O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| FINN PETTE, et al.,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL UNION OF OPERATING ENGINEERS, a trade union, etc., et al.,<br><br>Defendants. | Case No. CV 12-09324 DDP (PJWx)<br><br>**ORDER GRANTING MOTIONS TO DISMISS**<br><br>[Dkt. Nos. 83, 84, 87, 88, 91, 92] |

Presently before the court are five motions to dismiss filed by several, but not all, of the dozens of defendants in this matter. Having considered the submissions of the parties and heard oral argument, the court grants the motions and adopts the following order.

## I. Background

Plaintiffs are current and former members and officers of Local 501 of the International Union of Operating Engineers ("Local 501"). Local 501 represents operating engineers throughout Southern California and Southern Nevada. In their Second Amended Complaint ("SAC"), Plaintiffs bring eight claims against 43

Defendants, including four claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C §1961 *et seq*., a violation of the Labor-Management Reporting and Disclosure Act ("LMRDA") 29 U.S.C. §401 *et seq*., a breach of fiduciary duties under §502(a)(2), 29 U.S.C. § 1132(a)(2) of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. §1002 *et seq*., and aiding and abetting.

Plaintiffs assert that Defendants International Union of Operating Engineers ("IUOE"), 24 associated individuals, Able Engineering Services ("Able"), its CEO Paul Bensi, ABM Engineering Services ("ABM"), its President Jim Scranton, and its employee Cornell Sneeks (collectively, "Moving Defendants") conspired to embezzle funds and divert assets belonging to Local 501, its employees, and its benefit funds.

Defendant IUOE is a trade union that represents operating engineers in the construction industry and stationary engineers in the service industry. (SAC ¶ 26 at 5.) Local 501 is a stationary local of IUOE. (Id.) Plaintiffs allege IUOE participated in embezzlement schemes with Able Defendants and ABM Defendants to avoid required payments to Local 501 and its benefit funds. The SAC alleges Defendant Vincent Giblin, the former General President of IUOE, threatened to remove Plaintiff Pette and other Local 501 officials from their officer positions (SAC ¶ 101, 108-23, 187-96), prevented Local 501 leadership from investigating diversion of assets (Id.), required local union officers to contribute hundreds and thousands of dollars per year to IUOE's political action fund (Id. ¶ 75-80), and forced local unions to use CVS Caremark ("Caremark") for prescription and benefit management. The SAC also

alleges Defendant James T. Callahan, the current IUOE president, continues these practices. (Id. ¶¶ 196, 202-04) Plaintiffs further allege that IUOE retained Defendant James Zazzali, a retired New Jersey Supreme Court Chief Justice and current IUOE Ethics Officer, to bolster false ethics charges. According to the SAC, all IUOE Defendants received kickbacks. (Id. ¶ 1, 166, 168, 190, 232.)

Defendant Able is an employer that provides onsite stationary engineering and facility maintenance services to hotels and other real estate assets thought the United States. (Able Motion to Dismiss Plaintiffs' SAC at 1.) Able and Local 501 have a collective bargaining agreement ("CBA") that governs the terms and conditions of Able's employment of Local 501 members. (Id.) Defendant ABM is a signatory to contracts with IUOE local unions and controls 70% of stationary engineering positions in California. (SAC ¶ 155.) ABM's contracts with Local 501 require that any building unionized through Local 501 must remain unionized in subsequent labor contracts. (Id.)

Plaintiffs assert Able and ABM breached union contracts by conspiring with IUOE to operate double-breasted (side by side operation of union and non-union workforces) (SAC, ¶¶ 112, 166, 168-71), failing to make required benefit contributions to various union funds as required by the companies' CBA (Id. at ¶¶ 112, 154, 156, 158-60), shorting and concealing underpayments to the Health and Welfare fund and the Apprenticeship Fund by employing retired workers (Id. at ¶¶ 154, 157, 163, 172-5), using influence to prevent audits (Id. at ¶¶ 154-58), impeding fair union elections by blocking electioneering emails to union members from 'resistance' candidates, while permitting through their mail services

electioneering emails sent on behalf of candidates approved by IUOE (Id. at 197, 249), and retaliating against Plaintiffs because of their union activities (Id. at 247). Plaintiffs also allege Defendant ABM targeted Local 501 employees sympathetic to Plaintiffs' lawsuit. (Id. ¶ 247). Lastly, Plaintiffs assert that ABM and Able conspired and aided and abetted "fraudulent schemes" that were part of an overarching scheme to defraud Local 501. Defendants now move to dismiss claims one through seven.[1] [2]

**II. Legal Standard**

A complaint will survive a motion to dismiss when it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court must "accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include "detailed factual allegations," it must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or allegations that are no more than a statement of a legal conclusion "are not entitled to the assumption of truth." Id. at 679. In other words, a pleading that merely offers "labels and

[1] Defendants ABM, Scranton, and Sneeks also join in Able and the IUOE's motions.

[2] Though no Defendant has moved to dismiss Plaintiffs' eight cause of action for unfair competition under California Business & Professions Code § 17200, Plaintiffs have expressed a desire to amend that cause of action.

conclusions," a "formulaic recitation of the elements," or "naked assertions" will not be sufficient to state a claim upon which relief can be granted. Id. at 678 (citations and internal quotation marks omitted).

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief." Id. at 679. Plaintiffs must allege "plausible grounds to infer" that their claims rise "above the speculative level." Twombly, 550 U.S. at 555. "Determining whether a complaint states a plausible claim for relief" is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

**III. Discussion**

A. RICO claims

Defendants contend that Plaintiffs lack standing to bring RICO claims under 18 U.S.C. § 1961. RICO provides a private cause of action to "[a]ny person injured in his business or property by reason of a violation" of the RICO statute. 18 U.S.C. § 1964(c). To establish statutory standing, therefore, a plaintiff must show that the RICO violation "proximately caused an injury to his business or property." Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 972 (9th Cir.2008). Moreover, the injury must constitute a "concrete financial loss." Id. at 975; Diaz v. Gates, 420 F.3d 897, 898-900 (9th Cir. 2005).

Plaintiffs contend that they have adequately pled concrete financial injury to business or property because the SAC alleges that Local 501 and ERISA funds suffered monetary losses. (e.g.

Opp., Dkt. No. 125 at 13-14.) For example, Plaintiffs allege that IUOE, Able, and ABM conspired to deprive Local 501's Apprenticeship Fund, Health & Welfare Fund, and General Welfare Fund of mandatory contributions. (SAC ¶¶ 157-162.) The SAC further alleges that these contribution shortfalls "harmed Local 501's ability to operate." (Id. ¶ 162.)

Plaintiffs' allegations are, however, insufficient for two reasons. First, Section 1964(c) requires that a plaintiff suffer damage to "*his* business or property." 18 U.S.C. § 1964(c) (emphasis added); Sparling v. Hoffman Const. Co., 864 F. 2d 635, 640-41 (9th Cir. 1988) (shareholders lacked RICO standing because their injuries derived from injury to the corporation); Adams-Lundy v. Ass'n of Prof'l Flight Attendants, 844 F.2d 245, 250 (5th Cir. 1988) (union members lacked RICO standing where "financial improprieties occurred with union funds and directly injured solely the union."); United Bhd. Of Carpenters and Joiners of Am. v. Bldg. and Constr. Trades Dep't, 911 F.Supp.2d 1118, 1124-26 (E.D. Wash. 2012)(finding standing lacking where damaged property did not belong to any named plaintiff). Here, Plaintiffs are sixteen individuals, and bring purported class claims on behalf of other individuals.[3] The injuries alleged, however, inhere to Local 501 and its ERISA funds, none of which is a named plaintiff in this case.

[3] While the SAC does include some allegations that certain individual Plaintiffs were improperly terminated or otherwise deprived of certain employment opportunities in 2009 and 2010 (e.g. ¶¶ 119, 138, 140, 185), those individual Plaintiffs explicitly limit their claims to events occurring on or after May 1, 2012. (SAC ¶¶ 9-10.)

Second, and on a related note, there must be a "direct relationship" between the injury and the alleged racketeering activities. Hemi Group, LLC v. City of New York, 559 U.S. 1, 9 (2010); United Bhd. Of Carpenters; 911 F.Supp.2d at 1125-26. Plaintiffs, however, at best allege only indirect injury to themselves. For instance, the SAC alleges that withheld health fund payments "would have, had they been paid, provided for payment of benefits in future years . . . . By underfunding the Health & Welfare Fund, Able and ABM deprived Local 501 members of this supplemental benefit cushion." (SAC ¶ 160.) Any such harm, however, would necessarily flow from the earlier injury to the Health & Welfare Fund. As the Ninth Circuit has recognized, "plaintiffs who have suffered 'passed on' injury - that is, injury derived from a third party's direct injury - lack statutory standing." Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1169 (9th Cir. 2002).[4]

The various racketeering acts alleged in the SAC harmed Local 501 and its benefit funds, not Plaintiffs. Even if Plaintiffs had identified any non-speculative injury to themselves, any such harm would be the indirect result of direct injuries to the nonparty union and plans. Thus, Plaintiffs cannot satisfy 18 U.S.C. § 1964(c), and lack statutory standing to bring their RICO claims.

B. LMRDA claim

[4] Even if Plaintiffs' alleged injuries were sufficiently direct, they are nevertheless fatally speculative. See Steele v. Hosp. Corp. of Am., 36 F.3d 69, 71 (9th Cir. 1994) (holding no RICO standing where alleged depletion of insurance benefits had not yet required plaintiff to incur any expense.)

Title I of the LMRDA provides union members with a "Bill of Rights" designed to guarantee members' ability to participate in union decisions and to protect members' freedoms of speech and assembly. Local No. 82 Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers v. Crowley, 467 U.S. 526, 536 (1984). The LMRDA states, in relevant part, that "[e]very member of a labor organization shall have equal rights . . . to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings." 29 U.S.C. §411(a)(1). Union members also "have the right to meet and assemble freely with other members; and to express any views arguments, or opinions." 29 U.S.C. § 411(a)(2).

Plaintiffs contend that the IUOE Defendants, "through their schemes to usurp control of Local 501 [. . .], deprived Plaintiffs of their right to freely meet and assemble to express their views (Able and ABM used managerial employees to intimidate members, and the IUOE, which now controls Local 501, does nothing to stop it)." (Opp., Dkt. No. 125 at 24.) Plaintiffs do not identify where in their 119-page complaint these allegations lie. The SAC does make reference to potentially intimidating conduct by ABM and Able, but the majority of these allegations relate to claims which Plaintiffs concede are moot. (See, e.g., SAC ¶¶ 197, 249.) The only other allegation seeming to fit Plaintiffs' description asserts that an ABM vice president took pictures of certain unnamed Local 501 members in December 2012. (SAC ¶ 248.)

A generous reading of Plaintiffs' submissions suggests that Plaintiffs intend to allege that the IUOE Defendants ratified some sort of activity undertaken by Local 501, perhaps in collusion with

ABM and Able, in violation of Section 101(a) of the LMRDA. In some cases, international unions may be held liable for the actions of a local. See Moore v. Local Union 569 of Int'l Bh'd of Elec. Workers, 989 F.2d 1534, 1543 (holding international liable for local's illegal actions only if it ratified such actions knowing that the local intended to suppress dissent); Chapa v. Local 18, 737 F.2d 929, 932 (5th Cir. 1984). The only paragraph seeming to relate to Plaintiffs' Title I allegation, however, refers only to activity by an ABM employee, without any description of any improper conduct by Local 501, let alone knowledge or approval of IUOE. Plaintiffs' LMRDA claim is therefore dismissed with leave to amend. See Fed. R. Civ. P. 8(a).

C. Breach of Fiduciary Duty

Plaintiffs' Sixth Claim for Breach of Fiduciary Duties Under ERISA or Common law fails to provide a plain statement of the claim, and is little more than a bare recitation of the elements of the claim. Plaintiffs assert the claim "Against Specific Defendants," but do not further identify any defendant beyond the conclusory assertion that "Defendants identified herein as Administrators and/or Trustees and/or IUOE executives and/or Local Executives have assumed fiduciary obligations to Plaintiffs." SAC ¶ 344. Moreover, nowhere does the SAC identify any ERISA plan to which any administrator or trustee or executive owed a fiduciary duty. While the SAC does state that Plaintiffs are beneficiaries of a General Pension Fund plan, Health and Welfare Fund plan, and Operating Engineers Trusts, "among others," it does not state whether one or multiple defendants breached duties to one, two, or

all of the named or unnamed plans. The claim is, therefore, dismissed. Fed. R. Civ. P. 8(a); Iqbal, 556 U.S. at 678.

D. Aiding and Abetting

"Congress has not enacted a civil aiding and abetting statute." Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994). Aiding and abetting liability is therefore limited to those statutes in which it is imposed. Id., Freeman v. DirecTV, Inc., 457 F.3d 1001, 1006 (9th Cir. 2006); In re Easysaver Rewards Litigation, 737 F.Supp.2d 1159, 1181 (S.D. Cal. 2010). Plaintiffs' Aiding and Abetting claim is dismissed with prejudice.

**IV. Conclusion**

For the reasons stated above, Defendants' Motions are GRANTED. Plaintiffs' RICO claims (Claims 1-4) and Seventh Claim for Aiding and Abetting are dismissed with prejudice. Plaintiffs' Fifth Claim for violation of the LMRDA and Sixth Claim for Breach of Fiduciary Duty are dismissed with leave to amend. Any amended complaint shall be filed within fourteen days of the date of this order.[5]

IT IS SO ORDERED.

Dated: October 9, 2013

DEAN D. PREGERSON
United States District Judge

[5] Any amended complaint shall also include amendments to Plaintiffs' unfair competition claim, to which no Defendant appears to object.