate, through the production of evidence listed in Fed. R. Civ. P. 56(c)(1), that there remains a "genuine issue for trial." *Celotex*, 477 U.S. at 324. The non-moving party may not rely upon the pleading allegations, *Brinson v. Linda Rose*

[4] Because I conclude the ministerial exception and the ecclesiastical abstention doctrine bar review in this case, I do not reach the parties' other arguments.

Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995) (citing Fed. R. Civ. P 56(e)), or "unsupported conjecture or conclusory statements," *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). All reasonable doubts and inferences to be drawn from the facts are to be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

I. Whether the Ministerial Exception Bars Review in this Case

"The Supreme Court has long recognized religious organizations' broad right to control the selection of their own religious leaders." *Puri*, 844 F.3d at 1157. Pursuant to this principle, the Supreme Court has recognized a ministerial exception, which "precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012). The ministerial exception "applies to claims that impinge on protected employment decisions regarding a religious organization and its ministers, and when applicable, it flatly prohibits courts from requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so." *Puri*, 844 F.3d at 1158 (citations and internal quotation marks removed). In *Hosanna-Tabor*, the Supreme Court reasoned that judicial review of a religious group's ministerial employment decisions would constitute "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188.

Although "the ministerial exception is not limited to the head of a religious congregation," the Supreme Court in *Hosanna-Tabor* declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Instead, the Supreme Court put forth several guidelines for courts to consider when deciding whether the ministerial exception applies in a given case. In *Puri*, the Ninth Circuit described these considerations as follows:

> First, an employee is more likely to be a minister if a religious organization holds the employee out as a minister by bestowing a formal religious title. Although an ecclesiastical title "by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant." A second consideration is the "substance reflected in that title," such as "a significant degree of religious training followed by a formal process of commissioning." Third, an employee whose "job duties reflect [] a role in conveying the Church's message and carrying out its mission" is likely to be covered by the exception, even if the employee devotes only a small portion of the workday to strictly religious duties and spends the balance of her time performing secular functions. Finally, an employee who holds herself out as a religious leader is more likely to be considered a minister.

Puri, 844 F.3d at 1160 (quoting *Hosanna-Tabor*, 565 U.S. at 191–93). Courts have applied the ministerial exception to the claims of a number of different types of employees, including the claims of the"called" teacher in *Hosanna-Tabor*, 565 U.S. at 176; a musical director at a Catholic church, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012); a principal of a parochial school, *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017); and a Hebrew teacher at a Jewish day school, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018).

As discussed above, the Ninth Circuit concluded, based on the pleadings alone, that the ministerial exception does not bar review in this case. Although the court noted that "a 'mission and purpose' of SSSC and UI is 'to benefit the Sikh Dharma community and to advance and promote [Yogi Bhajan's] teachings,' and it is 'surely relevant' that their board members must be ordained ministers of Sikh Dharma and must meet certain other religious criteria," the court

concluded that other factors outweighed these considerations. *Puri*, 844 F.3d at 1160. In particular, the Ninth Circuit found it significant that the pleadings did not allege that: (1) the board members have ministerial duties; (2) the board members are held out as religious leaders, either by the members or their employers; or (3) that board membership required significant religious training or requirements. *Id.* at 1160–61.

The Ninth Circuit also found it important that UI and SSSC are not churches, reasoning "it is not clear that the ministerial exception could ever apply to the type of positions at issue here. This is a dispute over seats on the boards of corporate entities that are apparently affiliated with a church, but are not themselves churches." *Id.* at 1159. However, the Ninth Circuit noted that the Supreme Court suggested "a fairly broad application of the exception" in *Hosanna-Tabor*, as has the Ninth Circuit in previous cases. *Id.* (citing *Hosanna-Tabor*, 565 U.S. at 188–89; *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999)).

Defendants argue that information outside the pleadings now shows that membership on the UI and SSSC boards clearly qualifies for the ministerial exception. In particular, Defendants argue that SSSC and UI are religious organizations and that board members serve as ministers, because they hold themselves out as such and have explicitly religious duties. Plaintiffs argue that SSSC only holds administrative authority, that board members were not required until after Yogi Bhajan's death to be ministers, and that the UI and SSSC boards do not require any religious training.[5] Below, I address each of *Hosanna-Tabor*'s guidelines, the Ninth Circuit's

[5] Plaintiffs also argue that the Ninth Circuit's decision is law of the case, but the Ninth Circuit clearly stated its decision was based on the pleadings alone.

interpretation of those guidelines in this case, and how any new evidence outside of the pleadings may affect the ministerial exception analysis in this case.[6]

A. Whether UI and SSSC are Religious Groups

The Supreme Court referred to "religious groups" in *Hosanna-Tabor*, but did not offer a specific definition of "religious group." *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 196 (referencing "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission"). In a recent case, the Second Circuit noted that although the Supreme Court did not define "religious groups" in *Hosanna-Tabor*, "other circuits have applied the ministerial exception in cases involving 'religiously affiliated entit[ies],' whose 'mission[s are] marked by clear or obvious religious characteristics.'" *Penn v. New York Methodist Hosp.*, 884 F.3d 416, 424 (2d Cir. 2018) (quoting *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015)).

In this case, the Ninth Circuit determined that "[i]n assessing the responsibilities attendant to the board positions, it is relevant that the entities involved are not themselves churches, but rather corporate parents of a church." *Puri*, 844 F.3d at 1160. The Court concluded that "SSSC's primary responsibility appears to be holding title to church property, and UI, in addition to being the sole member of SDI—i.e., the direct corporate parent of the Sikh Dharma church—owns and controls a portfolio of for-profit and nonprofit corporations, including a major security contractor and a prominent tea manufacturer." *Id.* The Ninth Circuit noted that based on the pleadings, "UI and SSSC are not churches," even though the organizations have some religious purposes. *Id.* at 1160–61 (noting that "the complaint alleges that a 'mission and

[6] In addressing the ministerial exception, I refer to the documents in existence at the time of the "employment decisions" Defendants argue are "protected" by the exception. This means the 1997 SSSC documents and the 2003 UI and SDI documents. I therefore DENY as moot the parties' Motions to Strike [418, 424, 428] as they pertain to this issue.

purpose' of SSSC and UI is 'to benefit the Sikh Dharma community and to advance and promote [Yogi Bhajan's] teachings'"). Plaintiffs argue that nothing has changed from the pleadings stage, but Defendants argue there is new evidence showing that UI and SSSC are clearly churches or religious groups.

There is some evidence that UI and SSSC are not churches, or at the very least, have some secular duties. As the Ninth Circuit described, SSSC and UI hold assets and oversee several subsidiaries, including for-profit companies like East-West Tea Company and Akal Security. Gurojodha Decl. [395], Ex. 7. And relevant documents sometimes describe their roles as "administrative" or overseeing the "program services" of SDI. *See* Southwick Decl. [398], Ex. 44; Gurojodha Decl. [395], Ex. 3 at 17.

But I conclude that evidence outside of the pleadings[7] show that SSSC and UI are "religious groups," even if they are not churches in the traditional sense.[8] First, SSSC received a tax exemption as a "church or a convention or association of churches." Gurojodha Decl. [395] ¶ 32; *id.* Ex. 3. Referring to Yogi Bhajan's role as "current leader of the Sikh religion in the Western Hemisphere," the tax documents stated SSSC was to be Yogi Bhajan's "successor, to fulfill his leadership functions following his death." Gurojodha Decl. [395], Ex. 3 at 17, 20.

Other documents state that SSSC's purposes include "conduct[ing] and/or facilitat[ing] religious, charitable, and educational activities." Soni Decl. [394], Ex. C, Art. VI. And according

[7] The Plaintiffs agreed at oral argument that to decide whether SSSC and UI are religious groups, I should look only to governing documents in existence at the time of the events in question, not to the declarations in the record. Minutes [433].

[8] There are several reasons why this case does not fit neatly into the precedents set by prior case law. First, it involves a religion not within the Judeo-Christian tradition, which is most commonly addressed by the case law. *But see Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999) (addressing the competing claims of individuals in an ancient Sufi order). This precedent presumes there are relatively clear distinctions between religious and secular purposes. Here, by contrast, it is by no means straightforward to determine that, for example, running yoga clinics is a secular endeavor, instead of part of the Sikh Dharma religious message. Additionally, this case addresses a dispute during a time when the Sikh Dharma hierarchy was evolving. During his illness and up to the time of his death, Yogi Bhajan was in the process of creating several new structures to replace him as the leader of Sikh Dharma in the Western Hemisphere.

to SSSC's 1997 Articles, the SSSC board also had the duty to choose a new Siri Sikdar Sahib/a—one of the two religious leaders of the Sikh Dharma religion in the Western Hemisphere—in the case that Yogi Bhajan did not choose such an individual. Soni Decl. [394], Ex. B at 4–5; Gurojot Decl. [396], Ex. 9 at 12. And SSSC was to make this decision with the advice of the Khalsa Council Adh Kari, SDI's board of directors, and with nominations from the Khalsa Council, SDI's ministerial board—two clearly religious bodies. Soni Decl. [394], Ex. B at 4–5; Gurojot Decl. [396], Ex. 9 at 12.

Similarly, according to the 2003 SDI Amended and Restated Operation Agreement, UI had a significant role in running the religious affairs of SDI. UI was to approve or elect nearly all religious and administrative leaders of SDI. Gurojot Decl. [396], Ex. 9 at 2–14 (UI to choose the directors of the Khalsa Council Adh Kari and the Khalsa Council, the Executive Officers of SDI, the Secretary General of SDI, and "designat[ing] such other religious or administrative officials of [SDI] as it deems appropriate"). UI could also remove employees, including the Siri Sikdar Sahib/a if the Siri Sikdar Sahib/a died or was incapacitated. Gurojot Decl. [396], Ex. 9 at 2–14. UI also had final authority over all actions of the Khalsa Council Adh Kari and could amend the Articles and Bylaws of SDI. Gurojot Decl. [396], Ex. 9 at 2–14.

In my view, these documents show that although SSSC and UI do act as corporate boards in some ways, they were also formed to perform Yogi Bhajan's leadership role in approving religious policy and leaders. Although both organizations perform some secular functions, they appear to be "religiously affiliated entities" with clearly religious purposes. *See Penn*, 884 F.3d at 424. Taking this information into consideration, I now address *Hosanna-Tabor*'s other guidelines.

B. Whether the Board Members Have Formal Religious Titles

The Ninth Circuit acknowledged that board members must be ministers, but concluded that "[a]n employee's status as an ordained minister, standing alone, does not trigger the ministerial exception when that individual is employed in a secular capacity by an entity other than a church." *Puri*, 844 F.3d at 1161. I take this to mean that formal religious titles can satisfy this first prong of the *Hosanna-Tabor* analysis, but do not control the outcome. Here, Plaintiffs do not dispute that the UI Amended and Restated Operating Agreement required board members to be qualified as Sikh Dharma ministers and included other religious qualifications. *See* Southwick Decl. [398], Ex. 22 at 3–4. But appears that the SSSC ministerial qualifications came into effect immediately after Yogi Bhajan's death and may not have applied at the time of the "employment decision" disputed by Plaintiffs. I therefore conclude this factor weighs in favor of applying the ministerial exception to Plaintiffs' claims against UI and against applying the ministerial exception to Plaintiffs' claims against SSSC.[9]

C. Religious Training and Other Religious Requirements

The Ninth Circuit noted that the pleadings did not allege that board membership required significant religious training or requirements. *Puri*, 844 F.3d at 1161. The Defendants do not specifically allege that board membership requires religious training, or detail what is required to become a minister with SDI. I therefore conclude this factor weighs against applying the ministerial exception to Plaintiffs' claims.

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[9] SSSC's evolution over the past fifteen years raises the novel question of how to apply the ministerial exception to an organization which has assumed more religious characteristics over time. I have only considered documents describing SSSC prior to Yogi Bhajan's death in analyzing the ministerial exception, because the term "protected employment decision" appears to apply to a particular moment in time. But doing so fails to take into account the fact that granting a remedy to Plaintiffs regarding SSSC would affect SSSC now, a significantly religious organization. Viewed in this light, the "formal title" factor would weigh in favor of applying the ministerial exception to SSSC, which now requires such titles for board members.

D. Job Duties

The Ninth Circuit found it significant that the pleadings did not allege that the board members have ministerial duties. *Puri*, 844 F.3d at 1160. Defendants argue that "the SSSC and UI Board positions carry a responsibility to convey the Sikh Dharma message and carry out its mission." Def. MSJ [390] at 23. Plaintiffs argue there are no ministerial requirements or religious job duties listed in the then-applicable 1997 Articles and Bylaws for SSSC, or in UI's governing documents. *See* Soni Decl. [394], Ex. B (SSSC Articles of Incorporation); Soni Decl. [394], Ex. C, Art. VI; Southwick Decl. [398], Ex. 21 at 1.

In my view, the evidence not available at the pleadings stage changes considerably the analysis of this factor. On one hand, Plaintiffs are correct that the section of the SSSC Bylaws entitled "Duties" makes no reference to religion. *See* Soni Decl. [394], Ex. C, Art. 2. But on the other hand, the boards members of SSSC and UI have some express religious duties. SSSC was to choose a new Siri Sikdar Sahib/a, one of the two religious positions to exist after Yogi Bhajan's death, in the event that Yogi Bhajan did not choose such an individual. Soni Decl. [394], Ex. B at 4–5. And as discussed above, UI had the power to choose and remove many of SDI's religious leaders, approve the decisions of the Khalsa Council Adh Kari, and amend the bylaws and articles of SDI. Gurojot Decl. [396], Ex. 9 at 2–14. Furthermore, some of the Plaintiffs testified that they were appointed to "spread the word of [Yogi Bhajan's] mission," including "the word of the Holy Scripture," and "teach the Sikh way of life." Southwick Decl. [419], Ex. 1 (Bibiji Dep.) at 59-60.

The duties of the board members do not fit neatly into case law, which often involves religious educators. *See, e.g. Hosanna-Tabor*, 565 U.S. at 192 (noting the plaintiff was "expressly charged . . . with 'lead[ing] others toward Christian maturity' and 'teach[ing]

faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church'"). But in my view, the board members of UI and SSSC have important religious duties: they may choose and remove religious leaders, and approve religious decisions and governing documents. Although the board members do not act as teachers, they have significant religious duties that allow them to shape the future of the Sikh Dharma religion through its religious employees, governing documents, and the decisions of its board of directors. In the context of SSSC's and UI's leadership roles in relation to SDI, these facts weigh strongly in favor of applying the ministerial exception to Plaintiffs' claims.

D. Whether Board Members or the Board Hold the Members Out as Religious Leaders

The Ninth Circuit found it significant that the pleadings did not allege that the board members are held out as religious leaders, either by the members themselves or their employers. *Puri*, 844 F.3d at 1160. However, there is evidence not available at the pleadings stage that both the Plaintiffs and their potential "employers" viewed these positions as involving religious leadership components. In their depositions, the Plaintiffs testified that they were appointed to "spread the word of [Yogi Bhajan's] mission," including "the word of the Holy Scripture," and "teach the Sikh way of life." Southwick Decl. [419], Ex. 1, (Bibiji Dep.) at 59-60; *see also* Southwick Decl. [398], Ex. 10 at 116 (Kulbir agreeing with the statement that board members would "generally be in a position to engage in that kind of outreach to religious leaders"). Furthermore, the Plaintiffs admitted "that the members of the SSSC Board of Trustees hold positions of leadership within the Sikh Dharma community by virtue of their position as SSSC Trustees." Southwick Decl. [398], Ex. 1 at 4. In terms of the boards themselves, it is clear from the governing documents of SSSC, UI, and SDI that the board members of SSSC and UI were to play an important role as religious leaders, in choosing and removing subordinate religious

leaders, and by affecting religious policy. Given these facts, I conclude this factor weighs in favor of applying the ministerial exception to Plaintiffs' claims.

Considering the role UI and SSSC were to play in the hierarchy of Sikh Dharma and these four factors, I conclude the application of the ministerial exception is a close call. On one hand, the board members of SSSC did not appear to need a religious title at the time of the employment decision in question. And neither board appeared to require religious training. Furthermore, this case falls outside the typical cases in which the ministerial exception applies, which tend to involve religious educators. On the other hand, the Supreme Court suggested "a fairly broad application of the exception" in *Hosanna-Tabor*. *Puri*, 844 F.3d at 1159 (citing *Hosanna-Tabor*, 565 U.S. at 188–89). I conclude the importance of each board in the religious hierarchy of Sikh Dharma at the time Plaintiffs allege they were appointed to the board is particularly relevant. And there were significant religious duties involved in these leadership positions, including choosing and firing religious leaders, approving the governing documents of SDI, and approving the actions of SDI's board of directors.

Given this religious structure and the ministerial leadership roles played by the board members, I conclude that judicial review of the decisions to not place Plaintiffs on the UI and SSSC boards falls within the purpose of the ministerial exception, as it would constitute "government interference with an internal church decision that affects the faith and mission of the church itself." *See Hosanna-Tabor*, 565 U.S. at 190. In effect, Plaintiffs seek court interference in the membership of the boards that choose Sikh Dharma's highest level of leadership and exercise significant control over the direction of the Sikh Dharma religious in the Western Hemisphere. Therefore, the ministerial exception bars review in this case.

II. Whether the Ecclesiastical Abstention Doctrine Bars Review in this Case

Because this case does not involve the typical application of the ministerial exception, I address in the alternative whether the ecclesiastical abstention doctrine applies. The ecclesiastical abstention doctrine is based on courts' determination that "[t]he Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs." *Bollard*, 196 F.3d at 945. "Under this doctrine of ecclesiastical abstention, 'a State may adopt any one of various approaches for settling church . . . disputes so long as it involves no consideration of doctrinal matters.'" *Puri*, 844 F.ed at 1162 (quoting *Jones v. Wolf*, 443 U.S. 595, 602 (1979)). But "[u]nlike the ministerial exception, which completely bars judicial inquiry into protected employment decisions, the ecclesiastical abstention doctrine is a qualified limitation, requiring only that courts decide disputes involving religious organizations without resolving underlying controversies over religious doctrine." *Puri*, 844 F.3d at 1164 (internal quotation marks and citation omitted). To this end, the Supreme Court held in *Jones* that "civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve [church property] dispute[s] on the basis of 'neutral principles of law.'" *Jones*, 443 U.S. at 597. The Ninth Circuit noted in this case that "we are unaware of any authority or reason precluding courts from deciding other types of church disputes by application of purely secular legal rules, so long as the dispute does not fall within the ministerial exception and can be decided without resolving underlying controversies over religious doctrine." *Puri*, 844 F.3d at 1165 (internal quotation marks and citation omitted).

Here, the Ninth Circuit concluded that a neutral-principles approach may be appropriate, because "the plaintiffs here ask the courts to decide what amounts to a secular factual question: under Oregon law and the secular governing documents of UI, an Oregon nonprofit limited

liability company, and SSSC, an Oregon nonprofit religious corporation, were the plaintiffs elected or designated to the disputed board positions?" *Id.* at 1167. The Ninth Circuit noted the Plaintiffs do not ask "for resolution of a controversy over religious doctrine. Nor do they ask civil courts to decide whether a religious organization properly applied ecclesiastical rules in settling a leadership dispute[.]" *Id.*

Defendants argue that evidence beyond the pleadings show that Plaintiffs do, in fact, ask the court for resolution of a question of religious doctrine: whether Yogi Bhajan's succession plan as to the religious leadership of the UI and SSSC boards. Plaintiffs disagree, arguing that neutral principles can clearly resolve this issue. Given my conclusions that UI and SSSC are religious organizations, and that board membership constitutes a religious leadership role in SDI, I look to see how the case law that the Ninth Circuit previously distinguished from this case may now apply to the facts of this case.

In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Supreme Court considered whether a state court could determine which faction of the Russian Orthodox Church was entitled to the Russian Orthodox Cathedral in New York City. *Id.* at 95–97. The state court applied a state law requiring that the decisions of the American churches be authoritative. *Id.* at 99. The Supreme Court reversed, holding that the application of the state law "displace[d] one church administrator with another" and "passe[d] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119. This was unconstitutional, concluded the Court, because it placed the "power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." *Id.* at 119. Similarly, in *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), the Supreme Court considered a case in which a

state court reinstated a bishop because the church had failed to follow its own constitution, as interpreted by the court. 426 U.S. at 707–08. Again the Supreme Court reversed, holding that the state court had "unconstitutionally undertaken the resolution of quintessentially religious controversies." *Id.* at 720.

In *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244 (9th Cir. 1999), the Ninth Circuit considered a dispute involving corporate bodies competing over trademarks related to a Sufi order. The Court concluded that the ecclesiastical abstention doctrine did not bar review of the trademark claims in the case. *Id.* at 1250. But in a separate claim, the plaintiffs asked that the defendants be enjoined "from representing that the Order ceased to exist with the death of the Forty–First Teacher, and that they are teachers or masters of the Order." *Id.* The Ninth Circuit held that "[t]he district court cannot determine by neutral principles the legitimacy of [the religious leader's] succession; that kind of determination could only be made by a recognized decision-making body of the Order itself." *Id.*

Here, as in *Kedroff, Milivojevich*, and *Kianfar*, Plaintiffs ask the Court to adjudicate a church leadership dispute. Like in *Kedroff*, the Plaintiffs here ask the Court to "displace[] one church administrator with another." *See* 344 U.S. at 119. And although the UI and SSSC board members are not bishops, as in *Milivojevich*, the board members have significant religious leadership roles within SDI. This case is perhaps most akin to *Kianfar*, which also involved competing corporate entities linked to a religious organization. The Plaintiffs ask the Court to determine the legitimacy of the SSSC board, which was to be Yogi Bhajan's "successor, to fulfill his leadership functions following his death," Gurojodha Decl. [395], Ex. 3 at 17, and of the UI board, which took over Yogi Bhajan's decisionmaking role as to certain religious decisions within SDI. In my view, this would require the Court to improperly "determine . . . the

legitimacy of [the religious leader's] succession," because such a "determination could only be made by a recognized decision-making body of [SDI] itself." *Kianfar*, 179 F.3d at 1250.

The concerns this case raises are even more apparent when considering the current status of the boards, and SSSC in particular. SSSC's current mission statement includes an explicitly religious purpose. *See* Gurojodha Decl. [395] ¶ 25 (SSSC to protect assets, support non-profit and for-profit entities, and "live to and hold the values of the teachings of the Siri Guru Granth Sahib and the Siri Singh Sahib Bhai Sahib Harbhajan Singh Khalsa Yogi Ji: selfless service, compassion, kindness, honesty, integrity, trustworthiness and Guru inspired consciousness"). And the SSSC board now has religious duties similar to those of the original UI board. Gurojodha Decl. [395] ¶ 28 ("SSSC has the authority to appoint and remove the board members of Sikh Dharma International (SDI), which, among other things, contains the Sikh Dharma Ministry and, through the Ministry, carries out the function of ordaining Sikh Ministers."). Board members participate in religious outreach "as representatives and ambassadors of Sikh Dharma." Gurojodha Decl. [395] ¶ 39. Finally, the current election process for SSSC requires board members to be elected by fellow Sikh Dharma ministers, active Khalsa Council members, and members of the Sikh Dharma community pursuant to the terms of the SSSC Board Election Policy," but in the future, "only Sikh Dharma ministers who are in good standing will be eligible to vote for SSSC Board members." Gurojodha Decl. [395] ¶ 16.

To grant plaintiffs' requested relief, this Court would have to determine the legitimacy of Yogi Bhajan's succession. Additionally, this relief would place Plaintiffs at the helm of religious institutions, thus displacing board members chosen by other methods. In my view, this raises a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *See Milivojevich*, 426 U.S.

at 709. I therefore conclude the ecclesiastical abstention doctrine also bars review of the claims in this case.[10]

CONCLUSION

For the reasons stated above, I GRANT Defendants' Motion for Summary Judgment [390], DENY Plaintiffs' Motion for Partial Summary Judgment [389], and DENY or DENY as moot the parties' Motions to Strike [418, 424, 428]. This case is therefore DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 26th day of April, 2018.

MICHAEL W. MOSMAN
Chief United States District Judge

[10] Because I conclude the ministerial exception and the ecclesiastical abstention doctrine bar review in this case, I do not reach the parties' other arguments.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BIBIJI INDERJIT KAUR PURI; RANBIR SINGH BHAI; KAMALJIT KAUR KOHLI; KULBIR SINGH PURI, *Plaintiffs-Appellants*, v. SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; SIRI KARM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; ROY LAMBERT; SCHWABE, WILLIAMSON & WYATT, an Oregon Professional Corporation; LEWIS M. HOROWITZ; LANE POWELL PC, an Oregon Professional Corporation; UNTO INFINITY, LLC, an Oregon Limited Liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon non-profit corporation; DOES, 1 through 5, *Defendants-Appellees*.	No. 13-36024 D.C. No. 3:10-cv-01532-MO OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief District Judge, Presiding

Argued and Submitted March 10, 2016
Portland, Oregon

Filed January 6, 2017

Before: Raymond C. Fisher, Marsha S. Berzon
and Paul J. Watford, Circuit Judges.

Opinion by Judge Fisher

SUMMARY*

First Amendment

The panel vacated the district court's dismissal, as foreclosed by the Free Exercise and Establishment Clauses of the First Amendment, of claims concerning a dispute over the control of two nonprofit entities associated with the Sikh Dharma religious community.

The panel held, based only on the pleadings, that the claims were not barred by the First Amendment's ministerial exception. The panel held that the ecclesiastical abstention doctrine did not apply because the claims could be resolved by application of neutral principles of law without

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

encroaching on religious organizations' right of autonomy in matters of religious doctrine and administration.

The panel addressed additional issues in a concurrently filed memorandum disposition.

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Susan Bower and Rebecca M. Auten, Assistant Attorneys General; Anna M. Joyce, Solicitor General; Ellen F. Rosenblum, Attorney General; Oregon Department of Justice, Salem, Oregon; for Amicus Curiae State of Oregon.

OPINION

FISHER, Circuit Judge:

This appeal concerns a dispute over the control of two nonprofit entities associated with the Sikh Dharma religious community. The plaintiffs, the widow and children of the late spiritual leader of the Sikh Dharma faith, brought claims against various individuals and entities alleging several interlocking conspiracies and fraudulent activities designed to exclude them from certain management positions and to convert millions of dollars in assets from entities under the individual defendants' control for personal benefit. The district court dismissed the plaintiffs' complaint, concluding their claims were foreclosed by the Free Exercise and Establishment Clauses of the First Amendment.[1] We vacate

[1] This opinion addresses only the defendants' First Amendment defense to the plaintiffs' direct claims. The plaintiffs also brought several derivative claims on behalf of Siri Singh Sahib Corporation and Unto Infinity, LLC. In a concurrently filed memorandum disposition, we affirm dismissal of those derivative claims. The memorandum disposition also addresses the parties' remaining arguments regarding the plaintiffs' direct claims.

the district court's dismissal because we conclude, based only on the pleadings, that the plaintiffs' claims are not barred by the First Amendment's ministerial exception and can be resolved by application of neutral principles of law without encroaching on religious organizations' right of autonomy in matters of religious doctrine and administration.

BACKGROUND

This case comes to us on the pleadings, so we accept the plaintiffs' factual allegations as true. Our review is limited to the facts alleged in the plaintiffs' first amended complaint ("complaint") and the attached exhibits incorporated by reference therein. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953 (9th Cir. 2004).

Yogi Harbhajan Singh Khalsa, also known as Yogi Bhajan, was a spiritual leader and entrepreneur who spread Sikhism and Kundalini Yoga in the United States beginning in the 1960s. In 1971, he was designated the Siri Singh Sahib, the Sikh leader for the Western Hemisphere. Yogi Bhajan founded or inspired the creation of numerous for-profit and nonprofit entities that were held and controlled by Siri Singh Sahib of Sikh Dharma (SSSSD), a California corporation sole of which he was the only shareholder.[2] Three of these entities are particularly relevant to this case: Siri Singh Sahib Corporation, Unto Infinity, LLC, and Sikh Dharma International.

[2] Under California law, a corporation sole is a corporation "formed . . . by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing the affairs, property, and temporalities thereof." Cal. Corp. Code § 10002.

Yogi Bhajan formed Siri Singh Sahib Corporation (SSSC) as an Oregon nonprofit religious corporation "to act as the successor legal organization to [SSSSD]" following his death or incapacity, "and in such capacity to conduct and/or facilitate religious, charitable and educational activities." SSSC would become "the guardian of those assets of [SSSSD] which are conveyed to it," and would replace SSSSD as the sole member of Unto Infinity, LLC. Yogi Bhajan was the sole director, or "trustee," of SSSC at its founding, but the SSSC articles of incorporation provided that following his death or incapacity, "the directors shall be those persons designated in writing by [Yogi Bhajan]," with such written designation to be "delivered to, and held in confidence by, the attorney for the corporation." The articles also set out certain religious criteria for directors:

> No individual will be eligible to be designated or elected as a trustee unless he or she . . . is currently qualified as a minister of Sikh Dharma; . . . is an active participant in Dasvandh [tithing]; . . . [and] is then living, and participating in the affairs of the Sikh community, in a manner consistent with the teachings and values of [Yogi Bhajan], and accepts the directives and proclamations of [Yogi Bhajan] as Siri Singh Sahib of Sikh Dharma, as such teachings, values, directives, and proclamations are understood by the Siri Sikdar Sahib/a of Sikh Dharma . . . .

Yogi Bhajan formed Unto Infinity, LLC (UI), as an Oregon nonprofit limited liability company to serve as a member or shareholder of various for-profit and nonprofit entities. Under UI's operating agreement, SSSSD was to be

the sole member of UI until Yogi Bhajan's death or incapacity, at which time SSSC would assume that role, and UI would become the sole member of Sikh Dharma International. Acting by virtue of his exclusive control over SSSSD, Yogi Bhajan appointed himself and four others to the UI board of managers, which would "exercise full and exclusive control over the affairs of the Company, subject to restrictions on that authority under the Oregon Limited Liability Company Act." The UI operating agreement set forth the same religious eligibility criteria for its board of managers as the SSSC articles established for its directors.

Yogi Bhajan formed Sikh Dharma International (SDI) as a California nonprofit religious corporation "organized to advance the religion of Sikh Dharma and as an association of religious organizations teaching principles of Sikh Dharma, including by ordination of ministers of divinity and operation of places of worship." SDI's sole member is UI.

Yogi Bhajan died in October 2004. He was survived by the plaintiffs in this case – his wife, Bibiji Inderjit Kaur Puri ("Bibiji"), and their three children, Ranbir Singh Bhai ("Ranbir"), Kamaljit Kaur Kohli and Kulbir Singh Puri. They allege the general counsel and five board members of UI and SSSC conspired to exclude them from participating in the management of those organizations.

First, the plaintiffs assert they have been improperly excluded from the SSSC board of trustees. They allege Yogi Bhajan, acting pursuant to the SSSC articles of incorporation, designated all four of them to become board members following his death or incapacity and furnished the written designation to defendant Roy Lambert, attorney for SSSC. Lambert allegedly failed to produce the designation following

Yogi Bhajan's death, and the defendants then held board meetings without providing notice to the plaintiffs and without the plaintiffs' attendance, in violation of SSSC bylaws and Oregon law. Second, the plaintiffs allege the UI board of managers added Bibiji as a manager of UI on July 26, 2004, prior to Yogi Bhajan's death, by unanimous written consent, but the defendants failed to inform her of her election and denied her the rights and duties of board membership.

In support of their claims, the plaintiffs point to various emails and corporate documents, attached to their complaint and incorporated by reference, that they allege confirm their allegations of wrongful exclusion from the SSSC and UI boards. On July 26, 2004, all five members of the UI board of managers apparently adopted a resolution increasing the membership of the board to six and electing Bibiji "to fill the new position as manager of the Corporation." In October 2004, defendant Sopurkh Kaur Khalsa ("Sopurkh"), president of the UI board of managers, left a voicemail message for plaintiff Ranbir explaining that she and Lambert were "proceeding on getting you guys on the Board" of SSSC and UI. Sopurkh followed up by email with a "Memo of Understanding" acknowledging that Bibiji was "already on [the] board" of UI and confirming that all four plaintiffs would be added to the SSSC and UI boards. In September 2005, Sopurkh apparently changed course, explaining to Bibiji that the previous Memo of Understanding "inadvertently omitted a statement regarding the corporate involvement of you and your children," and the "[m]emo was not intended to indicate either current board membership for you and your children or agreement that you and your children would ultimately be elected to the listed boards." Sopurkh furnished a "revised Memo of Understanding which

corrects the prior error," clarifying that the memo constituted her "understanding of the family's request to be included in the various boards in our organization." The revised document nonetheless reiterated Bibiji was "already on [the] board" of UI. Two months later, when Lambert sent an email listing "the board of [SSSC] as designated by [Yogi Bhajan]," two of the plaintiffs' names appeared on the list.

The plaintiffs' complaint seeks a judgment that Bibiji "has been a Manager of UI from and after July 26, 2004" and that all four plaintiffs "be appointed to the Board of Trustees of SSSC." They also seek damages for lost compensation they would have received for their services on the boards. After the defendants moved to dismiss for failure to state a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6), the plaintiffs moved for leave to file a second amended complaint. The district court granted the defendants' motions to dismiss, denied the motion for leave to amend and entered a judgment of dismissal with prejudice. The plaintiffs timely appealed.

STANDARD OF REVIEW

We review de novo a district court's dismissal for failure to state a claim upon which relief can be granted. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). We accept as true all well-pleaded allegations of material fact and construe them in the light most favorable to the plaintiffs. *See id.* We also review de novo a district court's legal determinations, including constitutional rulings, and its determinations on mixed questions of law and fact that implicate constitutional rights. *See Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc).

DISCUSSION

The question before us is whether the Free Exercise and Establishment Clauses of the First Amendment preclude a civil court from granting relief on the plaintiffs' claims, which seek declaratory and injunctive relief in the form of placement on the management boards of organizations associated with the Sikh Dharma religious community as well as damages for lost compensation due to their previous exclusion from those boards. The defendants raise the "ministerial exception" as an affirmative defense, and contend even if that exception does not apply, the plaintiffs' claims still cannot be decided by a civil court because the requested relief would infringe on the sphere of autonomy constitutionally guaranteed to religious organizations.

I.

A.

The Supreme Court has long recognized religious organizations' broad right to control the selection of their own religious leaders. *See, e.g.*, *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Recently, the Court "confirm[ed] that it is impermissible for the government to contradict a church's determination of who can act as its ministers," and formally recognized "a 'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704–05 (2012). This ministerial exception "ensures that the authority to select and control who will minister to

the faithful – a matter 'strictly ecclesiastical' – is the church's alone." *Id.* at 709 (citation omitted) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)). The Court explained:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 706.

Although the Supreme Court has not articulated the scope of the ministerial exception beyond employment discrimination claims, *see id.* at 710, our court has framed the exception as applicable "to any state law cause of action that would otherwise impinge on the church's prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999); *see also Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004).

Thus, any claim "with an associated remedy . . . [that] would require the church to employ [a minister]" would "interfer[e] with the church's constitutionally protected choice of its ministers," and thereby "would run afoul of the Free Exercise Clause." *Bollard*, 196 F.3d at 950. The ministerial exception also bars relief for "consequences of protected employment decisions," such as damages for "lost or reduced pay," because such relief "would necessarily trench on the Church's protected ministerial decisions." *Elvig*, 375 F.3d at 966; *see also Hosanna-Tabor*, 132 S. Ct. at 709 ("An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.").

B.

The ministerial exception is an affirmative defense. *See Hosana-Tabor*, 132 S. Ct. at 709 n.4. It applies to claims that impinge on protected employment decisions regarding "a religious organization and its ministers," *Elvig*, 375 F.3d at 955 (quoting *Bollard*, 196 F.3d at 945), and when applicable, it flatly prohibits courts from "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so," *Hosanna-Tabor*, 132 S. Ct. at 706.

As an affirmative defense, the ministerial exception can serve as the basis for dismissing a complaint at the pleadings stage under Rule 12(b)(6) only when the elements of the defense appear *on the face of the complaint*. *See Jones v. Bock*, 549 U.S. 199, 215 (2007) (citing 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)); *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013). Therefore, if it is apparent

on the face of the plaintiffs' complaint that the defendants' refusal to seat the plaintiffs on the disputed boards is a "protected employment decision[]" under the ministerial exception, *see Elvig*, 375 F.3d at 963, the plaintiffs' claims are altogether barred, and a civil court can neither order the defendants to employ the plaintiffs nor award damages against the defendants for past or future failure to do so.

The defendants argue the complaint should be dismissed under the ministerial exception because it seeks relief for a protected employment decision made by a religious organization concerning its ministers. Specifically, they contend the complaint alleges both that SSSC and UI are "religious organizations" covered by the exception, and that the disputed board positions are "ministerial" because they can be occupied only by individuals meeting certain "religious requirements," including that they be Sikh ministers. The plaintiffs do not dispute SSSC and UI are religious organizations within the meaning of the ministerial exception, but they argue the board positions are *not* ministerial because, on the face of the complaint, it is not apparent their duties involve conveying the church's message or carrying out its religious mission.[3]

As a threshold matter, it is not clear that the ministerial exception could ever apply to the *type* of positions at issue here. This is a dispute over seats on the boards of corporate entities that are apparently affiliated with a church, but are

[3] The plaintiffs also argue the religious requirements for SSSC board membership do not apply to them, relying on an exhibit attached to their disallowed second amended complaint. We do not reach this argument because, even assuming the plaintiffs are subject to the religious requirements, we conclude the ministerial exception does not apply.

not themselves churches. Thus, the positions are far afield from the "paradigmatic application of the ministerial exception" to ordained ministers employed by a church, such as Roman Catholic priests who "minister to the faithful" as that term is generally understood. *See Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (en banc). Neither the Supreme Court nor this court has applied the ministerial exception to the governing boards of church-affiliated organizations, let alone to those whose responsibilities are largely secular, as the complaint alleges here. There is, therefore, reason to question whether the exception is even potentially implicated.

At the same time, neither the Supreme Court nor this court has ever expressly limited the ministerial exception to particular types of positions, and both courts have expressly declined to adopt any bright line rule defining the scope of the exception. As the Supreme Court has made clear, there is no "rigid formula for deciding when an employee qualifies as a minister" within the meaning of the ministerial exception. *Hosanna-Tabor*, 132 S. Ct. at 707. Our en banc court echoed that view in *Alcazar*, where we "declined to adopt any particular test" for "determining whether a particular church employee . . . should be considered a 'minister'" for First Amendment purposes. 627 F.3d at 1291. Certain language in *Hosanna-Tabor*, moreover, suggests a fairly broad application of the exception. The Court explained "[t]he ministerial exception is not limited to the head of a religious congregation," and insulates a religious organization's "selection of those who will personify its beliefs." *Hosanna-Tabor*, 132 S. Ct. at 706–07. The Court further suggested the exception extends to "the Church's choice of its hierarchy" when that choice implicates "a religious group's right to shape its own faith and mission."

Hosanna-Tabor, 132 S. Ct. at 705–06. We too have suggested a potentially broad reach for the exception. *See Bollard*, 196 F.3d at 947 (referring to the ministerial exception as protecting "a church's freedom to choose its representatives"). In practice, there may be little difference between deciding whether a defendant has established the affirmative defense of the ministerial exception with respect to a hiring decision for a particular employment position in a particular case and deciding categorically whether the exception applies to hiring decisions for an entire type or class of employment positions, such as governing boards of church-affiliated organizations. As explained below, the former analysis considers, among other things, "the nature of the religious functions performed" and "[t]he amount of time an employee spends on particular activities." *Hosanna-Tabor*, 132 S. Ct. at 709. Any categorical analysis likely would turn on very similar inquiries.

Ultimately, we do not attempt to resolve the question of whether the ministerial exception ever applies to the type of positions at issue here. We need not categorically define the scope of the ministerial exception, because even if it is potentially available in a case such as this one, it is clear the defendants here have failed to make out the defense at this juncture. For the purpose of the following analysis, therefore, we only assume without deciding that the exception is potentially implicated with respect to the type of positions in dispute in the case before us.

The Supreme Court has provided some guidance on the circumstances that might qualify an employee as a minister within the meaning of the ministerial exception. First, an employee is more likely to be a minister if a religious organization holds the employee out as a minister by

bestowing a formal religious title. *See id.* at 707. Although an ecclesiastical title "by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant." *Id.* at 708. A second consideration is the "substance reflected in that title," such as "a significant degree of religious training followed by a formal process of commissioning." *Id.* at 707–08. Third, an employee whose "job duties reflect[] a role in conveying the Church's message and carrying out its mission" is likely to be covered by the exception, even if the employee devotes only a small portion of the workday to strictly religious duties and spends the balance of her time performing secular functions. *Id.* Finally, an employee who holds herself out as a religious leader is more likely to be considered a minister. *Id.*

Based on the pleadings here, some circumstances weigh in favor of considering the board positions ministerial. The complaint alleges that a "mission and purpose" of SSSC and UI is "to benefit the Sikh Dharma community and to advance and promote [Yogi Bhajan's] teachings," and it is "surely relevant" that their board members must be ordained ministers of Sikh Dharma and must meet certain other religious criteria. *See id.* at 708.

But, based on the face of the complaint, a number of other circumstances weigh against applying the ministerial exception. First, and most importantly, the pleadings do not allege the board members have any ecclesiastical duties or privileges. In assessing the responsibilities attendant to the board positions, it is relevant that the entities involved are not themselves churches, but rather corporate parents of a church. SSSC's primary responsibility appears to be holding title to church property, and UI, in addition to being the sole member

of SDI – i.e., the direct corporate parent of the Sikh Dharma church – owns and controls a portfolio of for-profit and nonprofit corporations, including a major security contractor and a prominent tea manufacturer. Although the complaint alleges the board members have "fiduciary duties to UI and SSSC to hold assets in trust for the benefit of the Sikh Dharma community," it is not clear on the face of the complaint that these duties are "religious" or "reflect[] a role in conveying the Church's message and carrying out its mission." *Id.*

No religious duties comparable to those found relevant in *Hosanna-Tabor* appear in the pleadings here. In *Hosanna-Tabor*, the Supreme Court observed the plaintiff was "expressly charged . . . with 'lead[ing] others toward Christian maturity' and 'teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'" *Id.* "In fulfilling these responsibilities, [the plaintiff] taught her students religion[,] . . . led them in prayer[,] . . . took her students to a school-wide chapel service, and . . . took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible." *Id.* The Court concluded, "[a]s a source of religious instruction, [the plaintiff] performed an important role in transmitting the Lutheran faith to the next generation." *Id.* By contrast, none of the allegations here support a similar conclusion.

Although the Court has cautioned against relying too heavily on "the relative amount of time . . . spent performing religious functions," it has recognized that "the nature of the religious functions performed" and "[t]he amount of time an employee spends on particular activities" are relevant

considerations. *Id.* at 709. We, too, have "look[ed] to the function of the position . . . in deciding whether the ministerial exception applies," *Elvig*, 375 F.3d at 958, and have held, for instance, that the exception does not apply "to lay employees of a religious institution if they are not serving the function of ministers," *Bollard*, 196 F.3d at 947. The pleadings do not allege the board members "serv[e] the function of ministers." *Id.*

Second, the pleadings do not allege the board members are held out as religious leaders, either by their respective employers or by the board members themselves. A board member of UI or SSSC has the job title of "manager" or "trustee," respectively, and the pleadings do not suggest these apparently secular titles hold any ecclesiastical significance in the Sikh Dharma faith. Although a board member must be "qualified as a minister of Sikh Dharma," and although we have held "[t]he paradigmatic application of the ministerial exception is to the employment of an ordained minister," *Alcazar*, 627 F.3d at 1291, this paradigm applies to employment *by a church*, *as a minister*. An employee's status as an ordained minister, standing alone, does not trigger the ministerial exception when that individual is employed in a secular capacity by an entity other than a church. *Cf. id.* at 1292 ("[T]he ministerial exception may not apply to a seminarian who obtains employment with a church outside the scope of his seminary training.").

UI and SSSC are not churches, and although their board members must be independently qualified as Sikh ministers, they are not employed or held out by the organizations *as* ministers. Nor is there any indication the board members hold themselves out as religious leaders. These factors weigh against viewing the board members as "representatives" of

the church or as being "close to the heart of the church." *Alcazar*, 627 F.3d at 1291 (quoting *Bollard*, 196 F.3d at 946–47).

Finally, the pleadings do not show the board positions are religious in substance, whether by requiring "significant religious training," by signifying ecclesiastical merit, or otherwise. *Hosanna-Tabor*, 132 S. Ct. at 707–08. In *Hosanna-Tabor*, the Court gave substantial weight to the six years of rigorous religious training required to become a called teacher, encompassing "college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher." *Id.* at 707. The Court also observed that a teacher could receive her call "only upon election by the congregation, which recognized God's call to her to teach." *Id.* Although it is possible that carrying out the disputed board positions here involves similarly substantial religious training and recognition, the record before us does not reveal what is entailed in becoming "qualified as a minister of Sikh Dharma" and "accept[ing] the directives and proclamations of [Yogi Bhajan] . . . as such teachings, values, and directives are understood by the Siri Sikdar Sahib/a of Sikh Dharma," nor does the record establish any functional connection between the duties of a board member and the religious criteria for selection. Therefore, in construing the allegations of material fact in the light most favorable to the plaintiffs, *see Daniels-Hall*, 629 F.3d at 998, we do not assume the board positions are substantively religious on this motion to dismiss.

Absent any allegation that board members have ecclesiastical duties or are held out to the community as religious leaders, and with scant pleadings on the religious requirements for the positions, we agree with the plaintiffs

that it is not apparent on the face of the complaint that the disputed board positions are "ministerial." Whereas the ministerial exception typically applies to those who are employed by a church to minister to the faithful, this case appears to concern board members who, in that capacity, are neither employed by a church nor employed to minister to the faithful. We do not foreclose the defendants from ultimately establishing that the ministerial exception applies, but the factual allegations in the complaint are too far removed from the core of the exception for us to conclude at this stage of the proceedings that the exclusion of the plaintiffs from the board positions is a "protected employment decision" falling within the ministerial exception affirmative defense.

II.

Given the defendants cannot at this point rely on the ministerial exception to bar the plaintiffs' claims, we next consider whether other principles of the Free Exercise and Establishment Clauses nonetheless preclude the courts' involvement in the internal affairs of UI and SSSC under what we have previously termed the "doctrine of ecclesiastical abstention." *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987). The plaintiffs do not dispute UI and SSSC are religious organizations protected by the religion clauses of the First Amendment, but they contend the district court can resolve this case without encroaching on that protection.

A.

Long before it formally recognized a ministerial exception, the Supreme Court developed a doctrine, grounded originally in common law but later in the First Amendment,

"limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights." *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976). Under this doctrine of ecclesiastical abstention, "a State may adopt *any* one of various approaches for settling church . . . disputes so long as it involves no consideration of doctrinal matters." *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (quoting *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)). The Supreme Court has recognized two principal approaches to deciding church disputes without "jeopardiz[ing] values protected by the First Amendment." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

The first, derived from *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), and its progeny, is simply to "accept[] the decision of the established decision-making body of the religious organization." *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999).

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church . . . but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Milivojevich, 426 U.S. at 709. But, recognizing that deference can sometimes lead to entanglement of civil courts in ecclesiastical issues and that some church disputes can be resolved by application of solely secular legal rules, the Court has also articulated an alternative to the *Watson* approach it has termed the "neutral principles of law" approach. *See Jones*, 443 U.S. at 602, 605.

1.

The Court first considered judicial intervention in church disputes in *Watson*, when it was asked to resolve which of two factions rightfully controlled the property of a local Presbyterian church. *See* 80 U.S. (13 Wall.) at 681. Ruling on common law grounds, the Court concluded "a broad and sound view of the relations of church and state under our system of laws" requires civil courts to defer to the determinations of a church's highest ecclesiastical authority on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727.

The Court later applied the *Watson* rule to an individual's claim of entitlement to a chaplaincy in the Roman Catholic Church. *See Gonzalez*, 280 U.S. at 10–11. Although the plaintiff was entitled to the position under the terms of a will establishing the chaplaincy, the archbishop had declined to appoint the plaintiff because he lacked the qualifications for the position as prescribed by canon law. *Id.* at 17–18. The Court explained:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate

> possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.

Id. at 16.

The Supreme Court subsequently adopted the holdings of *Watson* and *Gonzalez* as a constitutional rule insofar as they pertained to the "[f]reedom to select the clergy," explaining that a church's freedom to do so, "where no improper methods of choice are proven, . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Kedroff*, 344 U.S. at 116; *see also id.* at 116 n.23 (quoting *Gonzalez*, 280 U.S. at 16–17). Under this principle of noninterference, extended to cover judicial action in *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam), civil courts may not "[b]y fiat . . . displace[] one church administrator with another" and thereby "pass[] the control of matters strictly ecclesiastical from one church authority to another." *Kedroff*, 344 U.S. at 119. Doing so would "intrude[] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." *Id.*

The Supreme Court's early church dispute cases embraced "a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference,

matters of church government as well as those of faith and doctrine." *Id.* at 116. This deferential doctrine recognizes that "First Amendment values are plainly jeopardized when church [disputes are] made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church*, 393 U.S. at 449.

This does not mean, however, that civil courts have no role in disputes involving religious organizations. Unlike the ministerial exception, which completely bars judicial inquiry into protected employment decisions, the ecclesiastical abstention doctrine is a qualified limitation, requiring only that courts decide disputes involving religious organizations "without resolving underlying controversies over religious doctrine." *Kianfar*, 179 F.3d at 1248 (quoting *Presbyterian Church*, 393 U.S. at 448).

2.

The Court introduced the neutral-principles approach in the context of a property dispute between two local churches that sought to withdraw from the national Presbyterian Church in the United States. *See Presbyterian Church*, 393 U.S. at 441–43. *Presbyterian Church* held that Georgia's departure-from-doctrine rule, an alternative to the *Watson* approach never endorsed by the Court but nonetheless followed by some states, "require[d] the civil courts to engage in the forbidden process of interpreting and weighing church doctrine" and was therefore unconstitutional. *Id.* at 451. In so holding, the Court recognized "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Id.* at 449. But the Court continued:

> It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.

Id.

A year later, in *Maryland & Virginia Eldership*, the Court approved the Maryland high court's use of the neutral-principles approach to resolve a church property dispute between a regional church and two secessionist congregations. *See* 396 U.S. at 367–68 (per curiam). The Maryland Court of Appeals "relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property." *Id.* at 367 (footnote omitted) (citing 254 A.2d 162 (Md. 1969)). The Court rejected the petitioners' argument that this application of neutral state law principles "deprived the General Eldership of property in violation of the First Amendment" and dismissed the appeal for want of a substantial federal question, because "the Maryland court's resolution of the dispute involved no inquiry into religious doctrine." *Id.* at 367–68.

In a concurrence to the per curiam opinion in *Maryland & Virginia Eldership* later drawn on by a majority of the Court in *Jones v. Wolf*, *see* 443 U.S. at 602–03, Justice Brennan explained, "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Md. & Va. Eldership*, 396 U.S. at 368 (Brennan, J., concurring). "Thus the States may adopt the approach of *Watson v. Jones*, and enforce the property decisions made" by a church's highest ecclesiastical authority. *Id.* at 368–69 (citation omitted) (citing *Watson*, 80 U.S. (13 Wall.) at 722, 724). But "the use of the *Watson* approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious policy." *Id.* at 370. Alternatively, "'[n]eutral principles of law, developed for use in all property disputes,' provide another means for resolving litigation over religious property." *Id.* (citation omitted) (quoting *Presbyterian Church*, 393 U.S. at 449). For example, when "the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy," courts can avoid becoming impermissibly entangled in that ecclesiastical dispute by "determin[ing] ownership by studying deeds, reverter clauses, and general state corporation laws." *Id.* at 369–70.

In *Jones*, the Court definitively held that "civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve [church property] dispute[s] on the basis of 'neutral principles of law.'" 443 U.S. at 597. The Court observed:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

Id. at 603. The Court recognized "the application of the neutral-principles approach is [not] wholly free of difficulty" as it may, for instance, "require[] a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church." *Id.* at 604. "In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts." *Id.* Furthermore, "there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property," and, "[i]f in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* (citing *Milivojevich*, 426 U.S. at 709). Despite these challenges, the Court concluded "[o]n balance, . . . the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application." *Id.*

Property disputes have proved especially amenable to application of the neutral-principles approach. *See Kianfar*, 179 F.3d at 1249. But we are unaware of any authority or reason precluding courts from deciding other types of church disputes by application of purely secular legal rules, so long as the dispute does not fall within the ministerial exception and can be decided "without resolving underlying controversies over religious doctrine." *Presbyterian Church*, 393 U.S. at 449; *see also Milivojevich*, 426 U.S. at 710 ("This principle applies with equal force to church disputes over church polity and church administration."). Indeed, "we must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others," because "[s]uch a deprivation would raise its own serious problems under the Free Exercise Clause." *Kianfar*, 179 F.3d at 1248.

B.

1.

The Supreme Court has made clear that "a State may adopt *any* one of various approaches for settling church . . . disputes so long as it involves no consideration of doctrinal matters." *Jones*, 443 U.S. at 602 (quoting *Md. & Va. Eldership*, 396 U.S. at 368 (Brennan, J., concurring)). It is thus constitutionally permissible for a court to apply either the *Watson* approach (deferring to a church's highest ecclesiastical authority) or the neutral-principles approach to such disputes, as long as the court decides the dispute "without resolving underlying controversies over religious doctrine." *Kianfar*, 179 F.3d at 1248 (quoting *Presbyterian Church*, 393 U.S. at 449). But we are not without further

guidance in deciding the proper approach for cases litigated in federal court.

First, *Jones* suggested a clear preference for the neutral-principles approach, noting that its "promise[] to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice" outweighed occasional difficulties in its application. *Jones*, 443 U.S. at 603–04. Following *Jones*, we held that where a religious entity has adopted civil "legal structures, it is incumbent upon the civil court . . . to apply to those structures the secular law that governs them." *See Kianfar*, 179 F.3d at 1250.[4]

Second, where both approaches are available as a constitutional matter, we have made clear a court may apply the neutral-principles approach even though the *Watson* approach would lead to a contrary result. *See id.* at 1249 (discussing the Supreme Court's approval of a state approach that required a decision "by neutral principles even though the outcome might contravene the decision of the hierarchical church" (citing *Jones*, 443 U.S. at 604–06)).

[4] This holding follows from a principle announced in *Watson* itself. *See Jones*, 443 U.S. at 603 n.3 ("[E]ven in *Watson v. Jones*, . . . the Court[] stated that, regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." (quoting *Watson*, 80 U.S. (13 Wall.) at 722–23)). The Court's endorsement of the neutral-principles approach in *Jones* significantly buttressed this principle, and further supported its application where the "legally cognizable form[s]" or structures are embedded within church-related documents, such as corporate charters or even church constitutions. *See Jones*, 443 U.S. 603, 606.

Third, the *Watson* approach is *not* appropriate when "the nature of the religious organization or the identity of its decision-making body is disputed on the basis of religious doctrine." *Id.* at 1248–49. Where the "locus of control . . . [is] ambiguous," *Watson* deference "would appear to require 'a searching and therefore impermissible inquiry into church polity.'" *Jones*, 443 U.S. at 605 (quoting *Milivojevich*, 426 U.S. at 723).

Finally, our general preference in federal cases for resolving claims by applying neutral principles is further supported here by the fact that most claims in this case are based on state law. Oregon law would call for application of the state's neutral-principles approach if this matter were before a state court. *See Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 720–21 (Or. 2012) (outlining a neutral-principles approach after "reexamin[ing] the proper methodology for resolving church property disputes in Oregon" in light of the "new legal context for evaluating church property disputes under the First Amendment" provided by *Jones*).[5]

[5] The Supreme Court has not outlined one specific neutral-principles approach, and there may be significant variation in the approaches of various states. *See Jones*, 443 U.S. at 599–610; *see also Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 526–27 (8th Cir. 1995) (applying Missouri's neutral-principles approach and refusing to apply an element of Michigan's disparate approach). Additionally, other federal circuit courts have considered the appropriate state law to apply to resolve church property disputes when sitting in diversity. *See Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 92–94 (3d Cir. 1996) (applying New Jersey law, as predicted by federal court, to follow the state's neutral-principles approach); *Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 419 (3d Cir. 2012) (noting "Pennsylvania courts opt to apply neutral civil

In light of the preference to apply neutral principles to enforce secular rights where possible, the Oregon state law character of most of the claims in this case, and Oregon's adoption of the neutral-principles approach, we proceed to determine whether such an approach may be constitutionally applied in this case.

2.

It appears a neutral-principles approach "may resolve . . . the disputed . . . issues without significant constitutional difficulties," and is a proper means of resolving this dispute. *Kianfar*, 179 F.3d at 1249. The plaintiffs do not seek recourse to civil courts for resolution of a controversy over religious doctrine. Nor do they ask civil courts to decide whether a religious organization properly applied ecclesiastical rules in settling a leadership dispute, as was true in *Milivojevich*, 426 U.S. at 708, and of the one request for relief we held could not be decided by neutral principles in *Kianfar*, 179 F.3d at 1250. Rather, the plaintiffs here ask the courts to decide what amounts to a secular factual question: under Oregon law and the secular governing documents of UI, an Oregon nonprofit limited liability company, and SSSC, an Oregon nonprofit religious corporation, were the plaintiffs elected or designated to the disputed board positions? This question is quintessentially "susceptible to decision by neutral principles." *Id.* at 1249.

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law principles whenever possible to resolve such cases" before determining that such approach was improperly applied to an ecclesiastical question). Here, as in *Kianfar*, we do not seek to resolve *which* neutral-principles approach may be properly applied. Rather, our review is limited to the threshold constitutional question of whether the issues raised can be decided *at all* without violating the First Amendment. *See Kianfar*, 179 F.3d at 1248.

At this stage, the parties do not contest whether the plaintiffs meet the religious eligibility requirements for the disputed board positions, and the defendants "do not offer a religious justification" for their failure to seat the plaintiffs on the boards. *Bollard*, 196 F.3d at 947. The dispute, which "concern[s] the [d]efendants' actions, not their beliefs," turns entirely on "what the [defendants] *did*, . . . and the texts guiding [their] actions can be subjected to secular legal analysis." *Elvig*, 375 F.3d at 963, 968. As in *Bollard*, "[t]his is a restricted inquiry. Nothing in the character of th[e] defense will require a jury to evaluate religious doctrine or the 'reasonableness' of the religious practices followed . . . . Instead, the jury must make [only] secular judgments . . . ." *Bollard*, 196 F.3d at 950; *see also Elvig*, 375 F.3d at 963. As this dispute has been presented to us, it appears the district court can resolve it "by relying on state statutes . . . and the terms of corporate charters of religious organizations." *Kianfar*, 179 F.3d at 1249 (citing *Md. & Va. Eldership*, 396 U.S. at 367). Thus, there is "no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine." *Bollard*, 196 F.3d at 947. Under these circumstances, the availability of the neutral-principles approach obviates the need for ecclesiastical abstention.

C.

Even if ecclesiastical abstention would otherwise preclude resort to civil courts, the plaintiffs contend this dispute is susceptible to judicial review under the so-called "fraud or collusion" exception. *See Askew*, 684 F.3d at 418, 420 ("A doctrinally grounded decision made during litigation to insulate questionable church actions from civil court review

may indeed raise an inference of fraud or bad faith," and "[u]nder those circumstances, the integrity of the judicial system may outweigh First Amendment concerns such that a civil court may inquire into the decision."). Because we hold it is not apparent from the complaint that ecclesiastical abstention applies, we have no occasion to address the fraud or collusion exception here.

CONCLUSION

"[A]pplying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, [but] this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws." *Bollard*, 196 F.3d at 948. As this case has been presented to us, the defendants have not established that the plaintiffs' claims are barred by the ministerial exception, and the ecclesiastical abstention doctrine does not apply because the dispute is amenable to resolution by application of neutral principles of law. Thus, the district court erred in dismissing the plaintiffs' claims under the First Amendment.

For the reasons stated here and in the concurrently filed memorandum disposition, the judgment of the district court is vacated in part and affirmed in part, and the case is remanded to the district court.

VACATED IN PART, AFFIRMED IN PART AND REMANDED.

Each party shall bear its own costs on appeal.

APPENDIX D

NOT FOR PUBLICATION

FILED

JAN 06 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIBIJI INDERJIT KAUR PURI; RANBIR SINGH BHAI; KAMALJIT KAUR KOHLI; KULBIR SINGH PURI,

Plaintiffs-Appellants,

v.

SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; SIRI KARM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; ROY LAMBERT; SCHWABE, WILLIAMSON & WYATT, an Oregon Professional Corporation; LEWIS M. HOROWITZ; LANE POWELL PC, an Oregon Professional Corporation; UNTO INFINITY, LLC, an Oregon Limited Liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon non-profit corporation; DOES, 1 through 5,

Defendants-Appellees.

No. 13-36024

D.C. No. 3:10-cv-01532-MO

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief Judge, Presiding

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted March 10, 2016
Portland, Oregon

Before: FISHER, BERZON, and WATFORD, Circuit Judges.

The plaintiffs, individually and on behalf of Unto Infinity, LLC (UI), and Siri Singh Sahib Corporation (SSSC), brought claims alleging the defendants conspired to exclude them from certain management positions, convert millions of dollars in assets from entities under their control for personal benefit, and conceal their fraudulent conduct. In a concurrently filed opinion, we vacate the district court's dismissal of the plaintiffs' direct claims under the First Amendment. Here, we affirm the district court's dismissal of the plaintiffs' derivative claims and address the defendants' alternative theories for dismissal of the direct claims.

A. Derivative Claims

The district court dismissed all derivative claims, concluding the plaintiffs lacked derivative standing under Federal Rule of Civil Procedure 23.1(a).[1] The parties dispute the standard of review for dismissals based on Rule 23.1 standing, citing conflicting circuit precedent. *Compare Quinn v. Anvil Corp.*, 620 F.3d 1005, 1012 (9th Cir. 2010) (stating we review de novo whether a plaintiff has Rule 23.1

[1] Because Rule 23.1(a) provides a sufficient basis to dismiss all derivative claims, and because we affirm on that basis, we do not reach the alternative grounds for dismissal provided by the district court.

standing), *and Kona Enters., Inc. v. Estate of Bishop*, 179 F.3d 767, 769 (9th Cir. 1999) (same), *with Larson v. Dumke*, 900 F.2d 1363, 1364 (9th Cir. 1990) (stating we review a district court's determination of Rule 23.1 standing for abuse of discretion), *and Hornreich v. Plant Indus., Inc.*, 535 F.2d 550, 552 (9th Cir. 1976) (same). We need not resolve this conflict, because the district court did not err under either standard.

A "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association." Fed. R. Civ. P. 23.1(a). A number of factors are considered "in determining the adequacy of representation by a derivative plaintiff under Rule 23.1." *Larson*, 900 F.2d at 1367. As the plaintiffs concede, "the most important element to be considered is whether plaintiff's interests are antagonistic to those plaintiff is seeking to represent." 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1833 (3d ed. 2016). The district court found the plaintiffs have substantial interests antagonistic to UI and SSSC, the organizations they purport to represent. We agree.

First, the district court found the plaintiffs seek personal damages for lost compensation against all defendants, including UI and SSSC, of at least $200,000.

The plaintiffs' proposed but disallowed second amended complaint seeks personal damages in excess of $4 million, indicating the true scope of their economic antagonism is much greater than suggested by their operative pleadings.

Second, the district court found the plaintiffs have frequently been adverse to UI, SSSC and their subsidiary and affiliated entities in other litigation across multiple jurisdictions. To the extent the disputes underlying these various actions remain active, they create further economic antagonism. These numerous and contentious disputes also suggest a degree of "vindictiveness toward the defendants," another factor weighing against derivative standing. *Larson*, 900 F.2d at 1367.

Third, the plaintiffs' requested relief would leave them in complete control of the organizations whose interests they purport to represent, with the four plaintiffs as the only board members of SSSC and one of the plaintiffs as the sole board member of UI. The prospect of personally controlling organizations worth many millions of dollars dramatically increases "the relative magnitude of plaintiff[s'] personal interests as compared to [their] interest in the derivative action itself," *id.*, such that the plaintiffs' interests differ substantially from those of other members of the community UI and SSSC are intended to benefit.

For these reasons, we agree with the district court that the plaintiffs are not adequate derivative representatives under Rule 23.1(a). Accordingly, we affirm the district court's dismissal of the plaintiffs' derivative claims.

The plaintiffs argue in a conclusory manner that they should have been given leave to file a second amended complaint. Because the plaintiffs do not explain how amendment could have cured the Rule 23.1(a) defects, there was no abuse of discretion in dismissing the derivative claims with prejudice.

B. Alternative Grounds for Dismissal of the Direct Claims

Because we vacate dismissal of the direct claims under the First Amendment, we address the defendants' alternative arguments for dismissal of these claims. We review de novo dismissals under Rules 9(b) and 12(b)(6). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003). We review for an abuse of discretion the denial of leave to amend. *See AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 949 (9th Cir. 2006).

1. Unjust Enrichment Against the Lawyer and Law Firm Defendants

The plaintiffs asserted an unjust enrichment claim against Lane Powell, a law firm; Lewis Horowitz, an attorney at the firm; Roy Lambert, longtime legal counsel to Yogi Bhajan's companies; and Schwabe, Williamson & Wyatt (SWW),

Lambert's law firm, alleging it would be unjust for any of them to retain their attorney's fees.

In Oregon, the elements of the quasi-contractual claim of unjust enrichment are (1) a benefit conferred, (2) awareness by the recipient that she has received the benefit and (3) it would be unjust to allow the recipient to retain the benefit. *See Wilson v. Gutierrez*, 323 P.3d 974, 978 (Or. Ct. App. 2014).

The defendants argue this claim fails because the first amended complaint ("complaint") alleges that third persons – UI and SSSC – conferred benefits on these lawyers, not that the plaintiffs themselves did. The plaintiffs cite no authority supporting the proposition that a claim for unjust enrichment lies when the benefits in dispute were conferred by third persons rather than by the plaintiffs. The Restatement (Third) of Restitution and Unjust Enrichment §§ 47-48 (2011) sets out limited circumstances in which a plaintiff can pursue an unjust enrichment claim against a third party, but the plaintiffs do not argue their allegations fall under those provisions, and it is not self-evident that they do so.

Accordingly, the district court properly dismissed the unjust enrichment claim against the lawyer and law firm defendants. Because the plaintiffs do not identify what additional facts they would plead if they were granted leave to amend, the court did not abuse its discretion by denying leave to amend.

2. *Reynolds* Qualified Privilege for Lane Powell and Horowitz

The defendants argue any direct claims against the Lane Powell firm and Horowitz should be dismissed under *Reynolds v. Schrock*, 142 P.3d 1062, 1063 (Or. 2006), which "hold[s] that a lawyer may not be held jointly liable with a client for the client's breach of fiduciary duty unless the third party shows that the lawyer was acting outside the scope of the lawyer-client relationship." This rule, however, does not shield "actions by a lawyer that fall within the 'crime or fraud' exception to the lawyer-client privilege, OEC 503(4)(a)." *Id.* at 1069. Here, because the complaint alleges the services of Lane Powell and Horowitz were obtained to enable or aid in commission of a fraudulent plan, the *Reynolds* privilege does not apply. The defendants' argument therefore fails.

3. Legal Malpractice Claim Against Lambert and SWW

The plaintiffs allege a legal malpractice claim against Lambert and SWW. "In the traditional legal malpractice action, as in other tort actions in which there is a special relationship between the plaintiff and the defendant, the plaintiff usually must allege and prove (1) a *duty* that runs from the defendant to the plaintiff; (2) a *breach* of that duty; (3) a resulting *harm* to the plaintiff measurable in damages; and (4) *causation*, *i.e.*, a causal link between the breach of duty and the harm." *Stevens v. Bispham*, 851 P.2d 556, 560 (Or. 1993).

The plaintiffs have not satisfied this standard here, because they have not alleged a duty – i.e., an attorney-client relationship between themselves and the defendants. Although the complaint alleges the existence of an attorney-client relationship in a conclusory manner, such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The plaintiffs' alternative attempts to plead an attorney-client relationship also fail. The complaint, for instance, alleges these defendants represented Bibiji in negotiating a trademark licensing agreement. The complaint, however, does not allege a causal link between that representation and the harm alleged in the complaint. *See Stevens*, 851 P.2d at 560. Any attorney-client relationship that may have existed with respect to the trademark issues, therefore, is immaterial for purposes of the claims made in this lawsuit.

The plaintiffs alternatively contend they have pled an attorney-client relationship on the theory that Bibiji reasonably believed an attorney-client relationship existed between herself and the defendants. This argument fails because the complaint does not include allegations supporting an objectively reasonable belief in such a relationship. *See In re Conduct of Weidner*, 801 P.2d 828, 837 (Or. 1990) ("[T]o establish that the lawyer-client relationship exists based

on reasonable expectation, a putative client's subjective, uncommunicated intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent; by evidence placing the lawyer on notice that the putative client had that intent; by evidence that the lawyer shared the client's subjective intention to form the relationship; or by evidence that the lawyer acted in a way that would induce a reasonable person in the client's position to rely on the lawyer's professional advice." (footnote omitted)).

Finally, the plaintiffs rely on Oregon law providing that a lawyer owes a duty to act as a reasonably competent attorney in protecting and defending the interests not only of the client but also of "those who may be considered intended beneficiaries of the duty to the client." *Onita Pac. Corp. v. Trs. of Bronson*, 843 P.2d 890, 896 (Or. 1992). The plaintiffs, however, have not alleged they were intended beneficiaries of the defendants' representation. This argument is therefore unpersuasive as well.

For these reasons, the district court properly dismissed the plaintiffs' legal malpractice claim against Lambert and SWW. As the plaintiffs have not shown what additional facts they would allege were they given leave to amend, the district court did not abuse its discretion by dismissing this claim with prejudice.

4. Negligent Misrepresentation Claim Against Lane Powell and Horowitz

The plaintiffs allege a negligent misrepresentation claim against Lane Powell and Horowitz. The district court dismissed this claim for failure to allege a duty. Under Oregon law, "a negligence claim for the recovery of economic losses caused by another must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm." *Id.* (footnote omitted). The plaintiffs contend Lane Powell and Horowitz owed a duty to the plaintiffs because they owed a duty to UI and SSSC and, as a result, they owed a duty to them as UI's and SSSC's putative board members. The authority they cite in support of this theory, however, holds only that an attorney's duty to a client extends to "those who may be considered intended beneficiaries of the duty to the client." *Id.* They fail to present any legal or factual support for the proposition that they were the intended beneficiaries of the lawyer-client relationship between Lane Powell and Horowitz on the one hand and certain corporate entities relating to UI and SSSC on the other. The plaintiffs' argument therefore fails. The district court properly dismissed this claim, and given the plaintiffs' failure to identify additional facts they would plead to cure this

defect were they given leave to amend, the court did not abuse its discretion by dismissing the claim with prejudice.

5. Statute of Limitations as to Claims Against Lane Powell and Horowitz

The complaint alleges Lane Powell and Horowitz are liable for fraud and negligent misrepresentation in connection with the fraudulent conversion of UI's and SSSC's assets to the owners of Golden Temple Management, LLC (GTM). The defendants argue the plaintiffs' fraud and negligent misrepresentation claims against Lane Powell and Horowitz are untimely under Oregon's two-year statute of limitations governing fraud claims. That limitations period is subject to a discovery rule. *See* ORS 12.110(1) ("[I]n an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud."); *Bell v. Benjamin*, 222 P.3d 741, 744 (Or. Ct. App. 2009) ("For purposes of that statute, a plaintiff 'discovers' the fraud 'when the plaintiff knew or should have known of the alleged fraud.' 'Whether the plaintiff should have known of the alleged fraud depends on a two-step analysis. First, it must appear that plaintiff had sufficient knowledge to excite attention and put a party upon his guard or call for an inquiry.' 'If plaintiff had such knowledge, it must also appear that a

reasonably diligent inquiry would disclose the fraud.'" (citations omitted) (quoting *Mathies v. Hoeck*, 588 P.2d 1, 2-3 (Or. 1978))).

But "[a] claim may be dismissed as untimely pursuant to a 12(b)(6) motion 'only when the running of the statute of limitations is apparent on the face of the complaint.'" *United States ex rel. Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013) (alteration omitted) (quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010)).

Here, the alleged misconduct that forms the basis of this claim took place on or before November 2008. The complaint alleges the plaintiffs learned about the transfer of UI's assets to GTM by January 2010. It also alleges Lambert testified in a February 2010 deposition about the fraud in a manner that, in the defendants' view, would have placed the plaintiffs on inquiry notice of the fraud. Under that view, the complaint was not timely filed. The plaintiffs, however, maintain they first became aware of Lambert's February 2010 testimony sometime later, and that Lambert's testimony revealed only his actions, not those of Lane Powell and Horowitz. It is not apparent from the face of the complaint that the plaintiffs were put on inquiry notice of fraud by Lane Powell and Horowitz by February 2010, nor is it apparent a reasonably diligent inquiry would have disclosed the alleged fraud at that time. The defendants' argument therefore fails. The defendants' arguments

with respect to the plaintiffs' aiding and abetting claims against Lane Powell and Horowitz fail for the same reason.

6. Statute of Limitations as to Lambert and SWW

The complaint includes claims for breach of fiduciary duty, fraud, negligent misrepresentation, tortious interference with prospective economic advantage and legal malpractice against Lambert and SWW arising from the allegedly wrongful exclusion of the plaintiffs from the UI and SSSC boards. The defendants argue these claims are barred by the applicable two-year statute of limitations. *See* ORS 12.110(1). The claims against Lambert were filed in December 2010; those against SWW were added in March 2012.

(a) Breach of Fiduciary Duty, Fraud and Negligent Misrepresentation

Under Oregon's discovery rule, which the defendants agree applies to the plaintiffs' fiduciary duty, fraud and negligent misrepresentation claims, the question is whether the plaintiffs knew or, in the exercise of reasonable care, should have known, facts which would make a reasonable person aware of a substantial possibility that each of the three elements of legally cognizable harm (harm, causation, and tortious conduct) exists. *See Oregon Life & Health Ins. Guar. Ass'n v. Inter-Reg'l Fin. Grp., Inc.*, 967 P.2d 880, 883 (Or. Ct. App. 1998).

The defendants argue the plaintiffs knew or should have known they were tortiously excluded from the UI and SSSC boards by 2005, more than two years before they filed claims against Lambert and SWW. The face of the complaint, however, shows only that the plaintiffs were aware in 2005 that they had been denied positions on the boards, not that they were being denied board positions because of fraud or otherwise tortious conduct. The statute of limitations defense therefore is not apparent from the face of the complaint. *See Air Control Techs.*, 720 F.3d at 1178.

(b) Tortious Interference

A claim for tortious interference accrues when the economic injury occurs. *See Cramer v. Stonebridge Inn, Inc.*, 713 P.2d 645, 647 (Or. Ct. App. 1986). If the "plaintiffs' claim is not based on fraud or deceit, the accrual of the claim is not subject to a rule of discovery." *Butcher v. McClain*, 260 P.3d 611, 614 (Or. Ct. App. 2011). Here, however, the plaintiffs' interference claim is based on Lambert and SWW's concealment of facts regarding business and board operations. Thus, the discovery rule applies, and the defendants' statute of limitations argument fails for the reasons stated in part (a) above.

7. Pleading with Particularity Under Rule 9(b)

The district court dismissed the following claims under Federal Rule of Civil Procedure 9(b): fraud, negligent misrepresentation, federal Racketeer Influenced and Corrupt Organizations Act (RICO) and Oregon Racketeer Influenced and Corrupt Organizations Act (ORICO) as to all defendants except Lambert, Sopurkh and Kartar; unjust enrichment as to all defendants except Kartar, Sopurkh and Karam; legal malpractice as to all defendants; and aiding and abetting as to all defendants. The plaintiffs challenge those rulings on appeal. The defendants, on the other hand, contend Rule 9(b) dismissal is appropriate as to all defendants and all claims.

Under Rule 9(b), a plaintiff "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). This means the plaintiff must allege "the who, what, when, where, and how of the misconduct charged," including what is false or misleading about a statement, and why it is false. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (quoting *Vess*, 317 F.3d at 1106). "[M]ere conclusory allegations of fraud are insufficient." *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), *overruled on other grounds as stated in Flood v. Miller*, 35 F. App'x 701, 703 n.3 (9th Cir. 2002). Broad allegations that include "no particularized supporting detail" do not suffice, *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001), but "statements of

the time, place and nature of the alleged fraudulent activities are sufficient," *Wool*, 818 F.2d at 1439. Allegations of fraud based on information and belief may suffice as to matters peculiarly within the opposing party's knowledge, so long as the allegations are accompanied by a statement of the facts upon which the belief is founded. *See id.* We apply Rule 9(b) to the plaintiffs' various averments of fraud.[2]

[2] The plaintiffs point out, correctly, that "there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify *false statements* made by each and every defendant," because "'[p]articipation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980)). But allegations of conspiracy do not excuse the plaintiffs from offering detailed and particularized allegations regarding each defendant's role in the fraud. As *Swartz* explains, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Id.* at 764-65 (alterations in original) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1439 (M.D. Fla. 1998)). "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, 'identif[y] the role of [each] defendant[] in the alleged fraudulent scheme.'" *Id.* at 765 (alterations in original) (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989)). "There is no flaw in a pleading, however, where collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct." *United States ex rel. Swoben v. United Healthcare Ins. Co.*, ___F.3d ___, 2016 WL 7378731, at *17 (9th Cir. Dec. 16, 2016).

Claim 1 – Declaratory Relief. The defendants do not distinctly challenge these allegations and the district court did not address the issue. We assume this claim satisfies Rule 9(b).

Claim 2 – Breach of Fiduciary Duty. The plaintiffs raise solely a derivative claim of breach of fiduciary duty. Because this claim fails under Rule 23.1(a), we need not address the defendants' arguments under Rule 9(b).

Claim 3 – Fraud. The complaint's allegations of fraud in part allege the circumstances of fraud with sufficient particularity. The complaint includes minimally sufficient allegations against Sopurkh (¶ 53.1), Kartar (¶ 53.4) and Lambert and SWW (¶¶ 53.5, 55, 55.2). As to the remaining defendants, however, the complaint includes only broad and conclusory allegations regarding the circumstances of fraud, without supporting particularized detail. *E.g.*, ¶¶ 52.1, 53.1, 53.2, 53.3, 53.6, 54, 56.2, 57, 57.1, 57.2, 57.3. For example, the complaint alleges the defendants "falsely and fraudulently represented to BIBIJI that she was not on the Board of Managers of UI and had no management authority at UI." ¶ 52.1. It further alleges that "[s]aid Defendants adopted and ratified the acts of the others in fraudulently exclud[ing] BIBIJI from participating in the management of UI." ¶ 52.1. These allegations lack the particularized detail Rule 9(b) demands. *See Ebeid*, 616 F.3d at 1000 (holding a complaint's "general allegations – lacking

any details or facts setting out the who, what, when, where, and how of the [allegedly fraudulent conduct]" – were insufficient to satisfy Rule 9(b) (internal quotation marks omitted)); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1057 (9th Cir. 2011) (holding a complaint failed to satisfy Rule 9(b) where the allegations were lacking in detail); *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001) (holding a "broad claim" with "no factual support" was insufficient to satisfy Rule 9(b)).[3]

We recognize other portions of the complaint allege additional details (¶¶ 20 – 27.18). The portion of the complaint dealing explicitly with the fraud claim (¶¶ 51-59), however, does not cross reference these earlier allegations in any intelligible manner. The complaint's vague references to these details, using language such as "as alleged above" (¶¶ 57.1, 57.2), are insufficient in a case such as this, involving a lengthy and difficult to decipher pleading.

The complaint also includes a number of allegations made on information and belief. Such allegations are appropriate regarding matters known only to the defendants, but only insofar as the complaint also explains the basis for the belief.

[3] The chart the plaintiffs included in ¶ 29 of the complaint does not supply all of the requisite details.

See Wool, 818 F.2d at 1439. Here, although the complaint sometimes satisfies this requirement (*e.g.*, ¶ 55.2), it often does not (*e.g.*, ¶ 53.6).

In sum, the fraud claim fails under Rule 9(b) except as to Sopurkh, Kartar, Lambert and SWW.[4]

However, because the complaint contains allegations elsewhere that are more specific, and because existing averments come close to Rule 9(b) adequacy in some respects, it is not clear the plaintiffs could not cure the deficiencies by further amendment. The plaintiffs therefore shall be granted leave to amend. *See Vess*, 317 F.3d at 1107-08 ("As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice," and "'[l]eave to amend should be granted if it appears at all possible that the plaintiff can correct the defect.'" (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1998))). This case does not involve a "*repeated* failure to cure deficiencies by amendments previously allowed." *Foman v. Davis*, 371 U.S. 178, 182 (1962)

[4] With respect to the fraud claim, the complaint does include a relatively specific allegation regarding Peraim and Karm – their signing the SSSC consent minutes denying the existence of a letter from Yogi Bhajan naming the plaintiffs to the SSSC board (¶ 55.1). But the complaint offers only conclusory allegations to suggest this conduct was fraudulent. *See* ¶ 56.2 (alleging in a conclusory manner that the defendants knew their representations to be false). The complaint therefore fails to allege a plausible or particularized claim against Peraim and Karm as required by Rules 8 and 9(b).

(emphasis added). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Claim 4 – Negligent Misrepresentation. The defendants argue, and the plaintiffs do not contest, that Rule 9(b) applies to this claim. The complaint's allegations concerning negligent misrepresentations are uniformly conclusory. They include only broad reference to allegations made in previous paragraphs, lacking particularized detail of any alleged misrepresentations. *E.g.*, ¶¶ 61, 61.2, 62, 62.1, 62.2, 65, 65.1. The only allegation of misrepresentation made with any particularity concerns Kartar's and Karam's false claims of ownership in Golden Temple trademarks (¶ 61.9), but that misrepresentation does not appear to be a part of the claims raised in this lawsuit. The negligent misrepresentation claim thus fails under Rule 9(b) as to each defendant. For similar reasons stated in the analysis for Claim 3, however, this claim shall be dismissed without prejudice.

Claim 5 – Tortious Interference with Prospective Economic Advantage. Because this claim is grounded in fraud, it is subject to Rule 9(b). *See Vess*, 317 F.3d at 1103-04 (explaining that "Rule 9(b) applies to 'averments of fraud' in all civil cases in federal district court"). The allegations regarding this claim are

minimally sufficient with respect to Sopurkh (¶ 70), Lambert (¶ 70.1) and SWW (¶ 70.1). With respect to the remaining defendants, however, the complaint once again alleges the circumstances of fraud in broad and conclusory terms, lacking particularized detail. *E.g.*, ¶¶ 68.2, 68.3, 70, 70.2, 70.4, 70.5, 70.6. The claim therefore fails under Rule 9(b) with respect to defendants other than Sopurkh, Lambert and SWW. Because the fraudulent conduct alleged in this claim overlaps in part with allegations made as to Claim 3, this claim too shall be dismissed without prejudice.

Claim 6 – Conversion. The plaintiffs' conversion claim is entirely derivative. Because the derivative claim fails under Rule 23.1(a), we need not address the defendants' Rule 9(b) arguments.

Claim 7 – Unjust Enrichment. Because the unjust enrichment claim is based on fraud, it too is subject to Rule 9(b). *See Vess*, 317 F.3d at 1103-04. The complaint fails to allege the underlying circumstances of fraud with particularity, offering only broad and conclusory allegations lacking in particularized detail. *E.g.*, ¶¶ 82-89. The complaint therefore fails under Rule 9(b) as to each defendant. As with the other claims that are deficient under Rule 9(b), it is *possible* that the more detailed allegations contained in ¶¶ 20 through 27.18 could, if more clearly

connected to this claim, provide sufficient detail to satisfy Rule 9(b), so leave to amend should have been granted.

Claim 8 – RICO and ORICO. The complaint's RICO and ORICO allegations suffer from similar infirmities. A number of the most important allegations are broad and conclusory, lacking details particularized to each defendant. *E.g.*, ¶¶ 99.1, 100.1, 101.2, 101.5, 102, 103, 106.15, 106.16, 106.18, 106.19. Others allege facts based on information and belief without providing a basis for the belief (¶ 101.5). By contrast, the complaint includes minimally sufficient factual detail regarding Sopurkh (¶¶ 106.7, 106.8, 106.9) and against Lambert and SWW (¶¶ 105.1, 106.6, 106.10, 106.11). The RICO and ORICO claims therefore fail under Rule 9(b) as to each defendant other than Sopurkh, Lambert and SWW.

Claim 9 – Legal Malpractice. To the extent the legal malpractice claim is derivative, we affirm dismissal under Rule 23.1(a). To the extent the complaint alleges a direct claim, we affirm dismissal based on the plaintiffs' failure to allege an attorney-client relationship between themselves and Lambert and SWW. We therefore need not address the defendants' Rule 9(b) arguments.

Claim 10 – Aiding and Abetting. The aiding and abetting claim against Horowitz and Lane Powell includes some allegations that are too conclusory to

satisfy Rule 9(b). *E.g.*, ¶¶ 129, 130. The allegations in ¶ 131, however, are sufficiently detailed to satisfy the rule. The defendants' Rule 9(b) arguments regarding the aiding and abetting claim therefore fail.

C. Disposition

In sum, we vacate dismissal of the plaintiffs' claims under the First Amendment for the reasons stated in our concurrently filed opinion. We affirm dismissal with prejudice of all derivative claims under Rule 23.1(a). With respect to the plaintiffs' direct claims, we further hold as follows:

The district court shall dismiss claim 3 (fraud) without prejudice against all defendants other than Sopurkh, Kartar, Lambert and SWW for failure to plead the circumstances of fraud with requisite particularity under Rule 9(b) or plausibility under Rule 8(a).

We affirm the dismissal with prejudice of claim 4 (negligent misrepresentation) as to Lane Powell and Horowitz based on the plaintiffs' failure to allege a duty. As to the remaining defendants, the district court shall dismiss the claim without prejudice for failure to plead the circumstances of fraud with requisite particularity under Rule 9(b).

The district court shall dismiss claim 5 (tortious interference) without prejudice against all defendants other than Sopurkh, Lambert and SWW for failure to plead the circumstances of fraud with particularity under Rule 9(b).

We affirm the dismissal with prejudice of claim 7 (unjust enrichment) against defendants Lambert, SWW, Horowitz and Lane Powell for failure to state a claim. The district court shall dismiss the claim without prejudice as to the remaining defendants for failure to plead the circumstances of fraud with particularity under Rule 9(b).

The district court shall dismiss claim 8 (RICO/ORICO) without prejudice against all defendants other than Sopurkh, Lambert and SWW for failure to plead the circumstances of fraud with particularity under Rule 9(b).

We affirm the dismissal with prejudice of claim 9 (legal malpractice) against Lambert and SWW for failure to allege an attorney-client relationship.

We vacate the dismissal of claim 10 (aiding and abetting). This claim minimally satisfies Rule 9(b).

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BIBIJI INDERJIT KAUR PURI, RANBIR SINGH BHAI, KAMALJIT KAUR KOHLI, and KULBIR SINGH PURI, Plaintiffs, vs. SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; ROY LAMBERT; UNTO INFINITY, LLC, an Oregon limited liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon nonprofit corporation; DOES 1-5; SIRI KARM KAUR KHALSA; SCHWABE, WILLIAMSON & WYATT, an Oregon professional corporation; LANE POWELL, an Oregon professional corporation; and LEWIS M. HOROWITZ, Defendants.	Case No. 3:10-cv-01532-MO October 11, 2013 Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT JUDGE

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♀

(P R O C E E D I N G S)

THE CLERK: Your Honor, this is the time and place set for oral argument in Case No. 3:10-cv-1532-MO, Puri, et al. v. Khalsa, et al.

Counsel, can you introduce yourself for the record.

MR. SONI: Good morning, Your Honor. Surj Soni on behalf of plaintiffs.

MR. McGRORY: John McGrory on behalf of Unto Infinity, LLC; Siri Singh Sahib Corp; and the individuals Sopurkh Kaur Khalsa; Peraim Kaur Khalsa; Kartar Singh

Khalsa; Karam Singh Khalsa. And that's it, Your Honor.

And I have Paul Southwell with me, too. We're going to be splitting the argument, Your Honor.

MR. CROMWELL: Ralph Cromwell, representing Defendant Schwabe, Williamson & Wyatt, Your Honor.

MR. VOORHEES: Steve Voorhees, representing Defendant Roy Lambert. And I also have Candace Broock with me, who represents Roy Lambert, and will be handling part of the argument, Your Honor.

MR. ARELLANO: Your Honor, Joseph Arellano, representing newly added defendants Lane Powell and Lewis Horowitz.

MS. JOHNSON: Leslie Johnson for Defendant Siri Ram Kaur Khalsa.

MS. SCHROER: Janet Schroer from Hart Wagner, representing Schwabe, Williamson & Wyatt. And I'm here with Ralph Cromwell, and we're going to split up the argument.

THE COURT: Thank you all.

Let me go through my tentative thoughts, and we'll take oral argument from there.

There are three sort of broad conspiracies alleged in the first amended complaint, and I'm only briefly summarizing them, so don't panic if I don't get everything that's alleged in the conspiracy in this brief summary. It's just a way to differentiate them somewhat.

The first is a conspiracy to exclude certain of the plaintiffs from management of UI and SSSC. And that involves -- centers on the consent minutes and the memo of understanding as to subsequent events.

The second conspiracy alleges -- that's alleged is

essentially to usurp assets of EWTC for personal benefit, both by transfer or sale of those assets and by unjust compensation, voting in higher compensation later.

And the third is a conspiracy to cover up the change in corporate governance, corporate governing documents, and to cover up the transfer of EWTC assets.

There is, as I will discuss in a minute, an important correlative state court piece of litigation that ended in formal settlement finally adjudicated in state

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court. So the UI defendants have filed a motion to dismiss while others have made the same argument. I'm only focusing on theirs because I think it was the one most -- just happened to be the one most helpful to me on these points, but the points run across other defendants. And in their motion to dismiss, they raise several sort of systemic challenges to the claims here -- well, starting with the derivative claims here.

So we have, as you are very familiar, both derivative claims and direct claims. And I'm going to start with the systemic challenges raised to the derivative claims.

The first is standing, and that centers on an Oregon statute for who can bring derivative actions. And there are two in play: the one governing who can bring a derivative action against an LLC; and the other for who can bring such an action against a nonprofit corporation. And basically for our purposes, the LLC requires that a person be a member; and the nonprofit corp., that the person be a director.

We talked last time about the plaintiffs' argument that while they -- in terms of their derivative action against SSSC, which would require them to have been directors -- excuse me. I want to make sure I get the statute right. The statute governing SSSC would be 65.174

for nonprofit corps. So when we discussed this last time, and again this time, we all understand, it's agreed upon that in fact the technical requirements of that statute are not met, but the argument made by plaintiffs is that while they're not directors, they should have been made such. And therefore it's a bit of a -- I won't call it circular, but it's an argument that essentially says the only reason we don't meet the requirements has to do with the very nature of the litigation; therefore, we should be deemed to have standing. I was sympathetic to that argument last time. I remain somewhat sympathetic to it now, in the sense of standing under 65.174.

The derivative claims against UI require that plaintiffs, in order to have standing, be members. They have -- they're not, and they haven't provided any legal basis for disregarding UI's specific organizational structure. The statute is very clear. So I'm inclined -- as I said, these are my tentative thoughts. I'm inclined to say no standing in a derivative action against UI.

That's the Oregon statute on standing. Of course, we're in federal court, and that brings into play 23.1, both in direct federal actions and diversity cases that still apply. And that's a sort of a more equitable look at whether the facts support the particular derivative plaintiff bringing that kind of action. And it looks at a

variety of factors, including economic antagonism, other litigation, the magnitude of the derivative plaintiffs' personal interest compared to the scope of litigation, evidence of vindictiveness in either direction, but particularly by plaintiff, derivative plaintiff against putative defendants, and any support or other evidence of alignment between the derivative plaintiffs and other shareholders.

I've taken a look at those factors in light of this litigation, and it's my view that plaintiffs cannot fairly and adequately bring these claims in a representative capacity. They do have in this very action direct claims against UI and SSSC. It doesn't really matter -- they make the argument that they are essentially family of YB, I'll call him, and their intimate past acquaintance with him doesn't matter for their ability to fairly and adequately bring claims in a representative capacity.

There are claims brought by Bibiji that create direct economic antagonism here and, at a minimum, the claim that a UI subsidiary has falsely claimed ownership of certain intellectual property brings in some of the other litigation mentioned in other districts as a form of inconsistent or economically antagonistic lawsuits elsewhere.

So I think, for an abundant number of reasons, the

facts of this case do not support standing under 23.1.

The second systemic argument is res judicata, and

that's how you tell whether a lawyer is over 40 or not, if he still calls it res judicata as opposed to issue preclusion or claim preclusion. When I ask my law clerks to give me a memo on res judicata, it's like saying you like Elton John in this era.

So here it's all about the state court litigation, and is there an identity of parties there. And that has a lot to do with just how that litigation played out, what the claims were, how the state judge viewed the sort of litigative standing of the plaintiffs in that action compared to ours.

So the defendants contend that the parties are the same in the two actions; that the plaintiffs in the state court case asserted the same derivative claims against the individual UI defendants for the same conduct, or could have asserted the claims, which is another form of claim preclusion.

We have in the state court action this sort of unusual fact of the State itself was involved and asserted its interests in overseeing charitable conduct in the state of Oregon, and signed off on the settlement as in the best interest of the institutional entities here.

So I tentatively agree with those arguments that

the issues are the same, that the State and private plaintiffs in that case pursued claims on behalf of the same charitable entities, including in the state litigation claims were pursued by them on behalf of SSSC and UI; that they were in the state court action -- that is, SSSC and UI -- were nominal defendants and parties to the settlement agreement, and that the settlement agreement released all

claims. I would tentatively find that in that case both claim preclusion and issue preclusion bar plaintiffs' derivative claims here.

The third systemic challenge raised is mootness. And so there are three main arguments for mootness: one, that the individual UI defendants have resigned from the board or been replaced; second, that UI and SSSC have settled and released all their claims -- these are derivative claims we're talking about, so UI and SSSC have settled and released all their claims with respect to the individual UI defendants, there are no longer any claims left; that the comprehensive settlement has forestalled any occasion for meaningful relief through a kind of a short pathway that involves the agreement to indemnify, so that, as is obvious, if you obtain relief and the derivative claim involves UI or SSSC indemnifying individuals, then you don't get meaningful relief on behalf of UI or SSSC.

Plaintiffs' essential argument here is that at

least as to mootness and then as to the decisions made subsequent to that in the settlement agreement and in the indemnity agreement by the board, that it's the wrong board, that it's all invalid because the current board lacked the legal authority to do what they did, it should have been different people on the board. And that is not the established principle of directors' authority when there's been a challenge to their right to be on the board. They serve as the de facto board under corporate law, and their decisions, unless otherwise voided, are not improper that way.

So my own tentative view is that because of the comprehensive settlement agreement, indemnity agreement and the makeup of a board that doesn't contain people being challenged, that there is no live controversy, and the derivative claims are moot.

Those are the systemic challenges to the derivative claims. There's also systemic challenges to several of the direct claims: the first claim for relief, the declaratory relief; the second for breach of fiduciary duty; the fourth for negligent misrepresentation; and the fifth for tortious interference.

And this systemic argument against all of those is brought by UI and SSSC, not by the individual defendants, and it rests on factual and legal aspects. The factual

aspect here is actually agreed upon.

And so I should say at the outset that the systemic challenge we're talking about is the First Amendment, free exercise and no entanglement challenge. And the factual element is actually asserted in the first amended complaint, which is that the organizations involved are religious organizations, and that the managers and directors of both UI and SSSC are required to be what Anglo law calls ministers coming within a variety of cases about that subject.

So I don't see any real factual dispute that the setting is one where the First Amendment cases would apply, and so the legal argument is just a series of sort of concentric circles about the case law out there.

The first argument just rests on general First Amendment principles that courts are not to inject

themselves into the kinds of decisions such as which ministers ought to be running religious institutions, and then sort of getting more specific with each circle.

The second argument is that the Kedroff and Serbian cases -- fascinating cases -- stand for the proposition that in exactly this kind of case, the Supreme Court has reversed state courts, finding that state law required application of otherwise neutral state laws where it would require resolution of quintessentially religious

controversies. And so I think that's correct.

The third is that Hosanna-Tabor bars the above-mentioned claim.

I'll say that in the Ninth Circuit, the ministerial exception, if you'll call it that, applied in Hosanna-Tabor, predates Hosanna-Tabor and, in fact, has been held to be generally applicable not just to Title VII cases, but across the board to state laws that would require a court to decide which minister should lead in any sort of activity of religious institutions.

And the fourth argument made is that I already said this once, and I should have done it with prejudice last time, and I shouldn't change my mind this time.

So I'm inclined to agree that particularly in light of Hosanna-Tabor and Kedroff and the Serbian cases, that this is an area where what is being asked of the Court, on these institutional claims at least, given the allegations in the first amended complaint that these are religious institutions run by religious leaders, that the Court -- what's being asked is that I pick winners among

contested sort of who ought to be the religious leaders of this organization. And I think the First Amendment flatly denies me the authority to do that.

So those are the systemic challenges. And I guess what might be helpful before I take up pleading challenges

to the more specific claims is to hear any further argument on those systemic challenges.

Mr. Soni, all of my thoughts except for standing under the Oregon statute for SSSC have put the ball in your court. I'll hear from you first.

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THE COURT: Here's the issue that we're really talking about is is there any reason to believe that the current board, if they thought a billion dollars was sitting out there, that they should go after it in the best interests of the board, that they'd have some disincentive to do so. And so that -- you know, they've got to have some bias, some conflict of interest, something like that, and I haven't heard anything like that about the current board.

What I hear is that they're not the right people, they're not the ones chosen, but that doesn't get you there. You've got to show me why they wouldn't pursue fraudulently stolen assets on behalf of the entities if they thought it was out there.

MR. SONI: If you look at the nature of the settlement that occurred with the gang of four, three of them received money, rather than paying back any money, in order to encourage them to give up their board seats. The fourth paid back a fraction of what he had taken and the value that he received, and received -- and all four of them received indemnification in order to turn over control.

The plaintiffs in the state court action moved, claiming special standing. They were successful and the state court was still in the process of formulating an appropriate remedy.

Now, I understand that the argument that the gang of four and others would make is First Amendment, the Court couldn't fashion a remedy, but that's not true. Neither Hosanna-Tabor nor any other case says that the Court cannot require a religious entity to comply with its fundamental corporate charter, which does not involve questions of religious decision. None of the issues involved here involve questions of religious decision. The gang of four converted assets, breached their fiduciary duties. Those were facts that have been found.

THE COURT: Thank you.

I think I understand your argument on Rule 23.1. We're going to move on to the specific claims in just a moment.

Any response any defendant wishes to make on the systemic claims?

MR. CROMWELL: Your Honor, Ralph Cromwell, representing Schwabe Williamson & Wyatt.

Just a very small point that you've sort of touched on here about whether demand is excused or demand is futile. We filed a short pleading this morning, asking you

to take judicial notice that Unto Infinity, the entity, suing in its own name, suing on its own behalf, has filed

suit in Multnomah County against my client, Schwabe Williamson & Wyatt, seeking to pursue these same claims. So this is not a situation where not only is demand not futile, because if they made a demand, the board would be disinterested and able to pursue it, but it's a situation where the entity and its board have in fact already done so. And I don't see how demand can be futile when the entity, suing in its own behalf, pursues the exact claim she is saying I demand they bring.

Now, I want to be candid with you. This is not a recent development. This action was filed some time ago. It's been pending so long that -- almost two years, that in fact it's been resolved.

We're a new party here. We did not have an opportunity to pursue -- participate in the last round of motions, but on the fundamental issue of is demand excused and is demand futile, I would ask you to take judicial notice that in fact it can't be futile because they're doing exactly what she would have to demand that they do.

Thank you.

THE COURT: Just to be precise, you're probably not asking me to take judicial notice of your argument, but to take judicial notice of the pleadings?

MR. CROMWELL: Yes, the existence of the lawsuit.

THE COURT: The particular pleadings?

MR. CROMWELL: Yes.

THE COURT: And that's in your motion. Which pleadings are you asking me to take judicial notice of?

MR. CROMWELL: The complaint, Unto Infinity suing in its own behalf, bringing the malpractice --

THE COURT: That's all right. I mean, I always am willing to take judicial notice of filed complaints in related state court pleadings. That's classic judicial notice. I grant your request to take judicial notice of the complaint.

MR. CROMWELL: Thank you.

MR. VOORHEES: Your Honor, Steve Voorhees. Roy Lambert is also a party in that same lawsuit, and I think I heard you indicate that there had not been the First Amendment argument presented by other parties, including Lambert. And I, as I was writing down notes, I do note that our motion G on the intentional interference claim does include the Hosanna-Tabor argument, Your Honor.

THE COURT: Thank you.

Let me talk about the specific -- well, let me sort of split this in pieces, then. I stand by the tentative comments I made earlier, and those will be my actual rulings on the systemic arguments. I find the

derivative claims barred by res judicata, as I have tried to separate it out into claim and issue preclusion, mootness.

I find a standing issue sufficient to find no standing under Rule 23.1. That really sort of avoids the need for any ruling on 65.174 and 63.801, although I clearly find no standing in the derivative suits brought against UI under ORS 63.801.

MR. McGRORY: Do you want to hear argument on that other statute issue, or do you want to leave it the way it is?

THE COURT: I think if you win three ways, you

shouldn't reach for four.

MR. McGRORY: Thank you, Your Honor.

THE COURT: The First Amendment issue we discussed isn't an argument against derivative claims, it's against direct claims, specifically the first, second, fourth and fifth claims. I reject the argument that a variety of cases, including but not limited to Kedroff, Serbian and Hosanna-Tabor, bar the relief side of those claims, and grant the motion to dismiss those claims on the basis of those First Amendment cases.

What remains are a series of claims subject to motions to dismiss based on what you might call a pleading argument as opposed to a legal argument, as opposed to an argument about res judicata or First Amendment.

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So my first job is to determine what pleading standard applies, and that's really a difference between whether the fraud pleading standard applies to many of these or not. The case -- the claims for the most part sound in fraud, and normally would invoke the heightened pleading standard of Rule 9(b), Iqbal-Twombly and the like.

There is a case, Wool v. Tandem Computers, in which an exception is recognized, where the plaintiff asserts that it's the defendants who really have access to the information, and that the knowledge necessary to heighten the pleadings under Iqbal-Twombly is peculiarly within the opposing party's knowledge.

In my view, that exception manifestly does not apply here. One, we've had a boatload of discovery in the state court proceedings on -- related to these factual assertions, and that's gone on far enough to be concluded;

and two, these are not telephone owners suing AT&T. These are people with their own avenues of connection to the institutions involved. It's not enough just to say that a plaintiff wouldn't know about the secret fraudulent conversations of an inventor, because that would be an exception and would swallow the rule of 9(b) pleading.

So here I don't think the facts of this case justify invoking what I'll call the Wool exception, and therefore the heightened pleading standard for fraud

THE COURT: Just so I'm clear, you're not

alleging -- and I apologize for slightly rephrasing the hypothetical, but if the $150 million were not derivative, if it were a separate direct claim brought by someone nonderivatively for a minister embezzling money from a church, I don't hear you saying that that kind of claim would be barred by the First Amendment.

MR. McGRORY: We would have to look to see what the basis for the claim is. The only claim --

THE COURT: Embezzlement. That's not barred by those --

MR. McGRORY: I would agree, I would agree. But the --

THE COURT: So your real argument is just that it's not direct, it's derivative?

MR. McGRORY: Yes, it's absolutely derivative.

But the other part of it is the other relief asked for -- in all the claims you've mentioned, there's two types of relief: One, they want on the boards and get paid for their board service, which I had thought when you granted the motion on First Amendment, I really think that applies

to all of their claims. I don't think you need to --
THE COURT: Well, just so I'm clear, and I don't want to miss one, you're contending that the relief sought in Claim 3 for fraud is either, one, barred by the First Amendment or -- which is essentially injunctive relief, or

two, money sought derivatively on behalf of the entities. That's Claim 3, right?
MR. McGRORY: Almost.
THE COURT: I believe the answer is just yes.
MR. McGRORY: Technically, it's not, but --
THE COURT: Help me out, then.
MR. McGRORY: The First Amendment, there's two parts of it. One is injunctive relief, and the other part of it is being paid a salary because you would make them -- if you make them -- if you make them a director, that's the injunctive relief part. They also have a tagalong claim.
THE COURT: So injunctive is probably the wrong shorthand to put on it. But the claim is to be put back on the board.
MR. McGRORY: Yes.
THE COURT: Put on the board and paid.
MR. McGRORY: Yes.
THE COURT: And that's barred, in your view, by the First Amendment?
MR. McGRORY: Yes.
THE COURT: So there's two pieces to the fraud damages claim. One is this first piece, be put on the board and paid, barred by, at a minimum, the Serbian case and Hosanna-Tabor?
MR. McGRORY: Correct.

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THE COURT: And two is $150 million in damages, which you say is not damages that could be claimed in an individual capacity by these plaintiffs but only damages that could be claimed on behalf of the entities for being pillaged?

MR. McGRORY: Correct.

THE COURT: That's fraud.

The same two claims with the same two answers on negligent misrepresentation?

MR. McGRORY: Yeah. Because if you look at paragraph --

THE COURT: What was the paragraph on fraud?

MR. McGRORY: On fraud, it's 58.

And then there's paragraph 66, negligent misrepresentation, identical.

THE COURT: Tortious interference, same answer?

MR. McGRORY: Fifth claim for relief, tortious interference. It's paragraph 71.

THE COURT: Conversion?

MR. McGRORY: Conversion -- conversion is only brought derivatively. It's paragraph 79.

THE COURT: Unjust enrichment?

MR. McGRORY: Unjust enrichment is identical to the first ones we talked about. It's paragraph 90.

THE COURT: RICO? -- well, RICO and ORICO.

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MR. McGRORY: Let me find them.

MR. VOORHEES: Looks like 107 to me.

MR. McGRORY: 107, and it's identical to the first ones we talked about.

THE COURT: What about legal malpractice?

MR. VOORHEES: Your Honor, that's paragraph 127, solely damages to UI and SSSC, all derivative claims, and acknowledged as such in the reply memorandum by Mr. Soni.

THE COURT: All right. Thank you.

I'm going to turn then to Mr. Soni for the argument I did not bring up in my summary, which is that although these are direct claims, styled as direct claims, the damages sought -- I know you disagree with my ruling on whether the religious exemption applies, but let's put that to one side. What about the damages component? You have the paragraphs in front of you. Is it correct that in each of the claims we've just discussed, Mr. McGrory and I, the $150 million damages are sought on behalf of the entities, not on behalf of the individual plaintiffs as individuals?

MR. SONI: I'm troubled by the fact that Mr. McGrory's client in the state court brought an action claiming special standing as beneficiaries for the money that was embezzled by the gang of four, and somehow they maintain that that was permitted and the Court could exercise the power to force those defendants to return those

funds, and that Bibiji here, who is Bhai Sahiba, the chief religious authority for the community, was placed on the board by YB, is bringing this action for the very same embezzlement and seeking the return of the funds as now deemed -- or being argued to be a First Amendment violation.

The complaint, as framed, states that she does not seek to retain these funds, and that the recovery of the 150

she would return to SSSC and UI for the benefit of the beneficiaries of those trusts. She does not seek to retain that, but she does seek to recover for an embezzlement by these four ministers, which fairly closely parallels your hypothetical.

THE COURT: But the entity embezzled was not the individuals, it was UI and SSSC.

MR. SONI: Correct. And your example indicated that it was anything other than an entity that was embezzled from. And the question was, would that be something that would be prohibited by the First Amendment. And Mr. McGrory agreed, and I understand the Court agreed.

THE COURT: That's not the issue. The issue isn't whether the $150 million, seeking it is barred by the First Amendment. In my view, it is not, just by virtue of it being embezzlement. The issue is whether it's barred my standing, mootness, res judicata.

MR. SONI: I understand. And I think the

answer --

THE COURT: That depends in part, in major part on whether it's being sought derivatively. And I take it from your answer that it is being sought derivatively.

MR. SONI: It is, but I submit to you that not -- whether you call it a derivative claim under the Oregon statutes or you call it special standing for recovery of, as Mr. McGrory did in the state court action, Bibiji certainly does have a standing to assert a claim with respect to an identified embezzlement, where the wrongdoer is unknown, the amount taken is identified, and that she should be allowed

to proceed to make that recovery.

Now, your other arguments, or the other theories that are raised is res judicata and mootness, and as previously stated, res judicata does not apply. Those entities, SSSC and UI, did not participate in the underlying action, and neither the state court nor the attorney general did an analysis or justification, other than a mere conclusory statement that they thought it was in good faith and reasonable. They did not evaluate whether or not the parties entering into the settlement agreement had a right to bind SSSC or UI.

THE COURT: Thank you.

I grant the motions to dismiss. I grant the motions on the systemic challenges, as I divided them up

that way, for the reasons I stated earlier. I now agree that what I had previously called the direct claims, the damages for such are either barred by the First Amendment seeking the sort of thing the cases we talked about do not allow me to order a religious institution to do one way or the other, or represent damages sought derivatively, and therefore barred by the other doctrines I've discussed: standing under Rule 23.1, at a minimum, mootness, res judicata.

For what it's worth, I stand by my tentative comments on the nature of the pleadings, and add to that that I will dismiss Claim 10, both because it's partly derivative, and because it fails to meet the pleading standard against Mr. Horowitz under 9(b), Iqbal-Twombly.

I grant the request for judicial notice made earlier this morning for the other Multnomah County

complaint referenced. There's a 20-part request for judicial notice, two of them combined to 20 parts filed earlier. The only one I don't grant out of the 20 is the current corporate structure chart showing the corporate structure of the Sikh Dharma entities.

I deny the motion for leave to amend the complaint.

And these dismissals, for reasons I discussed a moment ago, are with prejudice.

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Thank you all. We'll be in recess.

THE CLERK: This court is adjourned.

(Proceedings concluded.)

APPENDIX F

FILED

FEB 3 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIBIJI INDERJIT KAUR PURI; RANBIR SINGH BHAI; KAMALJIT KAUR KOHLI; KULBIR SINGH PURI,

Plaintiffs-Appellants,

v.

SOPURKH KAUR KHALSA; PERAIM KAUR KHALSA; SIRI RAM KAUR KHALSA; KARTAR SINGH KHALSA; KARAM SINGH KHALSA; UNTO INFINITY, LLC, an Oregon Limited Liability Company; SIRI SINGH SAHIB CORPORATION, an Oregon non-profit corporation; SIRI KARM KAUR KHALSA; LANE POWELL PC, an Oregon Professional Corporation; LEWIS M. HOROWITZ; GURUDHAN SINGH KHALSA; GURU HARI SINGH KHASLSA; EWTC MANAGEMENT, LLC; AJEET SINGH KHALSA,

Defendants-Appellees.

No. 18-35479

D.C. No. 3:10-cv-01532-MO
District of Oregon,
Portland

ORDER

Before: GILMAN,* PAEZ, and RAWLINSON, Circuit Judges.

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

The panel has voted to deny the Petition for Panel Rehearing. Judges Paez and Rawlinson voted, and Judge Gilman recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc, filed January 6, 2020, is DENIED.

APPENDIX G

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ***." U.S. Const. Amend. I. is reproduced in the appendix to this petition. (App. ___, infra)

APPENDIX H

Oregon Revised Statutes provide, in relevant part, "An action . . . shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit." (App. ___, infra) O.R.S. §12.110(1).