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11 U.S.C. § 544(b)
11 U.S.C. § 548(a)(2)
11 U.S.C. § 548(d)(2)
42 U.S.C. § 2000bb
O.R.S. 95.240(1)
O.R.S. 95.200(10)
U.S. Const. Amend. I
U.S. Const. Amend. V

Hartvig v. Tri-City Baptist Temple Adv. #97-3309-rld
of Milwaukie, Inc. (In re Gomes) Main Case #396-38898-rld7
4/7/98 RLD Published

The Chapter 7 Trustee commenced an adversary proceeding to recover transfers in the form of tithes and offerings which the debtors made to the Church in the year before filing bankruptcy and while they were insolvent. The parties filed cross-motions for summary judgment based on stipulated facts. The court held that the analysis for recovery of the transfers under 11 U.S.C. §§ 548(a)(2) and 544(b), which incorporates ORS 95.240(1), was identical for purposes of this case. The court held the trustee was entitled to recover the transfers. Spiritual benefits do not constitute "value" for purposes of §§ 548(a)(2) or 544(b), as debtors had no ownership or exclusive right to possess them. Even if the Church gave value for the transfers the value was not given "in exchange for" the tithes where the debtors had access to the Church services and ministries regardless of whether they tithed.

In considering the affirmative defenses raised by the Church, the court held that it need not decide the constitutionality of the Religious Freedom Restoration Act ("RFRA") or the extent to which City of Boerne v. Flores, ___ U.S. ___, 117 S.Ct. 2157 (1997) has invalidated RFRA because §§ 548(a)(2) and 544(b) do not impose substantial burdens on the free exercise of religion. The court further held that, given the limits on the scope of the trustee's avoidance powers inherent in the language of the statutes, the requirement that the Church submit to trustee discovery and disgorge funds on occasion did not rise to the level of government action that would constitute an excessive entanglement with religion in violation of the First Amendment. Finally, the court held that because the Church had no reasonable "investment-backed expectation" in retaining the tithes received from insolvent debtors, recovery of the transfers by the Trustee did not violate the takings clause of the Fifth Amendment.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

| | | |
|-----------------------------|---|------------------------|
| In Re: |) | |
| |) | Case No. 96-38898-rld7 |
| DANIEL JOSEPH GOMES and |) | |
| LAURIE ANN GOMES, |) | |
| |) | |
| Debtors. |) | Adversary Proceeding |
| _____ |) | No. 97-3309 |
| |) | |
| DONALD H. HARTVIG, Trustee, |) | |
| |) | |
| Plaintiff, |) | |
| |) | MEMORANDUM OPINION |
| v. |) | |
| |) | |
| TRI-CITY BAPTIST TEMPLE OF |) | |
| MILWAUKIE, INC., |) | |
| |) | |
| Defendant. |) | |

This adversary proceeding was heard on March 24, 1998, on the parties' cross-motions for summary judgment, Teresa H. Pearson of Greene & Markley, P.C., appearing in behalf of the plaintiff, Donald H. Hartvig, Trustee (the "Trustee"), and Herbert G. Grey and Kelly E. Ford appearing in behalf of the defendant, Tri-City Baptist Temple of Milwaukie, Inc. (the "Church"). This is a core proceeding over which this court has jurisdiction pursuant to 28 U.S.C.

1 Sections 157 and 1334 and United States District Court of Oregon
2 Local Rule 2100-1.

3 **STIPULATED FACTS**

4 The parties have stipulated to certain facts for purposes of
5 considering their respective motions, including the following:

6 The debtors, Daniel Joseph Gomes and Laurie Ann Gomes (the
7 "Gomes"), filed a voluntary petition under Chapter 7 of the
8 Bankruptcy Code on November 22, 1996. The parties agree that the
9 Gomes became insolvent for purposes of 11 U.S.C. Sections 548(a)(2)
10 and 544(b)¹ on February 1, 1996, approximately ten months before
11 they filed their Chapter 7 bankruptcy petition, as a result of the
12 failure of their wholesale candy business.

13 The Church is an independent Baptist Church. It was formed
14 as an Oregon nonprofit corporation in 1974 and has operated
15 continuously since that time in Gladstone, Oregon.

16 The Gomes made transfers (the "Transfers") to the Church
17 prior to their bankruptcy filing, all in the form of tithes and
18 offerings, totaling \$6,124.00 after February 1, 1996. The Gomes had
19 ownership and property interests in said \$6,124.00 when they made
20 the Transfers to the Church. The Gomes received no economic benefit
21 or tangible personal property in exchange for the Transfers.

22 The Trustee regularly makes demands to a wide variety of
23 entities, including but not limited to, individuals, businesses,
24 governmental entities, religious institutions and secular charities,

25
26 ¹ Unless otherwise indicated, all references to Sections are
to the Bankruptcy Code, 11 U.S.C. §§ 101, et seq.

1 for repayment of transfers made by debtors prior to the petition
2 dates in their Chapter 7 bankruptcies pursuant to Sections 547, 548,
3 549 and 550. The Trustee takes such actions without regard to
4 whether an entity is religious or secular in nature, and for
5 religious entities, without regard to any particular entity's
6 religious doctrine or affiliation. In filing this adversary
7 proceeding, the Trustee asserted the rights of all unsecured
8 creditors with claims against the Gomes, including a number of
9 unsecured creditors whose claims arose prior to February 1, 1996.
10 In doing so, the Trustee was fulfilling his fiduciary duty to the
11 creditors of the Gomes' bankrupt estate by seeking to recover funds
12 for the creditors to share consistent with the scheme for
13 distribution provided for in the Bankruptcy Code.

14 The Church conducts many different types of ministries and
15 programs typically associated with Christian churches and community
16 organizations. Participation in all of the Church's programs is
17 available both to Church members and to the community at large. The
18 Church provides its programs without inquiry as to whether
19 participants have made financial contributions to the Church. The
20 Church does not charge fees to those who attend its worship services
21 and does not condition provision of services upon payment for them,
22 except that it does collect fees in connection with special
23 functions such as retreats and youth trips and derives revenue from
24 sales of goods at fundraising events for its youth programs and from
25 investment income earned on the Church's financial reserves. More
26 than 95% of the Church's total income is received from tithes and

1 offerings. Performance of the Church's ministries and programs is
2 made possible through the contributions of the Church's members,
3 visitors and other financial supporters.

4 The Church's payroll and payroll taxes, insurance, utilities,
5 equipment, supplies, building and equipment maintenance expenses,
6 bus operation expenses, and all other regular, recurring expenses of
7 the Church are paid from funds received as tithes and offerings.
8 The Church periodically budgets for its future operations based on
9 the level of recent contributions. In establishing its budget, the
10 Church expects that members will continue to support the Church's
11 ministries by consistent giving. In light of the Church's reliance
12 on tithes and offerings as a substantial portion of its annual
13 budget, any reduction in tithes and offerings affects the Church's
14 ability to maintain its programs. The total amount of the Transfers
15 is approximately one percent of the Church's annual budget.

16 The Church strongly encourages its members to tithe, through
17 its teachings, its publications and its ministries. However, people
18 are not required to tithe or to make individual contributions in
19 order to become or remain members of the Church. Individual
20 contributions are made confidentially in numbered envelopes, and
21 only the Church secretary is aware of who makes contributions and in
22 what amounts contributions are made. The Church secretary tracks
23 individual contributions to provide statements for contributors' tax
24 reporting purposes. If a member fails to tithe or to make
25 individual contributions, such failure is not a basis for revoking
26 membership or denying access to any of the Church's services or

1 **DISCUSSION**

2 A. Summary Judgment Standards

3 Granting a motion for summary judgment is appropriate only if
4 there is no genuine dispute as to any material facts, and the moving
5 party is entitled to judgment as a matter of law. Fed. R. Bankr. P.
6 7056; Fed. R. Civ. P. 56(c); State Farm Mutual Auto Ins. Co. v.
7 Davis, 7 F.3d 180, 182 (9th Cir. 1993). Material facts are such
8 facts as may affect the outcome of the case. Anderson v. Liberty
9 Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202
10 (1986). A dispute with regard to a material fact is "genuine" only
11 if there is sufficient evidence to justify a finding in favor of the
12 nonmoving party. Id. In considering a motion for summary judgment,
13 the court is required to draw all inferences from the evidence in
14 the light most favorable to the nonmoving party. Id.

15 B. Avoidable Transfers Under Sections 548(a)(2) and 544(b)

16 1. Standards for Avoidance

17 The Trustee asserts that the Transfers to the Church are
18 avoidable pursuant to Sections 548(a)(2) and 544(b). Section
19 548(a)(2) provides in relevant part as follows:

20 Fraudulent transfers and obligations

21 (a) The trustee may avoid any transfer of an
22 interest of the debtor in property ... that was
23 made ... on or within one year before the date of
the filing of the petition, if the debtor
voluntarily or involuntarily--

24

25 (2) (A) received less than a reasonably
equivalent value in exchange for such transfer ...;
and

26 (B) (i) was insolvent on the date that such

1 transfer was made....

2 Section 544(b) provides that the "trustee may avoid any transfer of
3 an interest of the debtor in property ... that is voidable under
4 applicable law by a creditor holding an unsecured claim...." The
5 provision of Oregon state law applicable in this case through
6 Section 544(b) is ORS 95.240(1), which provides that:

7 A transfer made ... by a debtor is fraudulent
8 as to a creditor whose claim arose before the
9 transfer was made ... if the debtor made the
10 transfer ... without receiving a reasonably
equivalent value in exchange for the transfer ...
and the debtor was insolvent at that time....

11 The United States Supreme Court has held that a trustee in
12 bankruptcy may avoid a transfer under Section 548(a)(2) if the
13 following matters are established:

14 1) that the debtor had an interest in property;

15 2) that a transfer of that interest occurred within
16 one year of the filing of the bankruptcy petition;

17 3) that the debtor was insolvent at the time of the
transfer ...; and

18 4) that the debtor received "less than a reasonably
19 equivalent value in exchange for such transfer."

20 BFP v. Resolution Trust Corp., 511 U.S. 531, 535, 114 S.Ct. 1757,
21 1760, reh'g denied, 512 U.S. 1247, 114 S.Ct. 2771 (1994). In light
22 of the provisions of ORS 95.240(1), cited above, the standards for
23 determining whether a trustee in bankruptcy may avoid an Oregon
24 transfer under Section 544(b) are for all practical purposes

25 ///

26 ///

1 identical.²

2 Under both Sections 548(a)(2) and 544(b), the Trustee has the
3 burden of proof by a preponderance of the evidence. See, e.g.,
4 Western Wire Works, Inc. v. Lawler (In re Lawler), 141 B.R. 425, 428
5 (9th Cir. BAP 1992); and Vaughan v. McDowell (In re McDowell), 173
6 B.R. 131, 134 (Bankr. N.D. Ohio 1994).

7 2. Reasonably Equivalent Value

8 The Stipulated Facts establish that the Transfers comprised
9 assets in which the Gomes had an ownership interest and were made
10 within one year prior to the date of filing of the Gomes' Chapter 7
11 petition, during a period when they admittedly were insolvent.
12 Accordingly, the initial focus of the parties' dispute is whether
13 the Gomes received less than a reasonably equivalent value in
14 exchange for the Transfers.

15 Section 548(d)(2)(A) provides that "value" means "property,
16 or satisfaction or securing of a present or antecedent debt of the
17 debtor...." Since there is no contention in this case that, in
18 making the Transfers, the Gomes satisfied or secured a present or
19 antecedent debt, the dispute regarding value turns on the meaning of
20 the term "property."

21 The parties agree that the Gomes did not receive any economic
22 benefit or tangible personal property in exchange for the Transfers.
23 However, the Church contends that the spiritual benefits the Gomes
24 received from their participation in Church services and ministries

25 ² ORS 95.280(2) provides a four-year statute of limitations
26 for claims brought under ORS 95.240(1).

1 have value that should not be disregarded in determining trustee
2 avoidance actions. In addition, the Church points out that the
3 Gomes regularly attended worship services and attended Church
4 sponsored activities conducted by or under the supervision of
5 personnel on the Church's payroll, and the Church provided the
6 facilities for all such services and activities, including normal
7 utilities, without charge.

8 The Church argues that such services constitute "property"
9 for value determination purposes, citing Ellenberg v. Chapel Hill
10 Harvester Church, Inc. (In re Moses), 59 B.R. 815 (Bankr. N.D. Ga.
11 1986), and Wilson v. Upreach Ministries (In re Missionary Baptist
12 Foundation of America, Inc.), 24 B.R. 973 (Bankr. N.D. Tex. 1982).

13 In addition, the parties have stipulated that providing such
14 services would not be possible in the absence of the Church's
15 predictable receipt of tithes and offerings from contributors such
16 as the Gomes. In these circumstances, particularly in light of the
17 fact that the Gomes did not tithe to the Church with any intent to
18 defraud their creditors,³ the Church argues that it would be
19 inappropriate and inequitable to apply the provisions of Sections
20

21 ³ The title of Section 548 is "Fraudulent transfers and
22 obligations." However, as applied to the facts of this case, that
23 title is a misnomer. There is no contention by the Trustee or
24 otherwise that the Transfers of tithes and offerings by the Gomes to
25 the Church were intended to be "fraudulent." For purposes of this
26 court's review of the facts and law in this case, the Gomes' good
faith in making the Transfers and the Church's good faith in
accepting them are undisputed. Nonetheless, the Bankruptcy Code
incorporates the legal concept of "constructive fraud," which does
not take into account the subjective intent of parties to a
transfer.

1 548(a)(2) and 544(b) to avoid the Transfers.

2 The Trustee responds that value is present for purposes of
3 Sections 548(a)(2) and 544(b) only where there is an economic
4 benefit to the debtor, "because the purpose of the fraudulent
5 conveyance laws is to preserve the economic value of the debtor's
6 estate for the benefit of the unsecured creditors." Trustee's Reply
7 Memorandum at p. 3. See, e.g., Wyle v. C.H. Rider & Family (In re
8 United Energy Corp.), 944 F.2d 589, 597 (9th Cir. 1991); Weinman v.
9 Word of Life Christian Center (In re Bloch), 207 B.R. 944, 948 (D.
10 Colo. 1997); Morris v. Midway Southern Baptist Church (In re
11 Newman), 203 B.R. 468, 473-74 (D. Kan. 1996).

12 One of the primary goals of the Bankruptcy Code is to achieve
13 equality of distributions to like situated creditors. 1 Collier on
14 Bankruptcy ¶ 1.03[2][a] at 1-21 (15th ed. 1998). If Bankruptcy
15 Courts must factor the worth of nonmarketable services or such
16 intangible benefits as religious inspiration into their value
17 determinations, it may be difficult, if not impossible, to avoid
18 inequities. In addition, making value determinations with respect
19 to the services performed by religious institutions would appear to
20 encourage precisely the sort of entanglement with religion that
21 courts generally are admonished to avoid. See Employment Division,
22 Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887,
23 110 S.Ct. 1595, 1604 (1990):

24 Judging the centrality of different religious
25 practices is akin to the unacceptable "business of
26 evaluating the relative merits of differing
religious claims." United States v. Lee, 455 U.S.,
at 263 n.2, 102 S.Ct., at 1058 n.2 (STEVENS, J.,

1 concurring).... Repeatedly and in many different
2 contexts, we have warned that courts must not
3 presume to determine the place of a particular
belief in a religion or the plausibility of a
religious claim. [Citations omitted.]

4 Ultimately, the Bankruptcy Code looks to underlying state law
5 to determine what is "property." See Nobelman v. American Savings
6 Bank, 508 U.S. 324, 329, 113 S.Ct. 2106, 2110 (1993); Butner v.
7 United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918 (1979) ("Property
8 interests are created and defined by state law.").

9 Oregon fraudulent transfer law defines "property" as
10 "anything that may be the subject of ownership." ORS Section
11 95.200(10). That definition is consistent with the definition of
12 "property" in Black's Law Dictionary 1216 (6th ed. 1990):

13 [t]hat which is peculiar or proper to any person;
14 that which belongs exclusively to one.... The term
15 is said to extend to every species of valuable
16 right and interest. More specifically, ownership;
17 the unrestricted and exclusive right to a thing;
the right to dispose of a thing in every legal way,
to possess it, to use it, and to exclude every one
else from interfering with it....

18 Likewise, the first definition of property included in the
19 Oxford English Dictionary 1471 (1971) is

20 [t]he condition of being owned by or belonging to
21 some person or persons ...; the holding of
22 something as one's own; the right (esp. the
23 exclusive right) to the possession, use, or
disposal of anything (usually of a tangible
material thing); ownership, proprietorship....

24 See also Fishburn v. Londershausen, 50 Or. 363, 368-69, 92 P. 1060
25 (1907).

26 What the foregoing definitions have in common is the

1 characterization of property as ownership or an exclusive right to
2 possession. In this case, the religious services and ministries of
3 the Church from which the Gomes derived benefit were provided freely
4 and on a nonexclusive basis to Church members and the community.
5 The Gomes had and have no enforceable proprietary interest in such
6 Church services. See Morris v. Midway Southern Baptist Church (In
7 re Newman), 183 B.R. 239, 247 (Bankr. D. Kansas 1995), aff'd, 203
8 B.R. 468 (D. Kan. 1996). Accordingly, the Gomes did not and do not
9 have any "property" interest in such services for purposes of
10 Section 548(d)(2)(A) and on that basis did not receive a reasonably
11 equivalent value for the Transfers.

12 3. "... In Exchange For...."

13 Even if this court were to determine that the Gomes received
14 value for 548(a)(2) and 544(b) purposes, the evidence establishes
15 that any such value was not received "in exchange for" the
16 Transfers. The parties have stipulated that the Gomes did not
17 contribute their tithes and offerings as a *quid pro quo* for their
18 continued participation in Church services and ministries. The
19 Gomes were aware that they could continue to be members of the
20 Church and participate in all Church programs even if they did not
21 tithe.

22 In addition, the Gomes deducted their 1996 contributions to
23 the Church, including the Transfers, as charitable contributions on
24 their federal and state income tax returns. For purposes of Section
25 170 of the Internal Revenue Code, 26 U.S.C. § 170, a charitable
26 contribution is a gift or "voluntary transfer of property by the

1 owner to another without consideration therefor." DeJong v.
2 Commissioner, 36 T.C. 896, 899 (1961), aff'd, 309 F.2d 373 (9th Cir.
3 1962). In Hernandez v. Commissioner, 490 U.S. 680, 690, 109 S.Ct.
4 2136, 2144 (1989), the United States Supreme Court discussed the
5 genesis of the charitable contributions provision of the Internal
6 Revenue Code:

7 The legislative history of the "contribution or
8 gift" limitation, though sparse, reveals that
9 Congress intended to differentiate between
10 unrequited payments to qualified recipients and
11 payments made to such recipients in return for
12 goods or services. Only the former were deemed
deductible. The House and Senate Reports on the
1954 tax bill, for example, both define "gifts" as
payments "made with no expectation of a financial
return commensurate with the amount of the gift."
[Citations omitted.]

13 In light of the evidence presented in this case, it would be
14 inappropriate and inconsistent to find, for purposes of Sections
15 548(a)(2) and 544(b), that the Gomes made the Transfers in exchange
16 for a reasonably equivalent value in the form of services and
17 benefits from the Church.

18 C. Constitutional Issues

19 1. RFRA v. Smith

20 The Church asserts as an affirmative defense that the
21 Trustee's avoidance and recovery of the Transfers would violate the
22 rights of the Gomes and the Church under the Free Exercise Clause of
23 the First Amendment to the United States Constitution.⁴ The parties
24 disagree on the applicable standard for review, the

25 ⁴ Congress shall make no law respecting an establishment of
26 religion, or prohibiting the free exercise thereof....

1 constitutionality of Congress' efforts to establish standards for
2
3 review under the Religious Freedom Restoration Act ("RFRA"),⁵ and
4 whether Sections 548(a)(2) and 544(b) impose a substantial burden on
5 the free exercise of religion.

6 The Church argues that in light of the requirements of RFRA,
7 the Trustee's enforcement of Sections 548(a)(2) and 544(b) against
8 the Church to recover the Transfers is subject to strict scrutiny
9 and may be authorized only if such enforcement is the least
10 restrictive means of furthering a compelling government interest.
11 The Trustee contends that because Sections 548(a)(2) and 544(b) are
12 valid, neutral statutes of general applicability, they are not
13 subject to strict scrutiny, but rather are constitutional in light
14 of their reasonable justification. See Employment Division,
15 Department of Human Services v. Smith, 494 U.S. 872, 110 S.Ct. 1595
16 (1990). The Trustee further asserts that RFRA's standards are
17 inapplicable following the Supreme Court's determination that RFRA
18 is unconstitutional. See City of Boerne v. Flores, ___ U.S. ___,
19 117 S.Ct. 2157 (1997).

20 The Church asserts that the Boerne decision only declared
21 RFRA unconstitutional as applied to state government action and that
22 RFRA remains valid and supplies the appropriate standards for
23 analyzing federal law in the First Amendment context. The Trustee
24 counters that the 9th Circuit has interpreted the Boerne decision to
25

26 ⁵ 42 U.S.C. §§ 2000bb, et seq.

1 restore the reasonableness test as the applicable standard for
2 reviewing free exercise challenges to federal as well as state law.
3 See Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997). The
4 Trustee further argues that Section 544(b) of the Bankruptcy Code is
5 merely a procedural vehicle for the enforcement of state law, and,
6 accordingly, the Boerne decision's determination of RFRA
7 unconstitutionality for state law purposes would govern any
8 determination under Section 544(b).

9 As a threshold matter, unless enforcement of the concerned
10 statutes imposes a "substantial burden" on the religious practices
11 or beliefs of the Gomes or the Church, I do not need to reach any
12 issues regarding the constitutionality of RFRA or the application of
13 RFRA strict scrutiny versus the Smith reasonableness standard. I
14 find no such substantial burden under the facts before me.

15 In Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1994), the
16 Ninth Circuit stated the test for determining whether a substantial
17 burden has been imposed on the free exercise of religion:

18 In order to show a free exercise violation using
19 the "substantial burden" test, the religious
20 adherent ... has the obligation to prove that a
21 governmental [action] burdens the adherent's
22 practice of his or her religion ... by preventing
23 him or her from engaging in conduct or having a
24 religious experience which the faith mandates.
25 This interference must be more than an
26 inconvenience; the burden must be substantial and
an interference with a tenet or belief that is
central to religious doctrine. [Citations omitted.]
[Emphasis added.]

25 In this case, the facts are undisputed that even though
26 members of the Church are strongly encouraged to tithe, tithing is

1 not required to become or remain a member of the Church. Further,
2 the programs and ministries of the Church are available to Church
3 members and the community at large whether or not they tithe or
4 otherwise contribute to the Church. The Gomes were aware that they
5 did not need to tithe or contribute to the Church in order to retain
6 their membership in the Church and participate in all of its
7 ministries. Finally, the Gomes "continued their regular attendance
8 at and participation in the ministries at the Church during the year
9 before they filed their petition, as they have subsequently."

10 Stipulated Facts, p. 9. [Emphasis added.]

11 There is nothing in Sections 548(a)(2) and 544(b) that
12 prevents a debtor from continuing to tithe. The Trustee's efforts
13 to avoid the Transfers have neither restricted the Gomes in their
14 prepetition or postpetition tithing practices nor done anything to
15 shake the Gomes' belief that they should tithe. The recovery of
16 prepetition tithes "may embarrass the debtor, but it does not burden
17 the debtor's ability to engage in the exercise of religion by making
18 postpetition tithes." Megard, "Tithing and Fraudulent Transfers in
19 Bankruptcy: Confirming a Trustee's Power to Avoid the Tithe After
20 City of Boerne v. Flores," 71 American Bankr. L.J. 413, 424 (1997).

21 In addition, as written and applied, Sections 548(a)(2) and
22 544(b) are limited in their impact. First, they only allow a
23 bankruptcy trustee to reach back for defined periods of time prior
24 to the debtor's bankruptcy filing. The trustee may not avoid all of
25 a debtor's tithes to a church over the years and may not reach
26 postpetition tithes.

1 Second, they only allow a bankruptcy trustee to avoid
2 transfers made for less than a reasonably equivalent value.
3 Finally, the trustee is subject to the further substantial
4 limitation that the debtor must be proven insolvent before any
5 transfer may be avoided.

6 The Church argues that notwithstanding the foregoing
7 limitations, the Trustee's exercise of his avoidance powers imposes
8 a substantial burden on the practice of religion, because the Church
9 relies on the consistent giving of its members to fund its programs.

10 The Church asserts that any disgorgement of tithes to the
11 Trustee jeopardizes its ability to continue its ministries by
12 creating budgeting uncertainty. However, the Church does not
13 provide services in the expectation that all of its members will
14 contribute to the funding of such services. One of the primary
15 functions of the Church is relief of the poor. See Church's
16 Memorandum at p. 15. There can be little question that insolvent
17 debtors generally would qualify among the poor, and the Church
18 reasonably could not expect to collect tithes from its insolvent
19 debtor members.

20 It is understandably important to the Church to achieve as
21 consistent a level of financial support for its services as
22 possible. Undoubtedly, the Trustee's efforts to avoid the Transfers
23 came as an unpleasant and unexpected surprise to the Church, which
24 did not budget for a recovery by the Trustee. However, in a very
25 mobile society, tithes and offerings inherently are subject to
26 fluctuations due not just to the financial reverses of Church

1 members, but also to the moves and deaths of members. Being subject
2 on occasion to the recovery by a bankruptcy trustee of a limited
3 portion of an insolvent debtor's tithed funds does not constitute
4 the type of substantial burden on religion that would justify
5 heightened scrutiny under RFRA or the Constitution.

6 In the circumstances of this case, the burdens imposed on the
7 Gomes and the Church by the Trustee's exercise of avoidance powers
8 under Sections 548(a)(2) and 544(b) are not substantial burdens on
9 the exercise of religion that would invalidate those sections under
10 RFRA, whether or not RFRA remains constitutionally viable.

11 2. The Establishment Clause

12 The Church further contends that the Trustee's attempts to
13 avoid the Transfers result in an excessive and unconstitutional
14 governmental intrusion and entanglement in religion in violation of
15 the Establishment Clause of the First Amendment to the Constitution.

16 In Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105,
17 2111, reh'g denied, 404 U.S. 876, 92 S.Ct. 24 (1971), the Supreme
18 Court set forth a three part test to evaluate the constitutionality
19 of statutes under the Establishment Clause:

20 First, the statute must have a secular legislative
21 purpose; second, its principal or primary effect
22 must be one that neither advances nor inhibits
23 religion ...; finally, the statute must not foster
24 "an excessive government entanglement with
25 religion."

24 In applying the Lemon test, the first step is analyzing the
25 text of the statute(s) under consideration. In this case, there is
26 nothing in either the texts or the legislative histories of

1 Sections 548(a)(2) and 544(b) that refers to religion or any
2 religious organization or even hints that the statutes were targeted
3 at any religiously motivated transfers. The subject statutes are
4 neutral with respect to religion and generally applicable according
5 to their terms.

6 However, that does not end the investigation. As stated by
7 the court in Fitzgerald v. Magic Valley Evangelical Free Church,
8 Inc. (In re Hodge), 200 B.R. 884, 903 (Bankr. D. Idaho 1996): "The
9 court ... must also look at the effect of the law in its real
10 application as strong evidence of its object."

11 In enforcing his bankruptcy avoidance powers, the Trustee
12 does not discriminate against religion in general or the Church in
13 particular. The Stipulated Facts reflect that the Trustee regularly
14 exercises his avoidance powers to recover from a wide variety of
15 individuals and entities, including religious institutions and
16 secular charities without regard to the religious or secular nature
17 of such entities or to any particular entity's religious creed or
18 affiliation.

19 For this reason, the Church's reliance on Church of the
20 Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct.
21 2217 (1993), is misplaced. In the Lukumi case, the record
22 established that the city ordinances at issue were designed and
23 implemented with the specific purpose of restricting the animal
24 sacrifice practices of the Santeria church.

25 In contrast, Sections 548(a)(2) and 544(b) provide tools for
26 a trustee in bankruptcy to recover prepetition transfers by debtors

1 to individuals and entities of all kinds, with the goal of
2 equalizing the recoveries by similarly situated creditors from
3 debtors' bankrupt estates. See In re Hodge, 200 B.R. at 903-04:

4 In this case, the subject statutes make no
5 reference to religions or to religious practice.
6 Similarly, Defendant has offered no proof that the
7 statutes were in any way intended to target
8 religious activity. The provisions merely allow a
9 bankruptcy trustee to recover certain transfers
10 when specified criteria are satisfied. None of
11 those criteria are related to religious belief or
12 practices, nor is it relevant whether there exists
13 a religious motivation for the transfers. Further,
14 the Court finds that the avoidance statutes have no
15 more than an incidental effect on religion. The
16 purpose of the statutes is to promote the equal
17 treatment of similarly situated creditors of the
18 debtor, and to enlarge the pool of funds available
19 for those creditors by recovering gratuitous
20 transfers made by insolvent debtors. [Internal
21 citations omitted.]

22 The Church nonetheless responds that it is unfair for the
23 reach of Sections 548(a)(2) and 544(b) to extend to the normal
24 tithes and offerings of a Church member made in the ordinary course
25 where the member made no change in the pattern of giving during the
26 period preceding a bankruptcy filing. However, if Congress wanted
to incorporate an exception for ordinary course giving in Sections
548(a)(2) and 544(b), it knew how to do so. For example, Section
547, dealing with bankruptcy trustees' avoidance of preferential
transfers, specifically incorporates a defense for transactions in
the ordinary course of business. See 11 U.S.C. § 547(c)(2). This
court is in no position to recognize an exception to avoidance
powers where Congress did not create one.

Because Sections 548(a)(2) and 544(b) each has a clear

1 secular purpose, the primary effect of which neither advances nor
2 inhibits religion, the statutes do not violate the Establishment
3 Clause of the First Amendment.

4 3. Excessive Entanglement

5 The Church characterizes the Trustee's exercise of authority
6 under Sections 548(a)(2) and 544(b) as "government action that
7 audits church ledgers and retroactively seizes private contributions
8 made to a church." Church Memorandum at p. 26. The Church asserts
9 that this government action constitutes an unconstitutional
10 entanglement in religious affairs.

11 I disagree. The Supreme Court has held that the
12 recordkeeping requirements of the Fair Labor Standards Act are not
13 substantially burdensome on religious organizations. Tony and Susan
14 Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953
15 (1985). In comparison, the nontargeted requirement that a church
16 submit on occasion to trustee discovery in relation to potential
17 avoidance claims would appear to constitute even less of an
18 entanglement. See also Jimmy Swaggart Ministries v. Board of
19 Equalization of California, 493 U.S. 378, 395-96, 110 S.Ct. 688,
20 698-99, 107 L.Ed.2d 796 (1990) ("[G]enerally applicable
21 administrative and recordkeeping regulations may be imposed on
22 religious organization without running afoul of the Establishment
23 Clause."); In re Hodge, 200 B.R. at 907 ("[R]outine regulatory
24 interaction between government and churches involving no detailed
25 monitoring or close administrative contact between secular and
26 religious bodies does not violate the anti-entanglement command of

1 the Establishment Clause.”).

2 The recovery of contributed tithes and offerings likewise
3 does not rise to an excessive entanglement, because it merely
4 requires the payment of funds; it does not impinge directly on
5 Church beliefs or ministries. Such recovery, on an incidental and
6 occasional basis, has only the indirect and unintended effect of
7 limiting the Church’s budget. A much greater entanglement of the
8 government with religion likely would result if this court were to
9 ignore the neutral language of Sections 548(a)(2) and 544(b) and
10 enforce an exception to the Trustee’s avoidance powers for religious
11 entities such as the Church.⁶

12 4. No Fifth Amendment⁷ Taking

13 The Bankruptcy Code is subject to the Fifth Amendment
14 prohibition against taking private property without just
15 compensation. See, e.g., United States v. Security Industrial Bank,
16 459 U.S. 70, 75, 103 S.Ct. 407, 410 (1982). In Penn Central
17 Transportation Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct.
18 2646, 2659 (1978), the Supreme Court identified three factors of
19 particular significance in considering unconstitutional takings

20
21 ⁶ The Church’s reliance on National Labor Relations Bd. v.
22 Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313 (1979), in
23 this case is not supported. There is no reason to believe, either
24 from the text of the statutes or from the legislative history, that
25 Congress intended to create an exception for religious giving in
26 Sections 548(a)(2) and 544(b). In addition, nothing in the facts
before this Court suggests that the Trustee’s avoidance of the
Transfers presents a significant risk that the First Amendment will
be infringed.

27 ⁷ “... nor shall private property be taken for public use,
28 without just compensation.”

1 claims:

2 a) the economic impact of the law on the
3 claimant;

4 b) the extent to which the law has
5 interfered with the claimant's reasonable
6 "investment-backed expectations;" and

7 c) the character of the government action,
8 i.e., did the law promote the common good or some
9 more limited objective.

10 The Church contends that the Trustee's proposed avoidance of
11 the Transfers constitutes an unconstitutional confiscation of Church
12 property. There is no question that the Trustee's avoidance of the
13 Transfers will have an adverse economic effect on the Church. If
14 the Church is forced to disgorge funds it otherwise would have
15 available to spend on its ministries, it will suffer a financial
16 loss. However, such a loss is within the reasonable investment-
17 backed expectations of the Church for purposes of constitutional
18 analysis.

19 The provisions of Sections 548(a)(2) and 544(b) have been in
20 existence in virtually their present forms since the Bankruptcy Code
21 was enacted by Congress in 1978. In fact, as the Trustee points
22 out, fraudulent transfer laws have been in existence in various
23 forms since the Statute of Elizabeth was adopted in 1570. Entities
24 such as the Church that avail themselves of the benefits of United
25 States law are charged with knowledge of its restrictions.

26 The Church reasonably could expect that its receipts from

1 recovering the Transfers.

2 This Memorandum Opinion contains the court's findings of fact
3 and conclusions of law, which will not be stated separately.

4 1. The Trustee's motion for summary judgment is granted.

5 2. The Church's motion for summary judgment is denied.

6 3. Counsel for the Trustee shall prepare and submit within
7 ten days following the date of entry of this Memorandum Opinion a
8 form of judgment consistent herewith.

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RANDALL L. DUNN
Bankruptcy Judge

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16 cc: Teresa H. Pearson
17 J. Gary McClain
18 Kelly E. Ford
Herbert G. Grey
U.S. Trustee

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