IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 2017-CV-210-RBJ

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.

MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND FOR SANCTIONS FOR WITNESS INTIMIDATION

"What really hurts in matters of this sort [the Watergate burglary] is not the fact that they occur . . . What really hurts is if you try to cover it up."

- President Richard Nixon, August 29, 1972

Plaintiff List Interactive, Ltd., d/b/a UKnight Interactive ("UKnight"), in this motion ("Motion"), hereby seeks a temporary restraining order enjoining Defendant Knights of Columbus ("KC Inc.") from taking action to intimidate third-party witnesses in this case, and seeks sanctions against KC Inc. for already doing so.

INTRODUCTION

This is not the first time Defendant has illegally intimidated witnesses in this case, *see* [Doc. No. 16], but its most recent actions are by far the most egregious. On February 10, 2017 Defendant sent an email to the thousands of local councils and agents of the Knights of Columbus wrongfully suggesting they would face consequences if they

cooperate with Plaintiff in this case. As Plaintiff demonstrated then, Defendant has a long history of taking retaliatory actions against its members and agents. *See* SEVEN AFFIDAVITS *attached to* [Doc. No. 16] at **Exhibits C-I**. At a hearing on that matter, this Court stated that the February 10th email was "inappropriate" because "it has a tendency to discourage people improperly from talking with plaintiff counsel." March 2, 2017 Hearing Transcript at 3:10-13, *attached hereto* at **Exhibit 1**. Not dissuaded by the Court's requirement that it send a correction to this *prior* email, Defendant dramatically upped the ante. In at least three separate emails sent to thousands of local council leaders of the Knights of Columbus, Defendant has now expressly ordered virtually every potential third-party witness in this case "Do not comply" with a recent informal request by Plaintiff for information, and further falsely implied that the third parties have a legal obligation not to respond. Defendant's September 22, 2017 e-Mail, *attached hereto* at **Exhibit 2** (emphasis added). This directive flatly contravenes the Court's prior Order:

> The Court: [KoC members] can't be terminated, fired, or sanctioned in any way because of their cooperation with the plaintiff, and I suggest that if somebody comes up with an alternate reason for terminating some of these people, it better be very darn good, or I will assume and conclude that it is pretextual and you will not be happy campers. I want these people to be freely able to say what they have to say without being sanctioned by the company for what they have said.

Exhibit 1, Hearing Transcript 20:11-19.

The background to this situation is significant. During a September 12, 2017 telephonic hearing on a discovery issue, Plaintiff requested the Court order Defendant produce its membership numbers, and the Court granted that request. Plaintiff needs these membership numbers because its fundamental theory of this case is that Defendant has fraudulently inflated its membership, fraudulently sold insurance and extorted local councils based on this continual pattern of inflation, and then committed various torts and

crimes against Plaintiff in an effort to cover up the fraud. Defendant has not yet complied with the Court's Order. However, in preparing to audit and verify membership data, Plaintiff sent an informal request to approximately 10% of the local councils of the Knights of Columbus for *their* objectively obtained membership data. Plaintiff's September 22, 2017 e-Mail, *attached hereto* at **Exhibit 3**. Plaintiff's email was intentionally neutrally-phrased, stating that the parties have a "disagreement" that is being "resolved by the Federal District Court," that "Supreme denies" Plaintiff's claims, and that it is "UKnight's job" to establish that fraud occurred. *Id*.

Almost immediately, local councils began to respond to Plaintiff's request, providing membership and billing information for their individual councils. This objective information confirmed what Plaintiff has alleged—Defendant is, in fact, fraudulently inflating its membership numbers in excess of 43%, and that Defendant is extorting dues from local councils based on these inflated membership numbers:

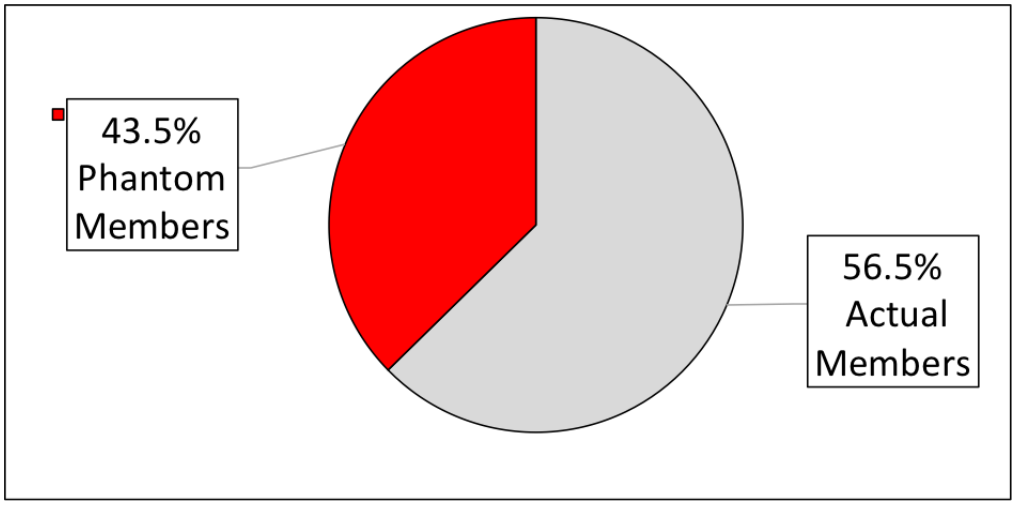

Figure 1: Chart of Phantom Member – 1037 of 2382 (43.5%) "members" from responsive councils do not pay dues, cannot participate in council meetings or events, and do not have membership cards, but local councils must still pay per capita dues on these "members" to Defendant. "Honorary Life Members" who do not pay dues are counted as actual members in this graph. All supporting payment coupons as provided to Plaintiff by local councils *attached hereto* at Exhibit 8.

Defendant has repeatedly and publicly denied *exactly this pattern of inflation* throughout this case. Presumably terrified that the cat was finally being let out of the bag, Defendant immediately, and illegally, ordered all 12,000+ local councils to stop responding to Plaintiff's request. **Exhibit 2**. This witness tampering by Defendant is of unprecedented scale: there are literally thousands of potential third-party witnesses in this case (all of the local council leadership), and Defendant has ordered all of them by individual emails to not cooperate with Plaintiff. Additionally, in these emails, Defendant poisoned this entire pool of witnesses by falsely accusing Plaintiff of including "false and misleading information" in its request. *Id*. Defendant's actions here are yet another transparent attempt to cover up its fraudulent and criminal scheme—despite Defendant's ongoing protestation that this is nothing more than a "garden variety" commercial dispute, their own actions lay bare the truth of the matter.

While it is clear that Defendant *wants* to cover up its crimes, that desire cannot excuse this further illegal activity. Accordingly, Plaintiff now files this emergency motion for a temporary restraining order and for sanctions.

ARGUMENT

In addition to the request for sanctions, below, Plaintiff seeks a TRO and preliminary injunction through at least the date of trial in this case preventing Defendant from threatening, improperly communicating with, or otherwise harassing any current or former local and state councils, officers, agents and members of the Knights of Columbus, as set forth in more detail below.

I. STANDARD FOR A TRO & PRELIMINARY INJUNCTION

The requirements for a temporary restraining order ("TRO") and a preliminary injunction are substantively identical. *Valley Cmty. Pres. Comm'n v. Mineta*, 246 F.

Supp. 2d 1163, 1165-66 (D.N.M. 2002), *aff'd*, 373 F.3c 1078 (10th Cir. 2004). A moving party must meet four prerequisites for such relief: (1) demonstrate a substantial likelihood that it will eventually prevail on the merits; (2) show that it will suffer irreparable injury unless injunctive relief is provided; (3) offer proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) show that the injunction, if issued, would not be adverse to the public interest. *Beltronics USA, Inc., v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

II. THE FACTORS

A. There Is A Substantial Likelihood That The Plaintiff Will Be Able To Demonstrate Witness Tampering And Improper Interference With Discovery

The merits evaluation in this context is limited: Plaintiff need not show that it will prevail on the merits of its claims for relief in this case. Rather, Plaintiff need only show that it is likely to ultimately be able to demonstrate that Defendant has engaged in witness tampering and that Defendant's actions are an impermissible interference with the discovery process subject to sanction and control under this Court's inherent power.

i. 18 U.S.C. § 1512.

Witness intimidation is a crime. *See* 18 U.S.C. § 1512(b). It is a federal felony punishable by up to 20 years in prison for any person to:

> knowingly use intimidation, threats, 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.

Id., § 1512(b). Initially, Defendant's email plainly constitutes "corrupt persuasion" of thousands of witnesses in violation of 18 U.S.C. § 1512(b). In 1988 Congress

specifically amended § 1512 to add 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 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).

Furthermore, a party also violates Section 1512 if it is "motivated by an improper purpose." *U.S. v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). It is an improper purpose to cause a witness to withhold relevant facts about a defendant's wrongful acts. *See U.S. v. Price*, 443 F. App'x 576, 582 (2d Cir. 2011). Even where there is an absence of evidence of intent behind a message, or an absence of evidence concerning the effect thereof (and that is not the case here), 18 U.S.C. § 1512 acts to prohibit a party from engaging in acts that may negatively influence testimony. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 594-595 (S.D.N.Y. 2014).

ii. Defendant's actions are prohibited by 18 U.S.C. § 1512.

Defendant's email at issue here, **Exhibit 2**, was sent to thousands of potential third-party witnesses in this case. *See* Defendant's Response to Request for Admission No. 4, *attached hereto* at **Exhibit 4** (admitting "that state-level officers (State Deputies, State Advocates, District Deputies, etc.) are not employees of Yours and are not represented by Your counsel in this matter"). And, as "the Strong Right Arm of the Catholic Church,"[1] the intimidating nature of Defendant's email is compounded by the ecumenical pressure stemming from Defendant's association with the Catholic Church. For example, in at least one instance of which Plaintiff is aware, Defendant's email directive was then forwarded on to an unknown number of local members of the Knights of Columbus in Colorado from an Archdiocese of Denver email account. *See* **Exhibit 5** (email forwarded by stephen.sweeney@archden.org). To make matters even worse, all of these third-party witnesses, as members of the Knights of Columbus, know that they are expressly barred from "insubordination" when given "orders" by Defendant. *See* Charter of Knights of Columbus at 66, Section 162(6), attached hereto at **Exhibit 6**. Violation of such an "order" from Defendant can result in expulsion of the member, the consequences of which include losing death benefits for which the member has already paid! *Id.*, § 162.

Defendant's email also *implicitly threatens legal action* against any witness who cooperates with Plaintiff, again in clear violation of 18 U.S.C. § 1512. *See* **Exhibit 2** ¶ 5 (incorrectly implying that communicating with Plaintiff would be a breach of contractual obligation to Defendant, despite the fact that the vast majority of councils contacted have

[1] http://www.catholicnewsagency.com/news/knights-of-columbus-leaders-praise-john-paul-iis-legacy-to-worlds-laity/

an existing business relationship with Plaintiff to which Defendant has consented). Indeed, the implicit threat and *quid pro quo* here is that 'we won't sue you for breaching confidentiality if you don't cooperate with Plaintiff.'

As set forth above, there is—at a minimum—a substantial likelihood that Plaintiff will succeed in demonstrating on the merits that Defendant has engaged in illegal witness tampering, satisfying the first requirement for issuance of an injunction.

iii. Defendant's actions are also a prohibited interference with a party's right to conduct informal discovery and violate this Court's Order.

However, even if criminal witness tampering did not occur, Defendant's actions still directly and in bad faith violate this Court's Order that members of the Knights of Columbus "can't be terminated, fired, or sanctioned in any way because of their cooperation with the plaintiff," and that they must "be freely able to say what they have to say." **Exhibit 1** at 20:11-18. Defendant's actions not only 'order' these third-party witnesses not to "say what they have to say," but threaten sanctions against them and falsely attempt to discredit Plaintiff in the process.

B. There Will Be Irreparable Injury Unless The Injunction Issues

As stated above, Defendant's actions have suppressed communication from virtually all potential third-party witnesses in this case, have (again) intimidated and threatened them should they cooperate with Plaintiff, and have falsely accused Plaintiff of being untruthful. For example, only after the September 22, 2017 email was sent by Defendant, local council members began affirmatively responding to Plaintiff that they would not provide the information requested. *See, e.g.,* Email Response from Michigan Council, *attached hereto* at **Exhibit 7** (quoting Defendant's email in reply to Plaintiff explaining that he "cannot in good conscience" now provide the requested information).

Traffic analysis demonstrates that Defendant's email—first sent at 2:41 p.m. MST on Friday, September 22nd, was highly effective at suppressing responses to Plaintiff's request, especially considering that most local council members have regular jobs and would be expected to respond Friday after work or over the weekend:

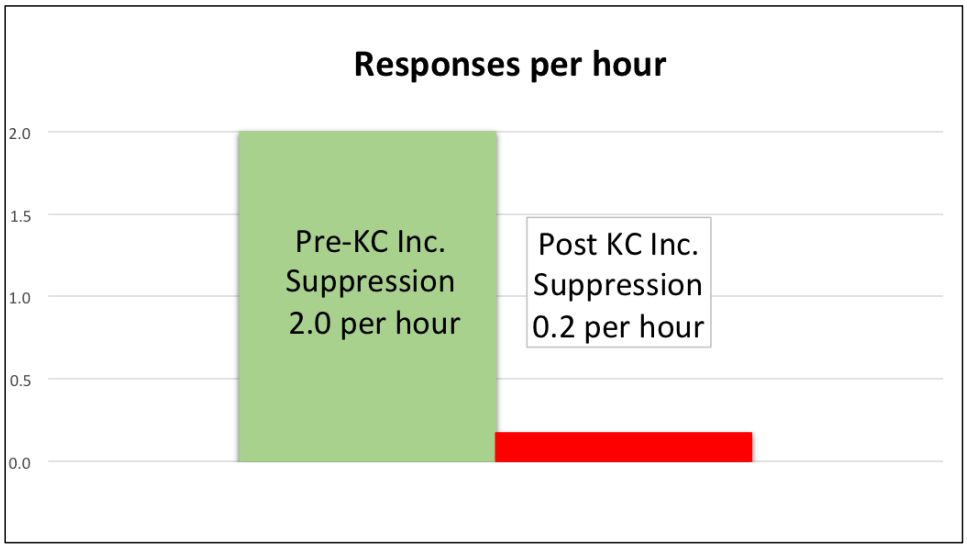

Figure 2: Rate of Responses to Plaintiff's Request Before/After 2:41 p.m. email by Defendant

Defendant has sent at least three essentially identical emails to thousands of its members beginning on September 22, 2017. If this injunction does not issue immediately there is every reason to believe that Defendant will continue this behavior. Without an injunction, not only will Plaintiff be unable to obtain this information going forward, but Defendant will be emboldened to continue this campaign of witness tampering.

C. The Threatened Injury Outweighs Whatever Damage The Proposed Injunction May Cause To Defendant

The injunctive relief sought is limited: direct the Defendant to cease improper communications with third-party witnesses. There will be no damage to Defendant from this prohibition, indeed there can be no protectable interest in being prevented from

committing further felonies. The requested injunction would not in any way inhibit Defendant from communicating with its members in the ordinary course of business.

D. The Injunction Would Serve The Public Interest

The public interest is best served by the federal witness intimidation statute being upheld. In the absence of our mutual respect for Section 1512, witnesses will be subject to the whims and threats of abusive parties, who may wish to silence witnesses for the other side or prevent discovery of relevant facts. There is no possible way that an injunction against witness intimidation could adversely affect the public interest.

E. There Should Be No Need For A Bond

As there can be no damages to the Defendant in the issuance of an injunction against committing felonies, no bond should be required. Nevertheless, Plaintiff offers a bond of $100 in the interest of formality.

III. REMEDIES SOUGHT

Plaintiff seeks a TRO and preliminary injunction through at least the date of trial in this case preventing Defendant from threatening, improperly communicating with, or otherwise harassing any current or former local and state councils, officers, agents and members of the Knights of Columbus. Because Defendant has already once crossed the line of acceptable conduct in this regard under the guise of "ordinary" communication with its membership, **Exhibit 1**, the Court's Order should include the directive that any communication with these individuals in any way related to the instant case must (1) not make any qualitative or substantive statements about the claims at issue in this case, and (2) be simultaneously disclosed to Plaintiff's counsel for review.

While this matter may not be subject to sanctions under Rule 37,[2] that rule does provide an informative guideline as to the scope of potential sanctions available. *See, e.g., Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 779 (7th Cir. 2016) ("Rule 37(b)(2)(A)(v) and (vi) authorizes both the dismissal of the action and the entry of a default judgment against the offending plaintiff or defendant; and the court's inherent power to sanction misconduct is likewise symmetrical"). Fed. R. Civ. P. 37(b)(2). Because of the lasting and irreversible impact and prejudice to Plaintiff from the witness tampering that has already occurred, Plaintiff asks this Court to enter sanctions against Defendant pursuant to its inherent power as follows:

A. Court's Inherent Power To Sanction Conduct

"[A] court has the inherent authority to manage judicial proceedings and to regulate the conduct of those appearing before it, and pursuant to that authority may impose appropriate sanctions to penalize and discourage misconduct." *Ramirez*, 845 F.3d at 776 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-50 (1991)). Witness tampering is specifically sanctionable under the Court's inherent power. *Compton v. Alpha Kappa Alpha Sorority, Inc.*, 938 F. Supp. 2d 103, 105-07 (D.D.C. 2013). "The court is vested with broad discretion to fashion an appropriate inherent power sanction to redress abusive litigation practices." *Carroll v. Jaques*, 926 F. Supp. 2d 1282, 1288 (E.D. Tx. 1996). Here, this is the second time before this Court that Defendant has engaged in witness tampering, and it has done so in direct contravention of this Court's prior Order, **Exhibit 1** at 20:11-19. There can be no question that Defendant has acted intentionally and in bad faith. Because this is repeat behavior, and Defendant's actions have blocked virtually all

[2] Arguably Defendant's conduct is also in violation of an Order of this Court to permit discovery, **Exhibit 1** at 20:11-19, subjecting it to sanctions under Rule 37.

third-party witnesses from communicating with Plaintiff, sanctions must be calculated to send a strong message.

B. Retraction Email

Initially, to the extent it is not too late to at least reduce the harm caused by Defendant's witness tampering as set forth herein, Defendant should be ordered to issue a retraction email to all recipients of its September 22, 2017 email. The prior corrective email ordered by this Court not having any effect on Defendant's subsequent behavior, this email should be required to state verbatim (1) Defendant has been sanctioned by the Court and Ordered to issue a retraction to its September 22, 2017 email(s); (2) that recipients are permitted to provide information to UKnight, the Plaintiff in this case; (3) that Defendant's September 22, 2017 email constituted illegal witness tampering; and (4) that its prior characterization of UKnight's statements as "false and misleading" was, itself, false and misleading.

C. Adverse Inference Concerning Membership Inflation And Motivation To Conceal

Next, this Court should enter an adverse jury instruction in this case, instructing the jury that Defendant engaged in witness tampering in an effort to prevent Plaintiff from discovering fraud with respect to its membership numbers, and that the jury may infer from that instruction that (1) fraud did occur, and (2) that Defendant was motivated to take action to cover up this fraud. *See, e.g.*, *Riley v. City of New York*, Case No. 10-CV-2513, 2015 WL 541346 at *12 (E.D.N.Y. Feb. 10, 2015) ("notifying the jury of the [party's] witness tampering and allowing them to draw an adverse inference from that conduct."). Because, especially in light of the repeated nature of Defendant's actions, there is a clear showing of bad faith here, the requested adverse jury instruction is both

warranted and authorized. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997).

D. Immediate Disclosure Of All Communications Related To This Witness Tampering

Additionally, the Court should order that Defendant immediately (within one week of the order) produce to Plaintiff all internal and external emails, communications, and other documents sent, received, or related to Plaintiff's September 22, 2017 email and/or Defendant's September 22, 2017 email(s). As argued below, because any emails, documents, or other communications sent to or received from counsel (both in-house and outside counsel) related to these emails through and including September 22, 2017 were sent in furtherance of both the crime of witness tampering and the effort to conceal the membership number fraud, they are discoverable under the crime-fraud exception to Attorney-Client privilege, and should also be subject to production under the Court's Order.

For the crime-fraud exception to apply, the moving party "must present *prima facie* evidence that the attorney participation in the crime or fraud has some foundation in fact," *In re Grand Jury Subpoenas,* 144 F.3d 653, 660 (10th Cir.1998), and must also show that "the purpose of the communication was to further crime or an intended fraud," *In re Grand Jury Proceedings,* 857 F.2d 710, 713 (10th Cir.1988). To the extent that any internal communications by Defendant were made with in-house counsel for the purpose of obtaining legal advice related to the emails in question, they necessarily constitute participation in that crime and their purpose was to further that crime. Accordingly, the Court should make a finding that Plaintiff has made a *prima facie* showing that the crime fraud exception applies in this case and order production of such documents.

E. Costs And Fees Associated With Seeking The Instant Relief

Additionally, Defendant should be ordered to pay the costs and fees incurred by Plaintiff in bringing this Motion, as well as any subsequent fees and costs incurred in prosecuting this Motion.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this Court grant the Motion for Emergency TRO and Preliminary Injunction against Defendant, preventing them from continuing to intimidate and threaten witnesses and potential witnesses in this case; and Defendant should be sanctioned as set forth above for its conduct leading to the necessity of filing this Motion.

Submitted 25 September 2017.

/s/ Jeffrey S. Vail
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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, the foregoing **MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND FOR SANCTIONS FOR WITNESS INTIMIDATION** was filed with the Court via the CM/ECF system and served via E-Mail all defense counsel listed with CM/ECF for this case.

/s/ Jeffrey S. Vail