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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-CV-00210-RBJ

LIST INTERACTIVE LTD., d/b/a UKNIGHT  
INTERACTIVE; and LEONARD S. LABRIOLA;

Plaintiffs,

vs.

KNIGHTS OF COLUMBUS, et al.,

Defendants.

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REPORTER'S TRANSCRIPT  
Motions Hearing  
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Proceedings before the HONORABLE R. BROOKE JACKSON,  
Judge, United States District Court for the District of  
Colorado, commencing on the 6th day of February, 2018, in  
Courtroom A902, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs:

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Proceedings reported by mechanical stenography;  
transcription produced via computer.

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2 (The proceedings commenced at 1:31 p.m.)

3 THE COURT: This is 17CV210, List Interactive versus  
4 Knights of Columbus. I see that the usual suspects are here  
5 once again. Please enter your appearances.

6 MR. VAIL: Yes, Your Honor. Jeff Vail for plaintiff  
7 List Interactive.

8 MR. NUSSBAUM: Martin Nussbaum for the Knights of  
9 Columbus. I have at the table with me Mr. Gleason,  
10 Ms. Kallman. I also have Michael O'Connor, who's the supreme  
11 secretary of the Knights of Columbus.

12 THE COURT: Okay. Well, you have several motions  
13 pending, five in all.

14 Julie, what did we set this hearing for?

15 THE COURTROOM DEPUTY: Your Honor, we had two motions  
16 this is set for, which is Nos. 76 and 77.

17 THE COURT: You can argue any of the five motions.  
18 You pick the ones that you think are the most important and  
19 argue those. You tell me if there are any that are now moot.  
20 I'll give you no more than an hour to a side and hope that you  
21 take less. Let's go.

22 Plaintiff first.

23 MR. VAIL: Thank you, Judge.

24 THE COURT: Well, wait a minute. No. It's actually  
25 the defendants first in order.

1           Go ahead, Mr. Nussbaum.

2           MR. NUSSBAUM: Your Honor, I'll be arguing the  
3 motions -- the three motions that have to do with the  
4 membership issue. That would be the September 25th  
5 defendants' motion for protective order, the September 25th  
6 plaintiffs' motion for TRO, and then our motion on  
7 January 25th of this year to dismiss or alternatively for lack  
8 of standing or to dismiss for summary judgment. Mr. Gleason  
9 will be arguing the other motions for our side.

10           Your Honor, do you want us to argue all of them on  
11 our side first? Or do the membership and then turn to the  
12 motions to dismiss based upon the pleadings?

13           THE COURT: I think you probably ought to take them  
14 one at a time. However, 76 and 77, which I thought would  
15 certainly be long moot by now, and I'll be very disappointed  
16 if they're not, perhaps should be argued together, if argued  
17 at all.

18           MR. NUSSBAUM: Thank you, Your Honor. The -- so  
19 before turning to the substantive arguments regarding the  
20 membership issue, I think it's helpful to recall that  
21 Uknight's claims regarding membership fraud are pervasive and  
22 ever changing. Uknight's claims are pervasive, as I pointed  
23 out in our brief. 76 out of the 105 allegations in the  
24 complaint, directly or indirectly --

25           THE COURT: Are you reading from a text?

1 MR. NUSSBAUM: Am I reading? I have notes, Your  
2 Honor, that I'm looking at, yes. I'm not going to read them  
3 all, though.

4 THE COURT: Well, your opening line sounded canned.  
5 Try not to be canned. Just talk to me.

6 MR. NUSSBAUM: Okay, Judge.

7 THE COURT: Tell me what's important.

8 MR. NUSSBAUM: So what's important as far as --  
9 before we turn to the substantive issues is how these -- the  
10 claims regarding membership fraud have morphed over time.  
11 You'll recall in the September 12th hearing before you, the  
12 plaintiffs' counsel said that what was important -- you asked  
13 him if he wanted the name of every Tom, Dick, and Harry, and  
14 he said he did. It was about names. Later on he said in that  
15 argument it was about dues and dues status of those names.  
16 And the motive -- or the relevance that he pointed out at that  
17 time was the Order's motive and the fact that the Order, they  
18 said, was extorting dues, excessive dues from councils.

19 THE COURT: Let's get our terminology consistent, and  
20 the consistency is what I determined in my previous long order  
21 on your motion practice. The Knights of Columbus is the  
22 parent company, I'll call them. It's the company that  
23 allegedly contracted with the plaintiff. The Order is the  
24 whole of the Knights of Columbus family, including all the  
25 lodges, agents, employees, and so forth. Even though I

1 defined those terms, I notice in the briefs that you went  
2 right back to calling things what you called them before.  
3 Please don't.

4 MR. NUSSBAUM: Thank you, Your Honor. I'll amend  
5 that. So I'll be referring to the Knights of Columbus. May I  
6 call them Knights, shorthand?

7 THE COURT: Uh-huh.

8 MR. NUSSBAUM: Unless I'm being clear I'm speaking to  
9 individual Knights.

10 THE COURT: Knights of Columbus. That's the parent  
11 corporation, the governing body. The entity in New Haven,  
12 Connecticut that directs traffic. That's the Knights of  
13 Columbus or Knights.

14 MR. NUSSBAUM: Got it. So on September 20th, just  
15 eight days later, plaintiffs' counsel sent an e-mail to Joy  
16 Woller of our firm and said, I want more than names. I want  
17 the council's statement summary. I want the payment coupon.  
18 This was based upon your order about names, Your Honor. I  
19 want the official billing extract. And for all the United  
20 States and Canadian councils, I want council numbers, member  
21 numbers, phone numbers, and billing fields. What was relevant  
22 in that, he said in that e-mail, was all about membership  
23 delinquency. Five days later --

24 THE COURT: This all has to do with the RICO claim.

25 MR. NUSSBAUM: Well, Your Honor, it is heavily

1 involved in the RICO claim, but as we point out in our brief,  
2 these allegations regarding membership fraud actually infect  
3 every one of the claims in the way that it's been pled --  
4 pleaded in the second amended complaint. But the largest  
5 number are in the RICO claim. You're correct about that, Your  
6 Honor.

7           On September 25 then, the plaintiff filed its motion  
8 for TRO, and there's a very significant passage on page three  
9 of that where the plaintiff says that its fundamental theory  
10 is that the defendant fraudulently inflated its members --  
11 this is its fundamental theory of the case -- fraudulently  
12 sold insurance, and extorted local councils based on a pattern  
13 of inflation to cover up the fraud.

14           Now, Your Honor, it's interesting, in the three  
15 briefs that plaintiff has filed since we've last been before  
16 the Court, in each one of them they include a pie chart, and  
17 it's interesting how that same pie chart with the same data on  
18 it has morphed. In their September 25th filing of the pie  
19 chart, the text around it is it's all about membership  
20 delinquency, and the Order's extortion of councils, or alleged  
21 -- pardon me -- the Knights' alleged extortion of councils.

22           THE COURT: I'm getting confused.

23           MR. NUSSBAUM: Of councils.

24           THE COURT: Already I don't really follow what's  
25 happening here other than the fact that you're criticizing

1 them for their ever-changing theory of the case.

2 MR. NUSSBAUM: It's very relevant, Your Honor, to  
3 whether they carry their burden, and this is a prequel for me  
4 to establish that they have not carried their burden to  
5 establish standing in this case to see how the theory  
6 continues to morph over time.

7 THE COURT: Well, let's get right to the standing,  
8 because I am interested in that.

9 MR. NUSSBAUM: Okay. I'll turn right to standing,  
10 Your Honor. I would just note that in their last filing of  
11 this pie chart, they said it's not about names, it's not about  
12 membership numbers. Now it's about membership cards. That's  
13 important for what I'm going to say about standing. So with  
14 regard to this fundamental theory in standing that the  
15 plaintiffs have is that it's about fraudulently selling  
16 insurance to insured members and extorting councils by making  
17 them pay assessments -- pro rata assessments or per capita  
18 assessments based upon the numbers of members they have. Now,  
19 with regard --

20 THE COURT: You say fraudulently selling insurance to  
21 members.

22 MR. NUSSBAUM: Yes.

23 THE COURT: Members are people.

24 MR. NUSSBAUM: Yes.

25 THE COURT: They have to provide insurance under

1 their chart.

2 MR. NUSSBAUM: Plaintiffs' theory is, Your Honor --  
3 and we don't buy any of this -- plaintiffs' theory is that our  
4 members who bought insurance -- we call them insured members  
5 -- that they bought insurance thinking they were buying  
6 insurance from a religious society that had an insurance  
7 division and that they had 1.9 million members, and they only  
8 had 1.5 million members, in fact, is plaintiffs' theory, and,  
9 therefore, that's a weaker organization to buy insurance from,  
10 than, in fact, what they thought. And the plaintiff alleges  
11 that's a fraud. Of course, it has nothing to do with being a  
12 website vendor, but that's their theory.

13 THE COURT: Well, that's a huge question in my mind.

14 MR. NUSSBAUM: Yes.

15 THE COURT: But I just want to understand. The  
16 Knights, in order to be the Knights under their tax  
17 designation, must offer insurance to the members.

18 MR. NUSSBAUM: Correct.

19 THE COURT: They do offer insurance to the members.

20 MR. NUSSBAUM: Correct.

21 THE COURT: The members can decide whether or not  
22 they want to buy it.

23 MR. NUSSBAUM: Correct.

24 THE COURT: But it's got to be offered.

25 MR. NUSSBAUM: Yes, Your Honor. That is absolutely

1 correct.

2 THE COURT: And some members have purchased the  
3 insurance.

4 MR. NUSSBAUM: Lots of them.

5 THE COURT: More than a million?

6 MR. NUSSBAUM: I don't know the precise number, but I  
7 don't think it's that large, Your Honor.

8 THE COURT: And some members have declined the  
9 insurance, I assume.

10 MR. NUSSBAUM: Yes.

11 THE COURT: So you say that plaintiffs' theory is  
12 that these members were defrauded by false representations  
13 concerning the quality or strength of the insurance company.

14 MR. NUSSBAUM: The insurance division of the Knights.  
15 And their theory, by the way, is not that we're not as  
16 financially strong, because those numbers, of course, are  
17 heavily audited, but that the number of members that support  
18 the insurance division of the Knights is less than what we say  
19 publicly.

20 THE COURT: You mean the number of members that  
21 subscribe to the insurance?

22 MR. NUSSBAUM: No, Your Honor. Their allegation is  
23 that there are members who aren't -- well, their allegation  
24 shifts. Until their last brief, I would say their allegation  
25 was that the Knights, they contend, are fraudulently retaining

1 members. That is, failing to remove certain members that are  
2 no longer paying their dues actively, and, therefore, were  
3 overstating the numbers of members. That's their theory.

4 THE COURT: That's their theory, but the defrauded  
5 party or parties were the people who bought the insurance.  
6 The people that actually did exist and buy the insurance.

7 MR. NUSSBAUM: That's their contention.

8 THE COURT: Well, what right do they have to  
9 represent those people?

10 MR. NUSSBAUM: Well, they don't, Your Honor, and  
11 that's part of our motion about standing is they don't  
12 represent a single insured member of the Knights of Columbus,  
13 nor do they represent a single council that they say were  
14 extorted by the Knights to pay excessive dues.

15 So one of the things we pass over often when we talk  
16 about standing, because it just seems procedural, is the  
17 plaintiff has the burden to establish standing, and I want to  
18 focus on that a little bit today, Your Honor, because I think  
19 it's important. Not only is it important to establish the  
20 Court's jurisdiction, but plaintiffs' theory, the Court is  
21 already indicating, is so breathtakingly implausible, that the  
22 Knights of Columbus turned down plaintiffs' proposal to be the  
23 Order's designated website vendor. There is only, Your Honor,  
24 an imaginary --

25 THE COURT: That's your way of looking at the world.

1 Their way of looking at the world is there was a deal and your  
2 client reneged on the deal.

3 MR. NUSSBAUM: That's fine, Your Honor. Let's take  
4 it that way.

5 THE COURT: That's a legitimate case issue, a  
6 legitimate trial issue. That one is going Jesse and is  
7 staying.

8 MR. NUSSBAUM: Yep. So they allege there's a -- that  
9 they have both a promissory estoppel claim, and you're right,  
10 Your Honor, they have an oral contract claim that they say  
11 that the Knights breached, and that they could have performed  
12 in a single day. But there's only an imaginary gossamer  
13 filament connecting plaintiffs' theory about membership fraud  
14 to its actual relationship with the Knights.

15 Consider, Your Honor, that the Knights of Columbus --  
16 that Uknight contends it would not have worked so hard to do  
17 business with the Knights of Columbus if it believed it had  
18 1.4 million members instead of 1.9 members. Like that  
19 wouldn't be a customer worthy for this startup business.

20 THE COURT: That's nonsense. That's totally  
21 unbelievable.

22 MR. NUSSBAUM: It's one of their contentions.

23 THE COURT: It's not credible.

24 MR. NUSSBAUM: Another of their contentions, Your  
25 Honor, is that Uknight contends that the Order denied it

1 preferred vendor status to keep Uknight in the dark about the  
2 membership fraud. But if that's so, the Order did nothing to  
3 stop Uknight from serving the thousand councils that it serves  
4 and it continues to market to remaining councils.

5 THE COURT: No. Not the Order. The Knights.

6 MR. NUSSBAUM: Did I slip again? I apologize, Your  
7 Honor.

8 THE COURT: You keep saying the Order.

9 MR. NUSSBAUM: Okay.

10 THE COURT: The Knights -- I should make a diagram  
11 for you. The Knights of Columbus --

12 MR. NUSSBAUM: I'm going to write it here on my --

13 THE COURT: The Knights of Columbus is the black hat  
14 bad guy that's ruining the world.

15 MR. NUSSBAUM: Got it.

16 THE COURT: The Order includes the Knights, but all  
17 the people whose worlds it's ruining.

18 MR. NUSSBAUM: So, Your Honor, so they -- so the  
19 Knights, they say, were out to cover things up, but allow them  
20 to continue to serve a thousand councils. But consider, Your  
21 Honor, the cat was already out of the bag.

22 THE COURT: Their theory is, as I understand it to  
23 be, that the reason that the Knights breached the contract was  
24 because the Knights were afraid that if they went ahead with  
25 the contract, this big racketeering scheme would be uncovered.

1 The reason that the Knights allegedly stole their trade  
2 secrets is because the Knights loved their product, but  
3 couldn't enter into a contract for fear of exposing this  
4 massive fraud; and, therefore, reneged on the contract and  
5 stole the trade secrets so they could use them.

6 MR. NUSSBAUM: That's correct. Their theory -- the  
7 plaintiffs' theory is that the Knights did all that to cover  
8 things up so they wouldn't find out. But consider, Your  
9 Honor, the cat was already out of the bag, because, according  
10 to the plaintiff, they already knew, and they know now, even  
11 though they're not the preferred vendor, they know now about  
12 this alleged membership fraud.

13 Now, consider also, Your Honor --

14 THE COURT: And I would say, Mr. Nussbaum, that if  
15 you assume for a moment that there is any merit at all in  
16 their claims of this fraud, then they can, if they have the  
17 evidence, pose the alleged fraud as a motive to breach the  
18 contract, but that is a far cry from a colorable RICO claim.

19 MR. NUSSBAUM: But the motive doesn't get us to  
20 standing, Your Honor, and I'm going to address that in just  
21 one second. I want you to consider also we have produced over  
22 5,000 pages of documents regarding all the discussions about  
23 this contract.

24 THE COURT: Mr. Nussbaum.

25 MR. NUSSBAUM: Yes.

1 THE COURT: The issue is whether or not they have  
2 standing to represent the members whom they claim were  
3 defrauded. The answer is no. I'll never be convinced of  
4 that. So maybe keep your powder dry and move to something  
5 that you do need to talk about.

6 MR. NUSSBAUM: Is the Court saying it will be --  
7 because of lack of standing it will dismiss the  
8 membership-related claims?

9 THE COURT: I'm saying that it's almost inconceivable  
10 to me that these guys have standing to represent the rank and  
11 file members who bought insurance who allegedly were  
12 defrauded.

13 MR. NUSSBAUM: Our motion, Your Honor, though, is to  
14 excise from this case the allegations regarding membership  
15 fraud and focus on the remaining claims.

16 THE COURT: Well, I don't know if I can do that or  
17 not. It depends on whether those allegations are some sort of  
18 a legitimate -- are legitimately tied to a motive for  
19 breaching the contract.

20 MR. NUSSBAUM: So let me address why there's no  
21 standing for even those allegations, Your Honor. So with  
22 regard to motive --

23 THE COURT: And you want to do that because it's not  
24 enough for you to get the members out. It's not enough for  
25 you even to get the RICO claims out, because you don't want to

1 subject your client to all this discovery.

2 MR. NUSSBAUM: Your Honor, the -- we have  
3 constitutional rights regarding our membership information,  
4 and we've addressed those in our briefs, and I'll be speaking  
5 to those as well.

6 THE COURT: Okay.

7 MR. NUSSBAUM: But let's turn to motive. The Court  
8 has raised that a couple of times. That's kind of plaintiffs'  
9 fallback position. And, by the way, the Court told -- the  
10 plaintiff told the Court that it had numerous members who had  
11 talked to Mr. Labriola that said they had information  
12 regarding this -- the Knights of Columbus fraud issue. Given  
13 that the plaintiff has the burden, one might think that the  
14 plaintiff would have provided affidavits from those members to  
15 carry their burden, but they didn't.

16 THE COURT: They tried to. Didn't they try to  
17 provide affidavits right at the beginning of the case, and  
18 that was the first thing we were in court scrapping about?

19 MR. NUSSBAUM: It's September 25th, Your Honor. It  
20 was the hearing on September 25th when they said we have -- we  
21 have people who've talked -- spoken to Mr. Labriola about the  
22 whole coverup situation. If so, we have no affidavits from  
23 those individuals. In fact, they provided no evidence to  
24 carry their burden with regard to standing.

25 In fact, Your Honor, when it comes to standing, the

1 plaintiffs' entire response on the standing issue is one-half  
2 of one sentence on page two of its response to our motion in  
3 which it says that the Knights of Columbus mislabeled the  
4 issue of standing when we really meant to be talking about  
5 relevance. That we don't really know what we're talking about  
6 when we say standing. It's really about relevance.

7 THE COURT: Well, you've got to give Mr. Vail credit.  
8 God bless him, he's finally gotten succinct in his pleadings,  
9 at least on that point.

10 MR. NUSSBAUM: That was succinct. Half of one  
11 sentence, yes, Your Honor. One of the standing factors -- let  
12 me just address -- well, there's just three of them. Injury  
13 in fact. So the test for injury in fact is that there has to  
14 be an invasion of a legally-protected interest that is  
15 concrete, particularized, actual and imminent. According to  
16 the plaintiff, Your Honor, the injury is to those Knights who  
17 bought insurance and to the councils who paid their fee, and  
18 that cannot be tied to the actions of the defendant with  
19 regard to the plaintiff in this case.

20 THE COURT: I thought I just said that.

21 MR. NUSSBAUM: Thank you, Your Honor. Ditto with  
22 regard to causation. And finally, with regard to  
23 redressability, Your Honor, the plaintiff has to show that  
24 there would be a -- that a favorable decision will address or  
25 redress the challenged action of the defendant. Clearly it

1 won't do that. He simply doesn't have standing with regard to  
2 any of the allegations in the complaint regarding membership,  
3 and we ask that without standing, we believe the Court needs  
4 to excise those from this case.

5 Let me turn to the right of association, Your Honor.  
6 We make two arguments here. The first is that the Order is an  
7 expressive association, and that disclosure of membership  
8 information could result in chilling  
9 constitutionally-protected speech. The right of association  
10 protects against that.

11 The second argument we make, Your Honor -- and that  
12 first argument, of course, is based upon *NAACP vs. Alabama* and  
13 the related *In re Motor Fuel* Tenth Circuit case.

14 THE COURT: So your theory is what? If the  
15 membership can be disclosed in this case, under a protective  
16 order to be sure, it's going to chill what?

17 MR. NUSSBAUM: It will chill --

18 THE COURT: Chill those members from staying --

19 MR. NUSSBAUM: The affidavits that we provided, Your  
20 Honor -- there were two affidavits regarding the fact that we  
21 have a lot of undocumented members who are here in the United  
22 States illegally, and that the directors within the Knights of  
23 Columbus in charge of recruiting and welcoming undocumented  
24 individuals to the Order, that they -- they're afraid to join  
25 the Order -- and they have conversations about this -- if they

1 think their names are going to be disclosed, because they want  
2 to be in the underground economy, and, of course, the Knights  
3 of Columbus doesn't look to citizenship. It looks to humanity  
4 and capitalicity to decide who are going to be members of the  
5 Knights of Columbus.

6 THE COURT: So you're saying on the record in open  
7 court that the Knights of Columbus welcome illegal immigrants  
8 with open arms?

9 MR. NUSSBAUM: It serves human beings, yes, whether  
10 they're legal or not, Your Honor. The Knights of Columbus  
11 does. Just like the Catholic church does.

12 THE COURT: Well, it sounds awfully nice, but there  
13 are other policies of this country that discourage illegal  
14 immigration. It's a huge political topic. Very divisive. I  
15 suspect that the Knights of Columbus wouldn't be well-regarded  
16 if it were well-known that they solicit and welcome  
17 undocumented members.

18 MR. NUSSBAUM: And, Your Honor, this goes to  
19 expressive association, because the other affidavit we have  
20 regarding this indicates that the Knights of Columbus seek to  
21 work for a just society and take positions that are often  
22 unpopular.

23 THE COURT: That's entirely different. Everybody can  
24 do that under the First Amendment.

25 MR. NUSSBAUM: They can. That's exactly right, Your

1 Honor. But it would have a chilling effect for some of our  
2 members who are very prominent individuals to have their names  
3 disclosed. Let me tell you what the plaintiff did with regard  
4 to --

5 THE COURT: Because they wouldn't want to be  
6 associated with an outfit that brings in to the fold illegal  
7 immigrants, is that why? They wouldn't want the public to  
8 know that this is what their fraternal organization does?

9 MR. NUSSBAUM: No, Your Honor, with regard to that  
10 part of it. There are efforts now to purge the United States,  
11 for example, of Columbus statues. That's, of course, the  
12 namesake for the Knights of Columbus. Columbus statues have  
13 been pulled down. This is in affidavits that we provided that  
14 are undisputed before the Court.

15 THE COURT: What are Columbus statues?

16 MR. NUSSBAUM: Statues honoring Christopher Columbus  
17 around the United States.

18 THE COURT: What does that got to do with this  
19 lawsuit?

20 MR. NUSSBAUM: Well, it has to do with expressive  
21 association, that the Knights of Columbus occasionally are a  
22 controversial organization. They do huge amounts of good  
23 work, but they also take public policy positions for which in  
24 this day and age there is the same kind of concerns there were  
25 in *NAACP vs. Alabama* where the disclosure of names --

1 THE COURT: Concerns about Christopher Columbus?  
2 There are parades in every town on Columbus Day, and concerns  
3 about illegal immigrants are entirely two different separate  
4 things.

5 MR. NUSSBAUM: You're correct, Your Honor. There are  
6 two different ways that individuals who are members of the  
7 Knights might have concerns about their names being published.  
8 That's all that is. Here's what plaintiff admits.

9 THE COURT: How are their names going to be published  
10 if they're published subject to a protective order?

11 MR. NUSSBAUM: Well, the plaintiff didn't propose a  
12 protective order, Your Honor, and that would begin to address  
13 part of the problem with regard to this particular argument on  
14 expressive association. Plaintiff admits -- doesn't contest  
15 our affidavits, doesn't contest we're an expressive  
16 association, doesn't contest that we take controversial  
17 positions from time to time, and the plaintiff doesn't contest  
18 the chilling effect we're talking about.

19 But let me -- let me talk now about the second part  
20 of the association argument, which is that as an association,  
21 under the *Roberts vs. Jaycees* case, the *California Democratic*  
22 *Party* case, and the *Hurley* case, associations, even secular  
23 associations, have a right to control who their members are,  
24 and they have a right not to have the Government foist members  
25 on them and -- or to remove members from their fold.

1           With regard to that, plaintiff doesn't contest this  
2 argument at all. In fact, plaintiff writes in its brief that  
3 the Knights of Columbus, quote, can associate with or not  
4 associate with whomever it wants. Why is that relevant, Your  
5 Honor? The plaintiffs' arguments, even all the different  
6 versions of his argument, is that we have members who ought  
7 not be members and is asking this Court to make a declaration  
8 that we have certain individuals, lots of individuals that we  
9 believe are members of the Knights of Columbus, and the  
10 plaintiff is asking this Court to say, no, Jones, Smith, and  
11 McGonigal are not members of the Knights of Columbus.

12           THE COURT: Of course the Court can't do that, but  
13 what if there isn't any Jones? What if there isn't any Smith?  
14 What if there isn't any McGonigal? They're ghosts. They  
15 claim they're just names that aren't real people but they're  
16 listed as members.

17           MR. NUSSBAUM: That's something for -- the Order is  
18 supreme over that, Your Honor -- pardon me -- the Knights of  
19 Columbus is supreme over that, Your Honor, and the Knights of  
20 Columbus --

21           THE COURT: Oh, really? So the Knights of Columbus  
22 can have phony members if it wants?

23           MR. NUSSBAUM: Any time, Your Honor, that an  
24 association has members, there will be individuals -- the list  
25 will not always be entirely accurate. In fact, one of the

1 things I learned in preparation for this argument is that our  
2 councils in the Philippines often don't send in what's called  
3 the Form 100 after they initiate new members, so the  
4 individuals are members upon the -- going through the initial  
5 initiation.

6 THE COURT: That kind of stuff is inevitable in a  
7 huge organization. People come and go. People die. People  
8 quit. People join. You'd have to be a pretty special  
9 organization, maybe using the plaintiffs' technology, but it's  
10 almost impossible. That isn't what we're talking about. From  
11 what you tell me, they're talking about out and out fraudulent  
12 representation that people are members when they know good and  
13 well they're not.

14 MR. NUSSBAUM: And they allege that without one piece  
15 of evidence, just surmise, and no standing -- and no standing  
16 to allege that.

17 THE COURT: That's a Rule 9 problem.

18 MR. NUSSBAUM: Yes.

19 THE COURT: Can't allege fraud without particularity.

20 MR. NUSSBAUM: Yes. Now, Your Honor, the -- so with  
21 regard -- the final shift the plaintiffs made in their last  
22 brief is they said, We don't need names. I think this is what  
23 they said. We don't need membership numbers. What we want to  
24 know is is there a disparity between those members that have  
25 membership cards and the Knights' official roster of members.

1 Okay. They want to know is there a disparity between  
2 membership cards, and this is the new theory, that you may  
3 recall when you ordered the production of names, they didn't  
4 say tell us who has membership cards. And there are several  
5 problems --

6 THE COURT: I don't recall exactly what I ordered.  
7 You tell me.

8 MR. NUSSBAUM: It was names. Names by council is  
9 what the Court ordered.

10 THE COURT: Names of members.

11 MR. NUSSBAUM: By council.

12 THE COURT: So I ordered that.

13 MR. NUSSBAUM: Yes.

14 THE COURT: Did you do that?

15 MR. NUSSBAUM: No, Your Honor. We filed a motion,  
16 and then the Court agreed that there would be an abeyance, and  
17 we made an elaborate effort to try to settle this case, which  
18 failed, which brings us back here today.

19 THE COURT: I will tell both sides, big mistake. Big  
20 mistake. You should have settled this case.

21 MR. NUSSBAUM: We agree, Your Honor.

22 THE COURT: Because I think the defendant has boodles  
23 of exposure, and I think the plaintiffs are trying to make  
24 this into *Marbury vs. Madison*. Not going to happen.

25 MR. NUSSBAUM: We agree the case should settle, Your

1 Honor. We're in total agreement with that.

2 THE COURT: Well, then I hope the Knights are willing  
3 to go into their very rich coffers and cough up some money,  
4 because that's what it's going to take. Go ahead.

5 MR. NUSSBAUM: Thank you, Your Honor. Even --  
6 there's several problems with membership lists -- pardon me --  
7 membership cards. First problem is it assumes plaintiff has  
8 standing on that issue. Second problem with that, Your Honor,  
9 is that the Order doesn't know who has membership cards.  
10 Membership cards are issued by the local financial secretaries  
11 in each council, and those secretaries are required to report  
12 membership status on the Form 100, but after that Form 100 is  
13 received by the Knights of Columbus, the Knights of Columbus  
14 issue a membership number. The financial secretary is  
15 supposed to issue a card, but we don't know if they do, and  
16 that's a local decision by the local council. So if they're  
17 asking for membership cards --

18 THE COURT: That sounds so lame, Mr. Nussbaum. If  
19 the Knights wanted to get ahold of the membership cards, you  
20 know good and well they could do so.

21 MR. NUSSBAUM: Your Honor, I don't believe that to be  
22 the case, and I spoke to leaders of the -- of dealing with  
23 membership issues just this past week.

24 THE COURT: So you're inviting the plaintiffs then to  
25 bring in all these local councils as defendants. Is that what

1 you want?

2 MR. NUSSBAUM: Clearly not, Your Honor. They have no  
3 more standing to do that than they have to pursue the Knights  
4 of Columbus.

5 THE COURT: Think about what you're asking for.

6 MR. NUSSBAUM: Your Honor, it's the plaintiff who's  
7 asking for membership card data. It's the plaintiff who's  
8 asking for that.

9 THE COURT: Okay.

10 MR. NUSSBAUM: We simply don't have it. We simply  
11 don't have it. And furthermore --

12 THE COURT: You say you don't have it and you say you  
13 can't get it. I'd like some evidence under oath on that.  
14 Your guy is here. Put him on the stand today. I'd like to  
15 hear him say under oath there's no way the Knights can get  
16 ahold of those --

17 MR. NUSSBAUM: Your Honor, I don't even know if the  
18 financial secretaries, as I stand here today, if they keep  
19 records of every time they issue a card, because those  
20 secretaries change from time to time. They're volunteers.  
21 But furthermore, Your Honor, consider this. Plaintiff has  
22 never alleged its website services would sniff out those  
23 without cards.

24 If this is about a card fraud, that we have people  
25 who are members without cards, they've never alleged their

1 website services would sniff that out. And even if they  
2 could, Your Honor, and even if they had standing, this still  
3 comes back to you, Judge, where the plaintiff is asking you to  
4 say, Those with cards are members, those without are not  
5 members. And to the extent there's a difference, that's a  
6 fraud for a case involving a disappointed website vendor.

7 THE COURT: Well, you keep talking about standing.  
8 You've got it in your notes, so you just keep coming back to  
9 it like you keep coming back to --

10 MR. NUSSBAUM: Your Honor, I'm --

11 THE COURT: I've already told you -- maybe I should  
12 put it this way. Maybe you can snatch defeat from the jaws of  
13 victory by keeping up the talk about standing. I already  
14 pretty much told you you're going to win on that one. The  
15 issue for me isn't do they have standing to represent these  
16 rank and file. The issue is whether there's some legitimate  
17 reason to discover their names, their cards, for some  
18 legitimate reason in legitimate claims in this case. That's  
19 what concerns me, not the standing issue, not on that part.

20 MR. NUSSBAUM: Let me go back to the motive issue,  
21 Judge, then if that's what you're focused on. So motive, of  
22 course, as the Court just said, doesn't demonstrate standing,  
23 but consider the implications. And the case that's key on  
24 this is the *Intelligent Office Systems* case, a 2009 District  
25 Court of Colorado opinion cited in our brief. Permitting mere

1 speculation by the plaintiff regarding motive to justify  
2 expanded claims and discovery, Your Honor, the implication of  
3 that is that will weaponize lawsuits, because every single  
4 plaintiff can, with regard to any claim, breach of contract,  
5 breach of statute, any claim, they can surmise wicked motives  
6 and argue for expanded discovery based upon their surmise of  
7 wicked motives.

8 THE COURT: Well, I wonder -- here's the legal issue.  
9 Does the motive for breach of contract even matter?

10 MR. NUSSBAUM: Of course not. Of course not.

11 THE COURT: In criminal law, the motive for  
12 committing a crime typically is not an element. Typically the  
13 prosecutor does not have to prove the defendant's motive.  
14 However, in most, if not all, cases they sure try to, because  
15 they think that if they can show motive, it's more likely that  
16 the jury will find that the defendant committed the crime.

17 MR. NUSSBAUM: And it goes to breach, right,  
18 according to the plaintiffs' theory. And here, Your Honor,  
19 we, of course --

20 THE COURT: But in your case, either you broke the  
21 contract or you didn't, and whether you broke it because they  
22 were going to uncover this massive fraud, or because you  
23 didn't want to pay them the money, or because they decided  
24 that Mr. Labriola was a liar, or because they didn't like the  
25 name of Uknight, or for some arbitrary and capricious reason,

1 maybe it doesn't even matter. The question is did they breach  
2 it or not.

3 MR. NUSSBAUM: Because if there is a contract, the  
4 plaintiff alleges that the contract required us to do one  
5 thing we could do in one day, which was to announce to all the  
6 Knights that Uknight is the designated vendor of website  
7 services for the entire Order. I'm going to use that term the  
8 way you intend.

9 THE COURT: Right.

10 MR. NUSSBAUM: And we never contended that we made  
11 that announcement.

12 THE COURT: Well, of course, you didn't make the  
13 announcement. That's why they sued you.

14 MR. NUSSBAUM: So why does motive matter when our  
15 actions that they allege are a breach are clear -- are clear?  
16 It matters even less, Your Honor, in that circumstance.

17 THE COURT: So your defense is simply you never made  
18 that promise.

19 MR. NUSSBAUM: Of course not.

20 THE COURT: Well --

21 MR. NUSSBAUM: Of course not.

22 THE COURT: You don't know if they made it or not.

23 MR. NUSSBAUM: I mean, of course they never made that  
24 promise, Your Honor.

25 THE COURT: So that's what your client says. Whether

1 that's true or not, that's why we have a trial.

2 MR. NUSSBAUM: Well, that's not before you right now,  
3 and that is why we have a trial. And we'll -- at trial we'll  
4 give you all --

5 THE COURT: But that's the defense. The defense is  
6 we never said that.

7 MR. NUSSBAUM: Yeah. We'll give you all the draft  
8 contracts that were exchanged back and forth.

9 THE COURT: You made a deal with us, and you promised  
10 you would announce that deal, and once you announced it,  
11 things would go forward, and your defense is, no, we didn't.  
12 We didn't say that.

13 MR. NUSSBAUM: Two more things I want to address and  
14 then leave time for my colleague, Mr. Gleason, and that's the  
15 freedom of religious society to determine who its own members  
16 are. Plaintiffs' response to this, Your Honor -- plaintiff  
17 acknowledges that this doctrine exists. Plaintiff doesn't  
18 contest that there's certain subject matters over which a  
19 religious society is essentially sovereign, and the  
20 government, whether it's the Court or some other branch of  
21 government, doesn't get to intersect on those comments. For  
22 example --

23 THE COURT: Is the Knights a religious organization?

24 MR. NUSSBAUM: Yes.

25 THE COURT: Only Catholics can belong?

1 MR. NUSSBAUM: Yes. And the plaintiff doesn't  
2 contest that. We have an affidavit that provides you page  
3 after page all the bona fides.

4 THE COURT: I believe that. I saw that.

5 MR. NUSSBAUM: And so the -- the plaintiff doesn't  
6 contest we're a religious society. What it says is that the  
7 subject matters that are protected by this doctrine are only  
8 two. One they say is the relationship between a minister or a  
9 clergy person and the religious society, which is -- of  
10 course, they have to admit that because of the *Hosanna-Tabor*  
11 unanimous decision. And secondly, they say it also applies to  
12 church property disputes between competing internal factions.  
13 And then they say that that would include whether the original  
14 or breakaway sect is the true church and owns the building.

15 Now, Your Honor, here's where they give away the  
16 whole thing, because determining which portion of a competing  
17 faction claiming a building is determining who are the true  
18 members of that religious society. And that's -- that is the  
19 lead case of all of these cases, *Watson v. Jones*, and *Watson*  
20 *v. Jones* involved just those circumstances, and what did the  
21 Court -- the United States Supreme Court say in *Watson*? It  
22 says that the key issue was which members -- pardon me -- it  
23 says, and I quote -- the Supreme Court was asked to decide,  
24 quote, whether the plaintiffs were lawful members of the  
25 Walnut Street Church. So when they concede that issue, they

1 concede the membership issue. Now, they say we cite no cases  
2 about membership.

3 THE COURT: Why do I get the impression that this has  
4 very little to do with this case?

5 MR. NUSSBAUM: Well, the whole thing, Your Honor, all  
6 of this membership has very little to do with this case. And  
7 plaintiff has --

8 THE COURT: These people have a right of association.  
9 I assume they have a right of associating with a religious  
10 society. I don't see why that's really controversial, and it  
11 seems to me, potentially, if not actually, irrelevant to this  
12 case.

13 MR. NUSSBAUM: I agree. And it's also remarkable,  
14 Your Honor, that plaintiff has asked this Court to interpret  
15 the Knights of Columbus' own laws that has a so-called ipso  
16 facto expulsion provision in it, and they ignored the  
17 exception to that when they cited that, but the *Serbian* case  
18 and other cases say clearly the Court doesn't get to offer its  
19 interpretation of a religious society's laws.

20 THE COURT: Sounds like you've been spending some  
21 time in the law library, Mr. Nussbaum. You cite these cases  
22 left and right. I don't know any of them.

23 MR. NUSSBAUM: Well, they're wonderful cases, Your  
24 Honor, and they're worth spending time with. And I have. Let  
25 me end with one thing, and that is with regard to our motion

1 for protective order, Your Honor. One of the things that we

2 --

3 THE COURT: What do you want to protect against now?

4 MR. NUSSBAUM: It is our Exhibit C, it is an e-mail  
5 from Mr. Vail to one of our colleagues, Joy Woller.

6 THE COURT: You want to protect against an e-mail?

7 MR. NUSSBAUM: I want to protect against the  
8 plaintiff or its counsel trolling in our confidential member  
9 data files, and that document was taken from our confidential  
10 files.

11 THE COURT: What does trolling mean?

12 MR. NUSSBAUM: It means entering there without  
13 permission, and the plaintiffs' counsel says in that e-mail,  
14 that Exhibit C, that it had tested the data, it had looked at  
15 our data fields in that file, and proposes a way for us to  
16 give them -- it talks about CSV files, whatever that means,  
17 and says that I've done some testing, and the CSV files should  
18 result and be very manageable.

19 THE COURT: How does the plaintiff even get into the  
20 files, surreptitiously or otherwise? Is that because of what  
21 was disclosed when these people were friends?

22 MR. NUSSBAUM: I'm not technologically savvy. I  
23 don't know. But they don't belong in there, and one of the  
24 things we ask is the Court to order them to stop it. Thank  
25 you, Your Honor. Do you want Mr. Gleason to speak now or do

1 you want to hear more on membership from opposing counsel?

2 THE COURT: I think maybe Mr. Vail ought to have a  
3 chance to respond.

4 MR. NUSSBAUM: Thank you, Your Honor.

5 MR. VAIL: Thank you, Judge. And I have a few slides  
6 here that quote from such things as the prior transcript. May  
7 I approach to provide a hard copy?

8 THE COURT: Sure. As long as you provide it to  
9 Mr. Nussbaum.

10 MR. VAIL: I have, Your Honor. And you have these on  
11 your screen as well. Judge, I'll be frank. I'm a bit baffled  
12 by some of the arguments. This is not a case where we've ever  
13 asked to have standing to represent individual members. This  
14 is, as you've phrased, a case where the Knights breached a  
15 contract, broke promises, and stole trades because, as we  
16 allege, they were afraid that proceeding and not doing so  
17 would essentially allow Uknight to discover and reveal their  
18 fraud with respect to membership numbers.

19 THE COURT: Why does it matter what their motive was?

20 MR. VAIL: Your Honor, because the test for relevancy  
21 -- and this is a discovery issue fundamentally. They tried to  
22 turn it into a motion for summary judgment.

23 THE COURT: It's a legal issue. Why does it matter  
24 why they broke the contract?

25 MR. VAIL: So something is relevant if it makes an

1 element at issue more or less likely to be true. And in this  
2 case, if there is this huge fraud that would be discovered if  
3 the contract went forward, if the trade secrets weren't  
4 stolen, it makes those elements of claims they have not moved  
5 to dismiss more likely to be true.

6 THE COURT: That doesn't answer my question. The  
7 claim of breach of contract is that they promised and promised  
8 and promised that they were going to make an announcement that  
9 the plaintiff was the approved vendor of a software system  
10 that would implement and keep track of the insurance business.  
11 That's it. They promised that they would announce that  
12 designation of the plaintiff, and of course it would follow, I  
13 guess, that once they made that announcement, the plaintiff  
14 would get business from the various lodges.

15 MR. VAIL: Yes, Your Honor.

16 THE COURT: That's the promise. They claim we did  
17 not say that. There was no promise. That's it. It's very  
18 simple. They said it, and you can prove it. They didn't say  
19 it, and they can prove it. It doesn't matter why they  
20 reneged. If they promised it -- they admit they didn't do it  
21 -- they're in breach.

22 MR. VAIL: I disagree the last --

23 THE COURT: If they didn't promise it, they're not in  
24 breach.

25 MR. VAIL: Your Honor, they claim they never made the

1 promise.

2 THE COURT: Yes.

3 MR. VAIL: And so a jury has to decide did they make  
4 this promise or not.

5 THE COURT: Right.

6 MR. VAIL: And they have to consider the reasons why  
7 would they lie about having made a promise when, in fact, they  
8 made it and didn't follow through. And one reason a  
9 reasonable jury could say I think that they're more likely to  
10 have lied about this because they realized they admitted to  
11 and then broke that promise or if they followed through they  
12 would have revealed this fraud.

13 Same thing with the theft of trade secrets. They  
14 claim they didn't steal any trade secrets. We claim they did.  
15 A reasonable jury could say, well, I think that it's more  
16 likely, or at least it makes it more likely in my view that  
17 they may have stolen those trade secrets because they had this  
18 massive fraud to conceal.

19 Same thing with the issue of contract. They claim  
20 there was no contract, and specifically --

21 THE COURT: Why doesn't whether they stole the trade  
22 secrets or not turn on some very simple things. What was the  
23 trade secret and did they steal it. That's it. Trade secret  
24 litigation is fairly common in the federal courts. You have  
25 to prove that you had a trade secret. You have to prove that

1 you tried to protect it. You have to prove that they  
2 misappropriated it. And your claim is that not only did they  
3 take the trade secret, but they put it out for bid, hired  
4 their spy to implement it, and now, you say, they're running  
5 your system under a different name. That's what you have to  
6 prove.

7 MR. VAIL: And one of those key elements, Your Honor,  
8 is did they steal the trade secrets. They claim no. And a  
9 jury could look at that --

10 THE COURT: How in the world would they get them if  
11 they didn't steal them?

12 MR. VAIL: I think that's a very good question, but,  
13 nonetheless --

14 THE COURT: That is a very good question.

15 MR. VAIL: -- they are denying that they've done so.

16 THE COURT: Well, of course they're denying it. But  
17 you come up with this massive conspiracy theory that costs  
18 your client tons of money and complicates the case to no end  
19 where really what you've got is did they promise or not, did  
20 they steal or not.

21 MR. VAIL: And, Your Honor, I think --

22 THE COURT: My guess is, if I had to guess, purely a  
23 guess, you probably have some evidence that they did make the  
24 promise. You probably have some evidence that they did steal  
25 the trade secret. And if you do, and if they did, they have

1 to settle with you. But the reason they aren't settling with  
2 you is because of all this other business. I don't know that  
3 you're doing your client any good at all by mucking this case  
4 up the way you have.

5 MR. VAIL: Your Honor, I understand your concern, but  
6 I do think it's the fundamental question that the jury has to  
7 grapple with. Why, why would they, if this was such a great  
8 system, if it was liked by everyone, if it was something that  
9 increased membership and drove insurance sales, why wouldn't  
10 they contract with Uknight?

11 THE COURT: I'll guarantee you there won't be a  
12 question on the jury verdict form, Why did they breach the  
13 contract?

14 MR. VAIL: No, I understand.

15 THE COURT: Why did they steal the trade secret?  
16 They're going to be asked, you've been given an instruction,  
17 ladies and gentlemen, on breach of contract. Yes or no.  
18 You've been given an instruction on misappropriation of trade  
19 secrets. Yes or no.

20 MR. VAIL: But the jury can most certainly consider  
21 when they're deciding did they ever make that promise in the  
22 first place, their motives and their reasons why they would be  
23 lying about it, and that is where this fundamentally comes in.  
24 And if I can turn your attention --

25 THE COURT: What is your evidence that they made the

1 promise?

2 MR. VAIL: Their evidence -- our evidence --

3 THE COURT: What is your evidence?

4 MR. VAIL: We have a variety of recorded phone calls.

5 We have demonstration --

6 THE COURT: No. Your evidence starts with a person.

7 Who's your witness?

8 MR. VAIL: Mr. Labriola would be the first person.

9 THE COURT: All right. So he's going to testify to  
10 this?

11 MR. VAIL: He will.

12 THE COURT: And you're going to support his testimony  
13 with recorded phone calls.

14 MR. VAIL: And other testimony, documents that show  
15 --

16 THE COURT: Other testimony from whom?

17 MR. VAIL: Individuals such as Denise Serafini. We  
18 have yet to depose Knights of Columbus officers, but we'll be  
19 doing so beginning next week.

20 THE COURT: Well, you don't know if they're going to  
21 back you or not.

22 MR. VAIL: No. I don't. That's true.

23 THE COURT: Who do you have in your pocket besides  
24 Mr. Labriola?

25 MR. VAIL: Terry Clark, also from Uknight. Then

1 there's also --

2 THE COURT: The promise was made to Terry Clark?

3 MR. VAIL: He was part of the conversations.

4 THE COURT: He's your tech guy?

5 MR. VAIL: He is the tech guy.

6 THE COURT: So you've got two live witnesses.

7 MR. VAIL: Two live witnesses and extensive documents  
8 that show that as soon as this meeting finished, they actually  
9 began paying for the restructuring of the graphic look and  
10 feel of Uknight's website with a third-party vendor. They  
11 paid for it. They took their entire membership list that  
12 they're so protective of, and they opened it up so that any  
13 one of the councils that signed up with Uknight could simply  
14 click a button and auto-download the information to Uknight's  
15 website. These and many, many more examples of documentary  
16 evidence that show the course of business that simply wouldn't  
17 make sense --

18 THE COURT: Sounds pretty strong.

19 MR. VAIL: Uh-huh. And they're claiming none of this  
20 happened.

21 THE COURT: And what's your evidence of the trade  
22 secret theft?

23 MR. VAIL: Well, we've subpoenaed Mr. Kinkade, and he  
24 produced files that include all of our trade secrets. I think  
25 that's fairly straightforward.

1 THE COURT: Well, and you've got Mr. Strong. Is that  
2 his name?

3 MR. VAIL: Mr. Kinkade is the --

4 THE COURT: No, Terry.

5 MR. VAIL: Terry Clark.

6 THE COURT: Mr. Clark, who's going to say Kinkade  
7 came to Texas, and I sat with him and explained how it works  
8 and gave him all the information that he wanted.

9 MR. VAIL: And he'll testify that Mr. Kinkade --

10 THE COURT: That's when Kinkade was wearing the hat  
11 of consultant.

12 MR. VAIL: Correct.

13 THE COURT: And Kinkade goes back to New Haven and  
14 says, Lookie what I have. I've got it all. I've got all the  
15 information.

16 MR. VAIL: And then suddenly he's hired to replace --

17 THE COURT: Put it out for bids to make it look good.  
18 He's hired, and then he implements their system. And you can  
19 prove that?

20 MR. VAIL: I don't believe they finished implementing  
21 any system, but they have put things out for bid. We've just  
22 concluded a confidentiality agreement that I think would  
23 resolve any protective order concerns as far as not disclosing  
24 membership names, and we're awaiting actual final production  
25 as far as what they have contracted with third parties to do.

1 THE COURT: Well, Kinkade got the bid, right?

2 MR. VAIL: No. Kinkade was actually hired by the  
3 Knights of Columbus to be their e-business director inhouse  
4 for several times the salary --

5 THE COURT: So one of the responders presumably is  
6 going to get the contract, but that hasn't happened yet?

7 MR. VAIL: That we haven't received discovery on yet.  
8 We're awaiting it. And that is fundamentally where we are  
9 here on this membership issue. This is a discovery question.  
10 Going back to the September 12th hearing of last year, and the  
11 relevant page 15 of the transcript is on the screen in front  
12 of you, but it states the Court's order is that the defendant  
13 produce to the plaintiff what he calls membership information,  
14 meaning the members of the local councils, a spreadsheet, a  
15 list. You've got it. Obviously, you've got it.

16 THE COURT: I ordered that. But they didn't like the  
17 order, so they didn't do it.

18 MR. VAIL: And it continues --

19 THE COURT: Kind of like I denied -- I dismissed the  
20 RICO claim, but you didn't like that, so you came back like a  
21 bad penny and filed it again.

22 MR. VAIL: Yes, Your Honor. But the order does  
23 continue, if what he says is true, and 20 to 40 percent of the  
24 members aren't actually even paying dues, and then it  
25 continues, then he's got something, and I'll let him have at

1 least this much, and all we're asking for is that we actually  
2 get the discovery this Court five months ago --

3 THE COURT: I tried. I ordered it.

4 MR. VAIL: I understand, Your Honor. And so they  
5 claim they can't get this information. So we put together --  
6 Mr. Labriola --

7 THE COURT: Well, I don't believe them.

8 MR. VAIL: I don't either, and I know it's not true,  
9 because Mr. Labriola put together a very simple system where  
10 he asked councils, go online -- and I'll put together -- I'll  
11 show you the -- exactly what it looks like. Here's an example  
12 on your screen. Submit to us your payment coupon that you get  
13 from the Knights of Columbus. It says how many members are  
14 being claimed, how many they're being billed for, and then  
15 tell us -- when you submit that, tell us how many membership  
16 cards you actually issued for people because people paid dues.

17 And just a couple of examples here. Council 1028,  
18 Knights of Columbus billed them for 257 members. But when  
19 they submitted this on our very simple online system, they  
20 said we only have 122.

21 THE COURT: 257 members?

22 MR. VAIL: Yes, Your Honor.

23 THE COURT: It's not very many members.

24 MR. VAIL: For one local council. But they claim  
25 they only had -- they actually only have 122. They're just

1 being billed for 257. Another council, 13704, they're being  
2 billed by the Knights of Columbus for 154 members, but their  
3 financial secretary when he submitted this simple online form  
4 said we only have 83 that we actually got paid dues and issued  
5 membership cards to. And this was what started the entire TRO  
6 protective order motions practice was they were not happy  
7 about us getting this information, so they issued an e-mail to  
8 all the local councils ordering them to stop providing the  
9 information to us.

10 THE COURT: Which I put the kibosh to.

11 MR. VAIL: Which we asked for a TRO on, that there  
12 was never a final hearing on. And I think this is something  
13 that could very easily be done with Court endorsement or  
14 jointly by the parties. These forms -- this summary and  
15 payment coupon shows exactly the numbers that they claim --

16 THE COURT: What is it now that you want? He said  
17 you wanted members and you don't want members anymore. What  
18 is it you want?

19 MR. VAIL: They've had a significant concern they've  
20 expressed about revealing the names of people who are members  
21 of the Knights of Columbus for fear of backlash, presumably.  
22 I don't know if that's reasonable, but we found a way around  
23 it. We've tried to work with Mr. Gleason, and there is a  
24 unique membership ID for every name. We can anonymize the  
25 data. So I agree we have shifted, as Mr. Nussbaum said, what

1 we're requesting. We're trying to accommodate their concerns.

2 THE COURT: So now what you want is membership  
3 numbers, ID numbers?

4 MR. VAIL: I think the simplest solution would be --  
5 this council statement summary and payment coupon for each  
6 council, it lists how many people they're billing for, and  
7 then just have the councils tell us how many membership cards  
8 did you actually issue. And I realize they're going to claim  
9 we have Catholic principles of charity that maybe --

10 THE COURT: So wait. You want membership -- how do  
11 you put what you want? You want the number of members  
12 claimed?

13 MR. VAIL: I think a workable solution, Your Honor,  
14 would be produce these payment coupons, which, as you can see  
15 on your screen, includes how many the Knights of Columbus --

16 THE COURT: This thing is a payment coupon?

17 MR. VAIL: Yes. This is where they say this is what  
18 I'm billing you for, this is how many members we count you  
19 have.

20 THE COURT: This is which page now of your --

21 MR. VAIL: That is --

22 THE COURT: Page 5.

23 MR. VAIL: Slides 5 and 6 are both the same thing,  
24 different councils.

25 THE COURT: And so what you want is -- is these

1 forms? Is that it?

2 MR. VAIL: They're existing forms. There's no  
3 requirement, as Mr. Nussbaum is concerned about, about the  
4 Court interfering with religious determinations. This is a  
5 billing form they issued in the past.

6 THE COURT: So that's what you want now?

7 MR. VAIL: We need that, and then we need the answers  
8 from the local membership secretaries, financial secretaries,  
9 how many membership cards did you issue? That's a great proxy  
10 for who paid dues. Because if you don't pay the dues, you  
11 don't get a card.

12 THE COURT: The forms show what now?

13 MR. VAIL: The billing form, as you'll see at the  
14 bottom, membership totals, that's the number of people the  
15 Knights of Columbus, the Connecticut organization, is claiming  
16 and billing every local council for. So, for example, on  
17 slide five where you are, they're claiming Council 1028 has  
18 257 members for the year 2017.

19 THE COURT: All right. So that gives you the total  
20 number of members claimed by --

21 MR. NUSSBAUM: By the Knights of Columbus.

22 THE COURT: That's one thing you want.

23 MR. VAIL: Yes, Your Honor.

24 THE COURT: And you can get that by getting these  
25 forms.

1 MR. VAIL: And that's half of what we want. The  
2 other half is to demonstrate, as we've seen from the sampling,  
3 the 20-odd responses we got before they ordered their local  
4 councils to stop responding, is the actual number of  
5 membership cards issued. It's not difficult.

6 THE COURT: In each of these local councils --

7 MR. VAIL: That's correct.

8 THE COURT: -- the actual number of membership cards  
9 -- cards issued.

10 MR. VAIL: And Mr. Nussbaum is correct. We have been  
11 including this pie chart because I think it's very powerful  
12 based on the 2,300-some odd individuals that were accounted  
13 for in the responses we got before they shut the process down.  
14 It shows that they are claiming and billing for a full  
15 43.5 percent more members than actually paid dues.

16 THE COURT: So that's what you're going to prove with  
17 this information?

18 MR. VAIL: That's correct, Your Honor.

19 THE COURT: They're billing whom?

20 MR. VAIL: They're billing the councils, and the  
21 councils have to pay. This is where the extortion claim comes  
22 in. If the councils don't pay --

23 THE COURT: Is council the same as a lodge?

24 MR. VAIL: It is, Your Honor. And if these councils,  
25 local councils, don't pay for the individuals that aren't

1 there anymore, that have left, that haven't paid dues in  
2 years, then they lose their fraternal benefits, which include  
3 death benefits for all of the local members.

4 THE COURT: You're saying that this information will  
5 prove that the lodges are billing -- are getting billed for  
6 members that don't exist.

7 MR. VAIL: Correct. And not two or three --

8 THE COURT: Let's say you prove that.

9 MR. VAIL: Uh-huh.

10 THE COURT: And as an aside, I would say if there's  
11 any chance that you're going to prove that, the Knights ought  
12 to do something presto quicko to get this case decided and  
13 done.

14 MR. VAIL: I think it's almost established, but --

15 THE COURT: Because that could cause all kinds of  
16 trouble for the Knights with their own lodges. All right. So  
17 that's what you prove. Let's say you prove that. So what?

18 MR. VAIL: So I think --

19 THE COURT: How does that fit into your case?

20 MR. VAIL: Any reasonable juror could look at that  
21 information and say, Wait a minute, if they had gone forward  
22 with Uknight, this system that otherwise was outstanding, low  
23 priced, provides all of these services, but it would have  
24 revealed this information, that's a great reason for them to  
25 claim that we never said anything about a contract, never made

1 a promise. That I think there is a direct logical connection,  
2 that any juror sitting in that box could say, that makes sense  
3 to me. Before it sounds like these guys are just upset  
4 because they didn't get picked.

5 THE COURT: So how would -- if they had gone ahead  
6 with the contract, how would that have -- at that point,  
7 Labriola's their friend. He's not out to get them like he is  
8 now. He's their friend, and he wants to make them happy and  
9 make boodles of money off them. So how is this information  
10 going to come out in a way that hurts them?

11 MR. VAIL: Well, several examples, Your Honor. To  
12 begin with, this information gets aggregated to every one of  
13 the field agents and general agents through the Uknight  
14 system, and once all their councils come online, each one of  
15 them are going to say, I've been told that I have 5,000 people  
16 in my territory, but only 3,000 of them actually paid dues in  
17 the last several years. How am I going to be selling  
18 insurance to people that don't exist? This information would  
19 never --

20 THE COURT: Why don't these councils already know  
21 this? They know what they're being billed for and they know  
22 what they're paying.

23 MR. VAIL: I think many of them do.

24 THE COURT: They already know the information. All  
25 of them should. If they know what they're being billed for,

1 257, but they know good and well there are only 200 members,  
2 then providing that information to Labriola isn't going to --

3 MR. VAIL: They don't know the scope of it.

4 THE COURT: -- expose it.

5 MR. VAIL: At most, they know my council, and as  
6 Mr. Nussbaum says, most of those guys at the local councils,  
7 they're volunteers.

8 THE COURT: They don't talk to each other? They  
9 don't have lodge meetings? Surely they go to Palm Springs or  
10 Las Vegas or someplace every once in a while and get together  
11 and raise Cain and --

12 MR. VAIL: And that, Your Honor, that rumor mill is  
13 exactly how we first became aware of this. It is percolating  
14 through the system, but no one, because they've been so  
15 protective of the information, has been able to actually  
16 aggregate it, what is exactly what would have happened if  
17 Uknight had launched Order-wide.

18 THE COURT: That's what you have to say about the  
19 issues Mr. Nussbaum was talking about?

20 MR. VAIL: A couple of quick things to address on the  
21 religious liberty issues, Your Honor.

22 THE COURT: Why do they come into this?

23 MR. VAIL: Well, he's argued that even if this --  
24 essentially he's asking for a license to say even if this  
25 fraud is all true, and it was our motive, and it was the

1 reason why we're not now claiming there's no contract, because  
2 we're a religious organization, you, the Court, can't inquire  
3 into it.

4 THE COURT: Nonsense.

5 MR. VAIL: I agree. And if the Court would like case  
6 law on that, I have it. Otherwise, I won't waste your time.

7 THE COURT: That's nonsense, and the production of  
8 this form and the number of membership cards issued doesn't  
9 disclose identities, it doesn't breach the freedom of  
10 association, it doesn't interfere with anybody's religious  
11 liberty, and I'm not troubled by that.

12 MR. VAIL: I agree, Your Honor, and that's all I have  
13 on the membership issue.

14 THE COURT: All right. Now, Mr. Gleason, your turn.  
15 What do you want to talk about? Let me jot down the time.

16 MR. GLEASON: Good afternoon, Your Honor. I'm  
17 prepared to talk about the two remaining motions that are  
18 before the Court now. We filed a motion to dismiss the first  
19 and second claims for relief of the second amended complaint,  
20 so I'm prepared to present argument on that. Mr. Vail filed a  
21 motion to dismiss the counterclaim that we filed, and maybe it  
22 might make more sense for Mr. Vail to address that, if he  
23 wishes, and then I can respond.

24 THE COURT: So you want the first and second claims  
25 dismissed. And the first is what?

1 MR. GLEASON: The first is the RICO claim.

2 THE COURT: That's the one I dismissed before.

3 MR. GLEASON: I'm sorry?

4 THE COURT: That's the one I already dismissed.

5 MR. GLEASON: Yes. And it was dismissed without  
6 prejudice, as the Court knows, and then re-filed, in our view,  
7 in a slightly modified form, but not one that makes any  
8 difference, and we'd like to --

9 THE COURT: Let's talk about that. The Court  
10 dismissed the RICO claim based on the distinguishability  
11 between the alleged person and the alleged enterprise, and  
12 said that the Knights and the remainder of the Order were not  
13 distinct under *Kushner* and were more like the *Posner* decision  
14 in the Seventh Circuit. So they came back and re-pled the  
15 RICO claim, and this time they added some parties. And I  
16 think you said in your brief that might have addressed the  
17 distinctiveness issue, but it creates new issues that they  
18 can't overcome.

19 MR. NUSSBAUM: Correct.

20 MR. GLEASON: Correct.

21 THE COURT: So you're not arguing the distinctiveness  
22 anymore, because I've already decided that piece. If all they  
23 had is themselves and their Order, they're out of court, but  
24 they've added some parties, and you're saying that doesn't  
25 help them because it creates more problems for them.

1 MR. GLEASON: Correct. And I'm prepared to address  
2 those additional problems. The first and foremost is the  
3 continuity requirement. As the Court knows, and in a moment  
4 I'd like to talk with the Court about the *Giese vs. Giese* case  
5 that this Court decided last April, because I think it's --

6 THE COURT: Which case?

7 MR. GLEASON: *Giese vs. Giese*. It was a --

8 THE COURT: Mr. Gleason, if I decided it yesterday I  
9 might have forgotten by now.

10 MR. GLEASON: Well, it was --

11 THE COURT: I try. I try to forget some of these.

12 MR. GLEASON: Well, I'm prepared to remind you about  
13 that a little bit. *Giese vs. Giese*, maybe I'll just get right  
14 into it.

15 THE COURT: *Giese vs. Giese* sounds like a water fowl  
16 case.

17 MR. GLEASON: No. It was a -- it was a case -- the  
18 bottom line is that you dismissed the RICO claim, and then  
19 there were state claims with it, and because the RICO claim  
20 was gone, you dismissed the whole case, and that was -- I'm  
21 looking now at your order published on Westlaw on April 17th  
22 of last year. It begins -- again, just maybe jogging the  
23 Court's memory a little bit -- plaintiff Adam Giese is the  
24 sole owner and employee of Black Diamond Well Services. He  
25 sued his mother, his father, his father's law firm and a CPA

1 firm involved in the business saying that they all ripped him  
2 off, and had --

3 THE COURT: Oh, children these days. You just can't  
4 count on them.

5 MR. GLEASON: Among the claims -- there were 13 or so  
6 claims. Among the claims was a RICO claim. And the way the  
7 Court looked at it -- the Court went through in its decision  
8 -- the citation, by the way, is 2017 WL 1407037. The Court  
9 began by talking about the continuity requirement of a RICO  
10 claim. Continuity is an element of the pattern requirement to  
11 make out a RICO. And the -- the Court, citing Colorado  
12 Supreme -- or United States Supreme Court and other precedent,  
13 said that in order to have a RICO claim, the predicate acts  
14 must amount to or pose a threat of continuing criminal  
15 activity.

16 It can't be a one-off. If there's going to be a RICO  
17 claim, there has to be a threat of continuing criminal  
18 activity as is set out in *Giese* and the authorities cited in  
19 *Giese*. So the first basis for dismissal of the new RICO claim  
20 is we don't have that here.

21 THE COURT: Is what?

22 MR. GLEASON: We do not have allegations --  
23 sufficient allegations in the second amended complaint of  
24 continuing criminal activity. What we have here, the  
25 plaintiff says that the Knights of Columbus broke a deal and

1 stole his trade secrets. If that, indeed, happened, it  
2 occurred sometime ago, and there's no threat that there's any  
3 continuing enterprise that's continuing to engage in the  
4 breaking of contracts or the theft of trade secrets from the  
5 plaintiff or anybody else.

6 THE COURT: Does this have to do with the new parties  
7 or it's just -- is this just a new argument you've figured  
8 out?

9 MR. GLEASON: No. It has to do with the new parties.  
10 They really have -- they've added two parties. They've added  
11 IDI Middleware, basically Ian Kinkade's firm that you talked  
12 with Mr. Vail about.

13 THE COURT: Which firm?

14 MR. GLEASON: Kinkade. So they've added Kinkade's  
15 firm as one additional claim participant in the association,  
16 and then the other --

17 THE COURT: Participant in the enterprise?

18 MR. GLEASON: I'm sorry?

19 THE COURT: IDA is an alleged participant --

20 MR. GLEASON: Yes.

21 THE COURT: -- participant in the enterprise?

22 MR. GLEASON: Yes. IDI.

23 THE COURT: IDI.

24 MR. GLEASON: IDI Middleware it's called.

25 THE COURT: Is part of the enterprise.

1 MR. GLEASON: Right. So they say the enterprise  
2 consists of the Knights of Columbus, IDI Middleware, and A.M.  
3 Best, the insurance rating service. And they say that that is  
4 the association that was formed to engage in a pattern of  
5 racketeering activity, and per *Giese* and other authority, if  
6 -- if indeed -- and it does, I have to concede, solve the  
7 distinctiveness problem. Certainly A.M. Best is distinct from  
8 the Knights of Columbus.

9 THE COURT: I wonder if A.M. Best realizes that  
10 they're being accused of participating in racketeering  
11 activity.

12 MR. GLEASON: I don't think they'd be happy.

13 THE COURT: I don't think so.

14 MR. GLEASON: But the point here is that while the  
15 second amended complaint has thereby solved the  
16 distinctiveness problem that hung them up when they said that  
17 the association in fact enterprise was the Knights of Columbus  
18 as a whole, the Order, if you will, then they come up against  
19 the -- against the requirement -- RICO requirement that -- the  
20 continuity requirement. And in your order in the *Giese* case  
21 you spoke for a couple of pages about the continuity  
22 requirement and how that's essential to a RICO claim and it  
23 means something, and the Supreme Court has long said that for  
24 there to be a RICO claim, it can't be that something happened  
25 in the past, and so now I'm bringing the RICO claim to address

1 that. There has to be a threat of continuing criminal  
2 activity on the part of this enterprise, this enterprise of  
3 A.M. Best, the Knights of Columbus, and Ian Kinkade's company.

4 THE COURT: Well, does it have to be a continuing  
5 criminal activity that adversely impacts the plaintiff?

6 MR. GLEASON: Yes. Well, and others.

7 THE COURT: I suppose if they say that the Knights  
8 are in this grand conspiracy with A.M. Best and Kinkade's  
9 firm, they could say, Well, that's a continuing conspiracy.  
10 They're still conspiring. But how does it affect the  
11 plaintiff? Does it need to affect the plaintiff? You're  
12 saying what affects the plaintiff are the breach of contract  
13 and the trade secrets.

14 MR. GLEASON: Well, and that's why this is not a RICO  
15 case, just like *Giese* was not a RICO case. The Court's --  
16 kind of the bottom line, the way the Court characterized  
17 things, if I can read a paragraph that sums things up pretty  
18 well after the Court went through the law relative to the  
19 continuity requirement, the Court said in the *Giese* case,  
20 Defendant's alleged racketeering amounts to a single  
21 narrowly-focused scheme conducted in the past to conduct only  
22 one discrete goal, stealing money from the plaintiffs. Here  
23 you can substitute stealing trade secrets from the plaintiff.

24 THE COURT: Do you have any better authority than me?

25 MR. GLEASON: The authorities that you cited,

1 including the United States Supreme Court in a case called  
2 H.L. Inc. is prominently cited in the *Giese* case. I have that  
3 citation here.

4 THE COURT: It's okay. I can find it.

5 MR. GLEASON: I'm sorry. It's *H.J. Inc.* at 492 U.S.  
6 229. And the -- and you begin citing *H.J. Inc.*, To state a  
7 claim for a RICO violation, a plaintiff must allege, among  
8 other things, the, quote, continuity of the defendant's  
9 alleged racketeering scheme. And then you talked about  
10 there's closed-end continuity and open-ended continuity.  
11 Those are two different theories of continuity. And you found  
12 in the *Giese* case neither was satisfied under circumstances  
13 virtually identical to what we have here.

14 You went on to say relative to the *Giese* case that  
15 the alleged racketeering was directed at a finite group of  
16 victims, i.e., just Adam Giese and Black Diamond -- maybe we  
17 can substitute here just Uknight and Leonard Labriola -- with  
18 no potential to expand behind those confined limits to hurt  
19 any potential victims, quote, waiting in the wings, and  
20 waiting in the wings is an expression used in other cases that  
21 you cited.

22 Simply put, that kind of narrowly focused, albeit  
23 allegedly illicit behavior, is not the kind of extensive  
24 continuing racketeering RICO is meant to cover. Extensive  
25 continuing racketeering. And on that basis, the Court

1 dismissed the claim. There is nothing in the complaint about  
2 any extensive continuing racketeering that the Knights of  
3 Columbus, A.M. Best, and IDI Middleware, Ian Kinkade's  
4 company, are engaged in.

5           What's alleged is that the three of them somehow  
6 caused the breach and the theft of trade secrets that they're  
7 complaining about, but then they were done. There's --

8           THE COURT: A.M. Best hasn't been named as a  
9 defendant, right?

10           MR. GLEASON: I'm sorry?

11           THE COURT: A.M. Best has not been named as a  
12 defendant?

13           MR. GLEASON: No. They're named -- they're  
14 identified -- identified is probably a better word. In the  
15 second amended complaint, the RICO claim, they have to  
16 identify the alleged RICO participants, the participants in  
17 the association in fact. And so they've --

18           THE COURT: So it's an unidentified co-conspirator.  
19 It's an identified but unnamed coconspirator.

20           MR. GLEASON: Yeah, I suppose you can look at it that  
21 way. RICO, of course, is unique with the association in fact  
22 element.

23           THE COURT: Well, if A.M. Best actually did that, I  
24 wonder why they wouldn't name that.

25           MR. GLEASON: I do too.

1 THE COURT: I can answer that question. They don't  
2 want them in this case.

3 MR. GLEASON: Well, and then that -- that gets to  
4 another maybe more involved reason why -- why this second RICO  
5 claim doesn't work either.

6 THE COURT: The IDI isn't a named defendant either,  
7 is it?

8 MR. GLEASON: Correct. That's correct. They're not  
9 named.

10 THE COURT: Okay. What's the second argument?

11 MR. GLEASON: There's nothing in -- we talked about  
12 this in our brief. There's nothing that the three of them,  
13 Knights of Columbus, A.M. Best, and IDI Middleware, supposedly  
14 did together. The allegation is that --

15 THE COURT: Are you still on continuity or are you on  
16 the next argument now?

17 MR. GLEASON: We're on the next RICO argument.

18 THE COURT: What's that?

19 MR. GLEASON: The lack of predicate acts, a  
20 conspiracy, a joint effort to engage in racketeering through  
21 predicate acts. This does relate to continuity as well,  
22 though, as I think about it. They say, first of all --

23 THE COURT: Well, you said your argument is that they  
24 don't allege even that these three entities, the Knights Order  
25 group being one, the IDI, and A.M. Best, did anything

1 together.

2 MR. GLEASON: Correct, not all three. Not all three.  
3 They say that IDI and the Knights got together to steal the  
4 trade secrets. A single, by the way, predicate act. That's  
5 just one thing. You need two for RICO. But they say that IDI  
6 and the Knights got together to steal Uknight's trade secrets.  
7 So that's what -- that's what IDI and the Knights of Columbus  
8 did. A.M. Best is not alleged to have had any involvement in  
9 that. What A.M. Best's involvement, they say -- and then  
10 additionally, the Knights of Columbus and A.M. Best got  
11 together to cook up fraudulent insurance ratings.

12 THE COURT: Insurance rates?

13 MR. GLEASON: Ratings. A.M. Best rates -- for years  
14 it has rated the Knights of Columbus insurance I think with  
15 its highest rating, very highly. They say that's fraudulent  
16 and that the Knights of Columbus and A.M. Best have been in  
17 cahoots to create fraudulent insurance ratings.

18 THE COURT: Well, if A.M. Best ever were to find out  
19 about what's going on in this case, they might take a whole  
20 new look at the insurance ratings they give to this insurance  
21 --

22 MR. GLEASON: I think they'd take exception at  
23 statements like that just made out of whole cloth.

24 THE COURT: They might take great exception to what's  
25 being alleged.

1 MR. GLEASON: Yeah, I think they would. I think they  
2 would.

3 THE COURT: But they would also be looking again at  
4 the ratings, I imagine.

5 MR. GLEASON: If I can have just a moment, Your  
6 Honor.

7 THE COURT: So what you were about to say is that  
8 they supposedly conspired to create fraudulent insurance  
9 ratings, but IDI had nothing to do with that.

10 MR. GLEASON: That's correct. There's no allegation  
11 --

12 THE COURT: So there wasn't anything that involved  
13 all three, and why is that important? They could drop IDI or  
14 they could drop A.M. Best and still have distinctiveness.

15 MR. GLEASON: To look at them one by one. So if we  
16 have A.M. Best and the Knights of Columbus conspiring to  
17 engage in fraudulent insurance ratings, that -- that might  
18 solve the distinctiveness and common purpose requirements.  
19 Under that theory, the Knights of Columbus and A.M. Best,  
20 they're distinct. They have a common purpose, that being to  
21 create fraudulent insurance ratings, but there's no causation.  
22 How does that hurt in any way, shape, or form the plaintiff  
23 here? There's not even -- there's no even straight-faced  
24 causation argument, and there's certainly no allegation of  
25 such in the complaint.

1           There's a -- as we explain, and I'm looking at page 8  
2 of our brief -- of our motion actually, as we explained in  
3 there, they say that the three -- when they put the two of  
4 them together, and I'll go back and talk about the other side  
5 of what they're talking about, but they say the three of them  
6 had a common purpose of engaging in fraudulent activities and  
7 hurting the plaintiff.

8           THE COURT: Yeah.

9           MR. GLEASON: And that doesn't cut it.

10          THE COURT: My question, Mr. Gleason, is why do they  
11 need all three?

12          MR. GLEASON: Well, because if they have only -- if  
13 they have only A.M. Best and the Knights of Columbus, they  
14 don't have any harm to the plaintiff. If they have --

15          THE COURT: Only IDI.

16          MR. GLEASON: If they have only IDI, they -- they  
17 have -- then they run into *Giese*. If they have only IDI and  
18 the Knights of Columbus conspiring to steal trade secrets, now  
19 they might get -- they might solve the problem they have with  
20 A.M. Best. But now we have a single act. We don't have a  
21 pattern. We don't have two predicate acts. We've got a  
22 single -- under that theory -- all we have is a single  
23 instance of the Knights of Columbus getting together with IDI  
24 and stealing the trade secrets. So they have to have all  
25 three, and as we said in our brief, to hope that some sort of

1 amalgamation emerges where we can have a viable RICO  
2 enterprise. And it doesn't work.

3 So they do -- as to -- for all those reasons, as to  
4 the new RICO claim, neither one -- neither IDI or the Knights  
5 of Columbus does not satisfy -- make out a RICO claim because  
6 --

7 THE COURT: Let's talk about the second claim.

8 MR. GLEASON: The IRS claim? Yes.

9 THE COURT: Well, you said you had the first and  
10 second claims you wanted me to dismiss.

11 MR. GLEASON: Yes.

12 THE COURT: The second claim was, what, to strip them  
13 of their IRS tax status?

14 MR. GLEASON: Yes. And that --

15 THE COURT: Also known as their vindictive claim.

16 MR. GLEASON: Well, they're seeking a -- I'm quoting  
17 from the prayer of their second amended complaint at page 66,  
18 paragraph B as in boy. They're seeking a permanent injunction  
19 ordering the commissioner of the IRS to revoke the 501(c)(8)  
20 tax exempt status of the Knights of Columbus.

21 THE COURT: Well, okay. I'd say buena suerte, señor.

22 MR. GLEASON: They have no standing to bring that  
23 claim as we've -- as we've briefed. They have no standing  
24 under Article III. There's no personal injury to the  
25 plaintiff from the IRS, the tax exempt status. Nothing fairly

1 redressable, nothing traceable to the tax status.

2 THE COURT: I glanced at the file this morning and  
3 noticed, I think, that the IRS hadn't even been served.

4 MR. VAIL: They have been served, Your Honor. They  
5 still have about 45 days to respond.

6 THE COURT: I'm almost tempted to leave that claim in  
7 just because it would be so delicious to hear what the IRS has  
8 to say about some federal judge in Denver telling them what to  
9 do about their tax status decisions.

10 MR. GLEASON: Well, that's crossed my mind, actually  
11 from my side of the podium.

12 THE COURT: Maybe I've got that authority. Maybe the  
13 authority of federal judges is close to infinite.

14 MR. GLEASON: Well, as a matter of fact, 26 U.S.C.  
15 Section 7428 -- in addition to the lack of standing as we  
16 explained, Section 7428 of the Internal Revenue Code says that  
17 there's various hoops that have to be jumped through, which  
18 they can't possibly jump through, and haven't, of course. But  
19 the affected taxpayer can challenge a 501(c) determination by  
20 the IRS, but there's only three courts in which you can bring  
21 that, none of which is in Denver.

22 THE COURT: Darn. I thought I had the authority.

23 MR. GLEASON: No. If you were on the tax court, the  
24 court of claims, or the district court in the District of  
25 Columbia, and other elements were met, you might have that

1 authority, but you certainly don't here. The response brief  
2 does not contest any of this. The response brief says that  
3 the Knights of Columbus cannot raise this issue, only the IRS  
4 claim can, because the claim is directed to the IRS.

5 THE COURT: I thought you said that the taxpayer can  
6 raise the claim if he wants to.

7 MR. GLEASON: I'm talking about if a taxpayer is  
8 unhappy -- if I applied for 501(c) status and it was denied, I  
9 have to follow an administrative process, and then ultimately  
10 I can -- that Section 74 --

11 THE COURT: So the taxpayer here is the Knights, and  
12 they're not about to complain about the rating.

13 MR. GLEASON: Well, they've had it since 1940, and  
14 there's nothing wrong with it. And as we say, there's  
15 numerous cases, including cases from the Tenth Circuit and  
16 from this Court, saying that only in really exceptional  
17 circumstances can anyone other than a taxpayer challenge  
18 somebody else's (c)(3) status.

19 THE COURT: All right.

20 MR. GLEASON: So they say we -- their response to  
21 that is not to address this on the merits at all, but to say  
22 that the Knights of Columbus has no standing to seek dismissal  
23 of this claim. That because the claim is nominally directed  
24 at the commissioner, only the commissioner can seek to dismiss  
25 it. And --

1 THE COURT: Okay.

2 MR. GLEASON: -- I think they're mistaken about that.  
3 This goes to the Court's subject matter jurisdiction. Any  
4 party at any time, of course, can wage subject matter  
5 jurisdiction. And additionally, they're seeking to revoke the  
6 tax exempt status of the Knights of Columbus, and so that  
7 certainly impacts the Knights of Columbus.

8 THE COURT: Thank you, Mr. Gleason.

9 Mr. Vail.

10 MR. VAIL: Yes, Your Honor. So, Your Honor, I think  
11 I can address -- and I'll start with the first claim, the RICO  
12 claim. The arguments that defendant is now making are new.  
13 They have --

14 THE COURT: So is your RICO claim new.

15 MR. VAIL: It is, Your Honor. I would argue it is  
16 revised specifically incorporating the guidance and the  
17 critique that you laid out in your prior order, and I'll go  
18 over that and exactly how we've addressed that, and they  
19 haven't addressed that issue at all. What they've done is  
20 they've taken dozens and dozens of predicate acts, and they  
21 have -- and they've claimed, well, they're all no good because  
22 of Rule 9(b), a new argument they didn't raise before, that  
23 they could have, exact same predicate acts. But now because  
24 those claims are all out, there's only this one left, and  
25 because there's only this one left, now there's no continuity,

1 and that's the entire basis of their continuity argument.

2           Now, I think, frankly, we've briefed this fairly well  
3 in the papers. The case law is in there. It's all addressed.  
4 I would like to address one issue on causation. Mr. Gleason  
5 also brought up RICO causation. And there is a case that we  
6 hadn't cited in a prior briefing that I would like to bring  
7 up. That's a Seventh Circuit case where the Seventh Circuit  
8 held that an action, a single action taken to cover up a RICO  
9 scheme gives the victim of the coverup standing, even, in that  
10 case, where the plaintiff was not harmed by the underlying  
11 RICO scheme, but only by the coverup. And that is *Schiffels*  
12 *vs. Kemper Financial Services*, 978 F.2d 34. That's Seventh  
13 Circuit, 1992.

14           Here, I think there is an argument that, as we've  
15 made, that plaintiffs were directly harmed by the RICO  
16 predicate acts themselves, but if even if it was only the  
17 coverup, at least the Seventh Circuit has ruled that's  
18 sufficient to confer standing to sue. The Tenth Circuit has  
19 never addressed the issue.

20           Now, the next thing Mr. Gleason talked about on the  
21 RICO claim are the alternative enterprises. Now, he actually  
22 only talked about the second one, which was added in the  
23 amendment, and I think Your Honor gets right to the point.  
24 There is not a requirement that all of the members of the  
25 enterprise specifically engaged in more than one act. There's

1 a requirement that the enterprise engaged in more than one  
2 act.

3           And I think it's important to point out from *Kushner*,  
4 probably the key Supreme Court case on the person-enterprise  
5 distinction, that, quote, the enterprise may be the person and  
6 the victim or the person and the tool. We're making no  
7 allegation that A.M. Best was knowingly conspiring with the  
8 Knights of Columbus here. Simply that they're the victim.  
9 They have been creating huge liability for themselves by  
10 issuing ratings based on self-reported information that  
11 they're being told is not true.

12           THE COURT: Did you say you're not alleging that A.M.  
13 Best is conspiring?

14           MR. VAIL: No, Your Honor. Because, as in *Kushner*,  
15 the U.S. Supreme Court has held the enterprise may consist of  
16 the person and the victim or the person and the tool. So you  
17 can have the person, the Knights of Columbus, and a tool, a  
18 member -- a person who's actively participating, or you can  
19 have the actual victim be a part of the enterprise. Here,  
20 A.M. Best is being used for that purpose.

21           But I think that the key item that Mr. Gleason  
22 entirely omitted to mention is that there are two alternative  
23 enterprises alleged here, and the first is the Order, as  
24 you've defined the terminology, which I believe we've added --  
25 it's just a cut and paste of the previous claim. It's not --

1 there are approximately a dozen new allegations and statements  
2 in there that are highlighted in the briefing.

3 THE COURT: Might be, but I decided that one.

4 MR. VAIL: Well, Your Honor, you decided it based on  
5 -- and I'll read from your order -- this is -- given the  
6 holding of such cases as *Fitzgerald*, it does not matter  
7 whether a corporation conducted its business through its own  
8 employees or through independent agents for purposes of RICO's  
9 distinctiveness. Rather, so long as these entities are mere  
10 ancillary components of the RICO person and do nothing more  
11 with respect to the alleged pattern of racketeering than carry  
12 out the corporation's ordinary business, they cannot be joined  
13 with the corporation itself.

14 And then you quote from *Brannon*, the Tenth Circuit  
15 case, that the subsidiary parent can't be part of the  
16 enterprise, if nothing in the plaintiff's allegations indicate  
17 how the relationship between the subsidiary and the parent  
18 allowed the subsidiary to perpetrate or conceal the alleged  
19 mail fraud.

20 Now, here the allegations we've added talk about this  
21 issue of how the local councils, quote, independently verify  
22 these membership numbers by paying the bills, but they're not  
23 the actual numbers. They're the numbers they're billed. And  
24 so the local council then -- that distinctiveness, the fact  
25 they're an independent group that verifies these numbers, and

1 then just sends them up to Knights of Columbus for compilation  
2 actually helps to --

3 THE COURT: The local lodges are independent of the  
4 Knights? How can they be? The way you get the tax status is  
5 to have lodges. You have to have them.

6 MR. VAIL: I agree, Your Honor. And this is exactly  
7 where *Brannon* comes in. A subsidiary can be a distinct person  
8 for purposes of creating an enterprise if their -- the  
9 distinction that they have helps them perpetrate the fraud.  
10 And here these membership numbers are independent -- are,  
11 quote, independently verified -- this is what we allege -- by  
12 the local councils, and that independence, the fact that local  
13 council members are claimed to have said these numbers are  
14 real when actually it's being foisted on them by the Knights  
15 of Columbus, allows the perpetration of the fraud.

16 THE COURT: Okay. What's your better argument? Your  
17 second argument.

18 MR. VAIL: Probably the second enterprise, Your  
19 Honor. But I do think that it's quite clear and essentially  
20 admitted that gets rid of the person-enterprise dichotomy  
21 issue, and they don't really have any argument these people  
22 weren't involved. They just say, you know, A.M. Best didn't  
23 know they were involved. Well, I agree. They were a victim,  
24 and that's perfectly permissible as part of the enterprise.  
25 You don't have to be an active conspirator under the RICO

1 laws.

2 Now, to address -- unless you have questions on RICO,  
3 I'll turn to the IRS claim.

4 THE COURT: So you talked about A.M. Best, but you  
5 don't say anything about IDI. Why?

6 MR. VAIL: Your Honor, that was and is Mr. Kinkade's  
7 company. He contracted with the Knights of Columbus. In his  
8 role as working with IDI, he was sent down to Dallas, stole  
9 the trade secrets, brought them back to Connecticut. That's  
10 the allegation. So I think that it's actually even more  
11 clearcut. That's not a case where we're alleging IDI is a  
12 victim. IDI, I think, was an active participant, admittedly  
13 in that one act, but the enterprise itself was engaged in many  
14 acts, and that's all that's required.

15 THE COURT: Okay. Now, explain why you're bringing  
16 the IRS into this case, other than just to try to create  
17 leverage for settlement purposes, because that's the only  
18 conceivable reason I can think of.

19 MR. VAIL: Well, Your Honor, the issue here is -- and  
20 we've discussed this -- that they've stole the trade secrets  
21 because they know it's a good system, and they're contracting  
22 with third parties to recreate it, and they're doing so with  
23 funds collected from councils. They're paying for this  
24 third-party creation to compete with my client using their tax  
25 exempt status.

1 THE COURT: Why does it make any difference to  
2 Mr. Labriola whether they're IRS 508 or not?

3 MR. VAIL: 508 -- 501(c)(8) or 501(c)(3) wouldn't.  
4 Tax exemption does.

5 THE COURT: Why does that matter to Mr. Labriola?

6 MR. VAIL: Gives them a business advantage. It's  
7 less costly to compete with him, and that concept of  
8 competitor standing is well-established. It is cited in our  
9 briefs. And the Court I understand jokingly talked about --

10 THE COURT: How are they competing with him?

11 MR. VAIL: They're providing -- they're contracting  
12 with a third party using the stolen trade secrets to provide  
13 the exact same system to the local councils that  
14 Mr. Labriola's company provides.

15 THE COURT: And if so, then you've got them by the --  
16 you've got them on the trade secrets.

17 MR. VAIL: I agree that there's a possibility they  
18 could be liable on both, but I don't think that the fact  
19 they're liable on one --

20 THE COURT: You're saying that Labriola has a  
21 snowball's chance to compete for the business of these lodges,  
22 notwithstanding the Knights' loathing of him and the Knights'  
23 control over the Order, because the Knights can sell their  
24 insurance to their members cheaper because they have a tax  
25 exempt status?

1 MR. VAIL: And they can provide all the services they  
2 provide to the local councils cheaper. And if this were only  
3 an issue of Mr. Labriola had no chance to compete, despite  
4 their loathing of him, how would he still have 600-some odd  
5 councils and general agents that are actively subscribing to  
6 his service.

7 THE COURT: Okay. I get it.

8 MR. VAIL: And, Your Honor, just to briefly address  
9 the final issue on whether you have the authority to even rule  
10 on that issue, Section 7428, quoted by Mr. Gleason, only  
11 applies to the taxpayer themselves, not to third-party  
12 challenges. There are cases where third parties under the  
13 competitor standing concept challenged successfully tax  
14 exemption. Two examples cited in our brief, *Arnold Tours v.*  
15 *Camp*, 400 U.S. 45; and lastly, *Association of Data Processing*  
16 *v. Camp*. Camp in this case was the IRS commissioner. And  
17 that -- I'll pull up the cite on that -- I apologize -- is 397  
18 U.S. 150.

19 Other than that, though, Your Honor, I do agree that  
20 I think the IRS should be allowed to respond to this. I  
21 understand certainly why the Knights of Columbus would like to  
22 dispose of this before the IRS digs into it, because while I  
23 recognize the IRS could try and protect sort of the fences on  
24 a standing challenge, I think that on the merits there's  
25 extremely strong argument why the tax exemption should be

1 revoked on three independent grounds, but I think that's  
2 something that the IRS should at least be in the case before  
3 we address it.

4 And, Your Honor, with respect to the final -- the  
5 motion to dismiss the counterclaims, I'm happy to answer any  
6 questions, but I, frankly, think that the briefs are  
7 sufficient, and that oral argument really today was just  
8 needed for the membership number issue.

9 THE COURT: Well, the defendant has six minutes left,  
10 if they want to -- seven minutes left, if they want to say  
11 something about the counterclaims.

12 MR. GLEASON: Your Honor, I agree with Mr. Vail. I  
13 could make some points about that, but I think the position of  
14 the Knights of Columbus is well-stated in our -- in our  
15 response to the motion to dismiss.

16 THE COURT: I don't suppose you'd like to tell me  
17 candidly why you filed the counterclaims.

18 MR. GLEASON: Well, I mean, there's nothing --  
19 because trademark infringement is going on.

20 THE COURT: You're like two heavyweights slugging  
21 back and forth. See who can come up with the most claims, the  
22 most dirt, the most damage to the other side. See where it  
23 all shakes out.

24 MR. GLEASON: Respectfully, Your Honor, I have to  
25 take exception to that. Maybe there's been other occasions

1 where we've been guilty of that, but the counterclaim -- as  
2 detailed in the counterclaim, the plaintiff is using the name  
3 and marks of the Knights of Columbus in violation of the  
4 Lanham Act and common law trademark law.

5 THE COURT: How are they doing that?

6 MR. GLEASON: They have K of C -- they're using the  
7 K of C name in their domain names. We have in our  
8 counterclaim several pictures, screenshots, examples of how  
9 they're doing that. They -- the counterclaim is based on --  
10 this is more a conclusory kind of statement, but the detail is  
11 in the counterclaim. They are -- they are passing themselves  
12 off as affiliates of the Knights of Columbus.

13 THE COURT: I apologize. I didn't realize that was  
14 what the thrust of the counterclaim was. If they're doing  
15 that, they're in big trouble potentially.

16 MR. GLEASON: And that is the thrust of the  
17 counterclaim. Thank you.

18 MR. VAIL: Your Honor, just to very briefly respond  
19 to that point. This is really an issue more appropriate for  
20 summary judgment, I think, and it's not --

21 THE COURT: Is your client using their trademark?

22 MR. VAIL: Your Honor, he is. And it was paid for  
23 and directed by the Knights of Columbus. So after -- in 2011  
24 when they began working together, at the direction of the  
25 Knights of Columbus, the Knights of Columbus paid for a

1 graphic design firm to build the website using their  
2 trademark. They've been aware since at least 2011 of all the  
3 domain usage.

4 THE COURT: That was when the parties were assuming  
5 they were going to be business partners.

6 MR. VAIL: And at a minimum they were barred by  
7 laches, which is four years on trademark claims. They've  
8 known since 2011, and acquiescence or permission, they  
9 actually directed and paid for the use of the marks in this  
10 case.

11 THE COURT: Until there was the falling out. Surely  
12 they aren't authorizing the use of the trademark now.

13 MR. VAIL: I'm sure that's true.

14 THE COURT: And why is he continuing to use it?

15 MR. VAIL: He's using the page that they paid for,  
16 but he's taken the marks off. But in the past, it was  
17 absolutely being used.

18 THE COURT: When did he take the marks off?

19 MR. VAIL: I don't remember the exact date.

20 MR. LABRIOLA: Within one hour of being told to.

21 MR. VAIL: There was a letter sent saying take these  
22 marks off at some point during the early litigation, and it  
23 was done.

24 THE COURT: All right. Well, then, Mr. Gleason or  
25 Mr. Nussbaum, tell me, if he was using the marks and you

1 called him on it and he took them down, then what's your  
2 claim?

3 MR. GLEASON: Your Honor, it's not -- it's not all  
4 taken down. He continues -- I say he -- the counterclaim  
5 defendants continue to use URLs with the Knights of Columbus  
6 name in it, K of C dot, in a way that misleads -- that we  
7 contend, as we spelled out in the counterclaim, violates the  
8 Lanham Act.

9 THE COURT: So it's a he said/she said. He said we  
10 took them down. You say he didn't.

11 MR. GLEASON: And we may --

12 THE COURT: One of you is right.

13 MR. GLEASON: That may be an issue for trial, but  
14 it's not all taken down.

15 THE COURT: There shouldn't be any dispute. Either  
16 he did or he didn't.

17 MR. GLEASON: I can assure the Court that if the  
18 problem was solved, we wouldn't have filed the counterclaim.  
19 It's an ongoing problem. It's a real serious problem. We've  
20 heard Mr. Vail say -- he said it in other contexts too, I  
21 think in his papers -- that laches, we can't do anything about  
22 it now. We haven't acted fast enough.

23 THE COURT: Laches is nonsense.

24 MR. GLEASON: Well, I think so too, but we have to  
25 protect our marks.

1           THE COURT:  If he didn't take them down, he's in  
2 trouble, and he ought to know that.  He can never say he  
3 wasn't warned today.  If he didn't take them down, he's in  
4 trouble.

5           Thank you, gentlemen.  The Court will take it under  
6 advisement.

7           THE COURTROOM DEPUTY:  All rise.  The Court is in  
8 recess.

9           (The proceedings were concluded at 3:14 p.m.)

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REPORTER'S CERTIFICATE

I, SARAH K. MITCHELL, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 15th day of February, 2018.

/s/ Sarah K. Mitchell

SARAH K. MITCHELL  
Official Court Reporter  
Registered Professional Reporter  
Certified Realtime Reporter