

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 2017-CV-210-MJW

LIST INTERACTIVE, LTD. D/B/A UKNIGHT INTERACTIVE,
LEONARD S. LABRIOLA

Plaintiffs,

v.

KNIGHTS OF COLUMBUS,
THOMAS P. SMITH, JR.
MATTHEW A. ST. JOHN,

Defendants.

PLAINTIFFS' EMERGENCY MOTION FOR PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 26(c), Plaintiffs List Interactive, Ltd. d/b/a UKnight Interactive ("UKnight") and Leonard S. Labriola file this Emergency Motion for Protective Order ("Motion"), and in support thereof state as follows:

CERTIFICATE OF CONFERRAL

Plaintiffs' counsel has conferred with counsel for Defendants Edward Gleason and Ian Speir in accordance with D.Colo.LCivR 7.1(A), who have stated that they oppose the relief requested herein.

I. INTRODUCTION & FACTUAL BACKGROUND

Defendant Knights of Columbus Supreme Council ("Supreme") is the leadership council and captive insurance company of the international Catholic fraternal order the Knights of Columbus ("Knights of Columbus"), which is comprised of thousands of

independent local councils, hundreds of thousands of individual members, and hundreds of independent insurance agents. There is a significant divide within the Knights of Columbus between the fraternal side of the Order with its local councils heavily involved in charity work, and Supreme, which is a Fortune 1000 insurance company and tax-exempt profit center. See Affidavit of Leonard S. Labriola at ¶ 2, *attached hereto at Exhibit A* (“Labriola Aff.”). Prior to and since the initiation of this case, more than a dozen current and former local officers, state officers, and agents of the Knights of Columbus, concerned about the fraudulent and illegal actions of Supreme, have acted as whistleblowers,¹ communicating with Plaintiffs and providing factual details substantiating many of the allegations in the Amended Complaint, [Doc. No. 15]. Without the assistance from these whistleblowers, Plaintiffs would have been largely unaware of the factual basis for, scope, and motivation behind Supreme’s fraudulent scheme. As outlined below, Supreme has a history of retaliating against members and agents who have pushed back against Supreme officers in any way, especially to resist this scheme or to report it.

Then, on February 10, 2017, after Supreme was notified that Plaintiffs and Plaintiffs’ attorney had been in contact with several fraternal leaders and insurance agents, and in a transparent attempt to prevent these and other potential whistleblowers from cooperating with Plaintiffs, Supreme engaged in witness tampering and intimidation by, among other things, corruptly persuading and misleading its members and agents to

¹ Corporate employee-informants, also known as whistleblowers, are generally classified as citizen informants, and perform what is arguably an especially important role by reporting wrongdoing that has the potential to inflict widespread harm that may otherwise be nearly impossible to detect. See MARLENE WINFIELD, *Whistleblowers as Corporate Safety Net, in WHISTLEBLOWING—SUBVERSION OR CORPORATE CITIZENSHIP?* at 21-31 (Gerald Vinten ed., 1994).

prevent and withhold testimony in this case. Accordingly, this Court should protect these actual and potential whistleblowers by requiring their identities to be disclosed only to Defendants' outside counsel, and prohibiting disclosure of their identities to Defendants, Defendants' in-house counsel, and third-parties.

II. ARGUMENT

A. Defendants' Have A History Of Retaliation Against Whistleblowers

As alleged in the Amended Complaint, Supreme has a demonstrable history of engaging in retaliation against its members and agents that resist its fraudulent scheme or attempt to report it. [Doc. No. 15] at ¶¶ 39, 40(e); Affidavit of Whistleblower #1 at ¶ 2, *attached hereto at Exhibit C*; Affidavit of Whistleblower #2 at ¶ 2, *attached hereto at Exhibit D*; Affidavit of Whistleblower #3 at ¶ 2, *attached hereto at Exhibit E*.² As a result, there is a general climate of fear within the Knights of Columbus that one will face retaliation if one crosses Supreme, and especially Defendant Tom Smith. *Id.* At least two whistleblowers testify as to having been personally retaliated against by Supreme and Mr. Smith. **Exhibit D** at ¶ 2 (“I have personal experience with this: after I attempted to report a non-existent council and numerous phantom members to Supreme and Tom Smith, false charges were leveled against me by Supreme. I was able to definitively prove to Supreme that these charges were false, but none-the-less I was fired, in my opinion in retaliation for my attempt to report certain fraudulent activity to Mr. Smith and Supreme”); Affidavit of Whistleblower #7 at ¶ 2, *attached hereto at Exhibit I* (“I have

² For the purposes of this Motion, all Whistleblower Affidavits are referenced by the anonymous numbering above, and are attached in redacted form to protect the identity of the whistleblowers. The un-redacted affidavits will be produced to the Court as a separately filed Level 4 Restricted Document for *in camera* review, and will be produced to Defendants' outside counsel upon granting of the Protective Order requested in this Motion.

multiple personal experiences [with this retaliation . . . proceeding to detail retaliation]”). One state-level officer of the Knights of Columbus, who declined to sign an affidavit out of fear of retaliation, stated that “everyone knows it’s happening, but no one has the balls to speak up.” [Doc. No. 15] at ¶ 40(d). Additionally, since the inception of this case Plaintiffs’ counsel has received death threats³ from members of the Knights of Columbus, further highlighting the fear and intimidation running rampant within that organization, and the lengths some members are willing to go to protect the Order without regard to the merit of the claims against it.

Because of this climate of fear and retaliation created by Supreme,⁴ the requested Protective Order is necessary to minimize the intimidation of witnesses, to permit Plaintiffs to engage in unfettered investigation and discovery, and to facilitate Plaintiffs’ role of private attorney general as envisioned by the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* See, e.g., *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (“The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity”).

B. Defendants’ 2/10/17 Emails Constitute Witness Tampering

Compounding the situation, and highlighting the climate of fear and retaliation within the Knights of Columbus, on Friday, February 10, 2017, Supreme engaged in

³ For example, one Knight of Columbus member emailed Plaintiffs’ counsel threatening “death,” elaborating that “you won’t even know where the flack is coming from,” and that he intends to “make an example [of Plaintiffs and their counsel] that no one in the future will ever be so foolish.”

⁴ “The prevalence of retaliation against informants is widely acknowledged.” Ethan D. Wohl, *Confidential Informants in Private Litigation: Balancing Interests in Anonymity and Disclosure*, *FORDHAM JOURNAL OF CORPORATE LAW & FINANCIAL LAW*, Vol. 12, Issue 3 at 556 (2007).

widespread and overt criminal witness tampering in violation of 18 U.S.C. § 1512(b). At 3:19 p.m., Supreme sent two emails containing the following text to thousands of Grand Knights and Financial Secretaries (local counsel leaders), State Deputies, District Deputies, Field Agents, and General Agents:

A company called UKnight, or List Interactive, operated by Leonard Labriola, has sued the Knights of Columbus in federal court in Denver. UKnight provides web-hosting services to some councils and agents. It claims it had a contract with the Order itself as a “preferred vendor.” The Order denies this, all of UKnight’s claims, and all the material allegations in the lawsuit. It will vigorously defend itself. Mr. Labriola or his attorney, Jeffrey Vail, may contact you **or other members** to obtain information to try to help their case. While there is nothing improper about this, you and other Knights have no obligation to speak with them. Any Knight who is contacted by Mr. Labriola or Attorney Vail may, in his own discretion, speak with them or decline to do so. **Please be aware, however, that if you choose to speak with them, you may become a witness in this lawsuit.**

Email from noreply@kofc.org 2/10/2017 at 3:19 p.m. (the “2/10/17 Email”), *attached hereto at Exhibit B* (emphasis added); *see also Exhibit A* at ¶ 4 (attesting to authenticity and source of email).

The 2/10/17 Email constitutes illegal witness tampering under 18 U.S.C. § 1512(b) for several reasons. That statute makes it a criminal act punishable by fine and not more than 20 years in prison for any person to:

knowingly use intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding . . . [or] cause or induce any person to . . . withhold testimony.

18 U.S.C. § 1512(b).

In addition to the general climate of fear and retaliation within the Knights of Columbus, because of the Order’s identification as “the Strong Right Arm of the Catholic

Church,”⁵ and because of the close association between the current Supreme leadership and the Pope, there naturally exists fear of ecclesiastical retaliation. Using these fears, the 2/10/17 Email knowingly and intentionally misleads the recipients to believe that if they do not choose to speak with Plaintiffs, they will not become a witness in this lawsuit (something that is implied to be both undesirable and dissuaded by Supreme). Pursuant to federal subpoena power, any such individual may be compelled to testify in this case, regardless of whether or not they choose to speak with Plaintiffs—something that was certainly known to Supreme when it sent this email, as it was drafted and sent by its substantial in-house legal department. Rather, the clear purpose of this language is to intimidate and persuade individuals to not speak with Plaintiffs. Among members of the Knights of Columbus it is *understood* that this is an *instruction* to not testify or otherwise cooperate with Plaintiffs. **Exhibit C** at ¶ 5 (“I immediately believed this to be an attempt to intimidate and silence members and agents from communicating with UKnight.”); **Exhibit D** at ¶ 5 (“I understand that email to be an instruction to not cooperate with or testify on behalf of UKnight in this case.”); **Exhibit E** at ¶ 5 (same); Whistleblower 3 Aff. at ¶ 4; Affidavit of Whistleblower #4 at ¶ 5 (same), *attached hereto at Exhibit F*; Affidavit of Whistleblower #5 at ¶ 5 (“I believe that email is meant to put people on notice that to cooperate with UKnight in any way would be considered disloyalty to the Knights of Columbus”), *attached hereto at Exhibit G*; Affidavit of Whistleblower #6 at ¶ 5 (same), *attached hereto at Exhibit H*; **Exhibit I** at ¶ 5 (same).

Second, this passage plainly constitutes “corrupt persuasion” of a witness in violation of 18 U.S.C. § 1512(b). In 1988 Congress specifically amended § 1512 to add

⁵ <http://www.catholicnewsagency.com/news/knights-of-columbus-leaders-praise-john-paul-iis-legacy-to-worlds-laity/>

the term “corrupt persuasion.” “‘Corrupt persuasion’ of a witness is a non-coercive attempt to induce a witness to become unavailable to testify.” The Minor and Technical Criminal Law Amendments Acts of 1988, HR 5210, 100th Cong. 2d Sess, in 134 Cong Rec S 7446-01, 7447 (daily ed June 8, 1988) (emphasis added). Within the Tenth Circuit, “corrupt persuasion” requires only that one act “voluntarily and intentionally . . . to prevent testimony with the hope or expectation of some benefit to the defendant or another person.” *U.S. v. Sparks*, 791 F.3d 1188, 1191 (10th Cir. 2015). Courts have held that a defendant is guilty of “corrupt persuasion” if he is motivated by any intent to avoid testimony detrimental to his case, *U.S. v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), even if it is the constitutional right of the witness in question to not testify in under the circumstances (which it is not here). *U.S. v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006) (finding “corrupt persuasion” where defendant encouraged witness to plead the Fifth).

Even ignoring the testimony of the Whistleblowers listed above that this is in fact a *coercive* attempt to intimidate witnesses, there is no reasonable explanation for the knowing misrepresentation contained in the 2/10/17 Email other than that it is an attempt to influence potential witnesses or prevent their testimony. Here, however, the broader context is not only informative but critical: within a religious Order where obedience that supervenes secular legal obligations is demanded, and where retaliation is commonplace, the mere act of putting witnesses on notice that they may be contacted by a party adverse to the Order, and that the Order requests witnesses report to them any such contact, constitutes *de facto* witness tampering.

C. This Court Should Enter An “Attorney’s Eyes-Only” Protective Order To Protect Whistleblowers

Because of the pattern of retaliation and witness tampering by Supreme as outlined above, this Court should enter a “CONFIDENTIAL – ATTORNEY’S EYES ONLY” Protective Order requiring Plaintiffs disclose the identity of Whistleblowers (all witnesses for Plaintiffs who are current or former⁶ members, officers, employees, or agents of the Knights of Columbus) only to the Court and to Defendants’ outside counsel, but prohibit that information from being communicated in any way to Defendants, Defendants’ in-house counsel, and third-parties.

D. This Court Should Require Defendants To Give Assurances To Recipients Of 2/10/17 Email

In addition to the Protective Order sought in this Motion, Plaintiffs request this Court order Defendant Knights of Columbus to send an ameliorative email to all recipients of the 2/10/17 Email as follows:

On February 10, 2017 we sent you an email informing you about a lawsuit between the Knights of Columbus Supreme Council and a web-services provider called UKnight. In that email, we stated “[p]lease be aware, however, that if you choose to speak with [UKnight], you may become a witness in this lawsuit.” Pursuant to a Whistleblower Protective Order issued by the Court, we are required to clarify that, regardless of whether you choose to speak with UKnight or not, you may be subpoenaed to testify in this lawsuit. The Court in this case has entered a Protective Order ensuring any potential whistleblower is afforded confidentiality, and your identity will not be disclosed to the Knights of Columbus. Furthermore, we wish to make it clear that the Supreme Council cannot retaliate against you in any way for cooperating with or testifying on behalf of UKnight, and that any such retaliation would be a violation of federal law.

⁶ Courts have recognized that the chilling effect of possible retaliation extends to former employees of a company, as future employers “almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job.” *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 307 (5th Cir. 1972). Here, the potential chilling effect on former agents is of particular concern, as former agents in many cases still receive tail commission payments from Supreme for products sold while they were still active Knights of Columbus agents.

Such an email would begin to ameliorate the harm caused by the 2/10/17 Email by correcting the intentional misrepresentation in that email, and is authorized by the inherent power of this Court to protect the integrity of the tribunal and the interest of justice. *See, e.g.*, US CONST. art. III § 1. Additionally, the 2/10/17 email’s statement that UKnight or its attorney “may contact you or other members,” **Exhibit B** (emphasis added), is an instruction to pass the instruction not to cooperate with UKnight on to all members of each council. **Exhibit A** at ¶ 18. This is literally an attempt to foreclose to Plaintiffs access to *all* people who may have knowledge of the facts alleged in the Amended Complaint, and the Court should exercise its power to at least partially rectify this through the requested ameliorative email.

III. CONCLUSION

For all of the reasons and authorities cited above, Plaintiffs respectfully request that this Court grant this Motion and enter a Protective Order permitting Plaintiffs to disclose the identity of whistleblowers who are current or former members, agents, or employees of the Knights of Columbus only to the Court and Defendants’ outside counsel, but prohibit communication of that information to Defendants, Defendants’ in-house counsel, and third-parties. Additionally, Plaintiffs respectfully request this Court require Defendant Knights of Columbus to send an ameliorative email as detailed above. For the Court’s convenience, a proposed order is attached hereto.

Respectfully submitted this 14th day of February 2017.

/s/ Jeffrey S. Vail

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, the foregoing **PLAINTIFF'S EMERGENCY MOTION FOR PROTECTIVE ORDER** was filed with the Court via the CM/ECF system and served via E-Mail on the following CM/ECF participants:

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