**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,
Plaintiff,

v.

KNIGHTS OF COLUMBUS,
Defendant.

KNIGHTS OF COLUMBUS,
Counterclaim Plaintiff,

v.

LIST INTERACTIVE, LTD. D/B/A UKNIGHT INTERACTIVE,
LEONARD S. LABRIOLA, WEBSINC.COM, INC., STEPHEN S. MICHLIK, JONATHAN S. MICHLIK, AND TERRY A. CLARK,
Counterclaim Defendants.

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**MOTION TO DISMISS COUNTERCLAIMS**

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Counterclaim Defendants List Interactive, Ltd. d/b/a UKnight Interactive ("UKnight"), Leonard S. Labriola, WebsInc.com, Inc.[1] ("WebsInc"), Stephen Michlik, Jonathan Michlik, and Terry Clark (collectively "Counterclaim Defendants") hereby move to dismiss the Knights of Columbus's ("KC") Counterclaims, [Doc. No. 101], pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"), and in support thereof state as follows:

[1] WebsInc also moves separately to dismiss the counterclaims against it under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, and appears specially herein to join the other Counterclaim Defendants in this Motion.

## INTRODUCTION

KC's claims for relief fail for numerous reasons. Initially, all of the trademark-related claims will fail, among other reasons, because UKnight's alleged actions were expressly requested, authorized, and in many cases *actually performed by* KC. Additionally, KC was aware of these events more than five years before this case was initially filed, and the doctrine of laches bars these claims. While those defenses present issue more appropriate for summary judgment, the Counterclaims also fail to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) for several reasons, as argued below:

## LEGAL STANDARD

To survive a Rule 12(b)(6) motion, "a complaint must have enough allegations of fact, taken as true, `to state a claim to relief that is plausible on its face.'" *Kansas Penn Gaming, LLC v. Collins,* 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570). In considering a motion to dismiss, "[a] court must not weigh potential evidence that the parties might present at trial," but instead must "assess whether the plaintiff's . . . complaint alone is legally sufficient to state a claim for which relief may be granted." *Checkley v. Allied Prop. & Cas. Ins. Co.,* 635 Fed. Appx. 553, 555-56 (10th Cir. 2016) (quotation marks and citation omitted). The Court must "accept[s] all well-pleaded facts as true, along with reasonable inferences from those facts." *Id.* at 556.

## ARGUMENT

### I. COUNTERCLAIM PLAINTIFF'S END-RUN AROUND THE VEIL PIERCING STANDARD MUST FAIL

KC asserts claims one through five and seven of their claims for relief against all six Counterclaim Defendants. Setting aside KC's sixth claim for relief (illegal recording of phone calls, addressed below), claims one through five name only "UKnight" as the actor alleged to have engaged in any illegal or tortious activity, but purport to be brought against "All Counterclaim Defendants." *See* Counterclaims, ¶¶ 107-149. For that reason alone, these first five claims should be dismissed as to all Counterclaim Defendants except UKnight.

In their seventh claim for relief, Counterclaims ¶¶ 156-163, KC seeks to extend liability for these alleged acts by UKnight by arguing that all of the remaining Counterclaim Defendants engaged in civil conspiracy by the simple act of forming UKnight. Counterclaims ¶ 167. UKnight, however, is a limited liability company. Under Colorado law, the members and managers of a limited liability company are not personally liable for the acts of the company. C.R.S. § 7-80-705. The traditional way to pierce this corporate veil of limited liability is through allegations of *alter ego*—something, as argued below, KC does not attempt here. Instead, KC seek to hold each of the individual Counterclaim Defendants liable simply because they are (Leonard Labriola and Jonathan Michlik) or were (Stephen Michlik) members in UKnight, without making any allegations as to what each Counterclaim Defendant individually is alleged to have done. Accordingly, KC's claim for relief number seven against each Counterclaim Defendant must fail because the required veil-piercing allegations are not made, and because KC's civil conspiracy claim fails as a matter of law.

### A. Counterclaim Plaintiff Has Not Alleged That UKnight's Corporate Veil Should Be Pierced.

Colorado law provides that:

> In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

C.R.S. § 7-80-107(1). Here, KC plainly alleges tortious action only by "UKnight," and make no specific allegations against the other Counterclaim Defendants, on its claims for relief one through five. Counterclaims ¶¶ 107-149. None-the-less, KC seeks to hold each of the individual Counterclaim Defendants—most of which are or were members of UKnight—personally liable for the actions of UKnight. *See* Counterclaims, Prayer For Relief ¶ Q. This is the exact scenario contemplated by the Colorado Legislature in enacting C.R.S. § 7-80-107. However, KC fails to make any of the allegations necessary to "apply the case law which interprets the conditions and circumstances under which the corporate veil [may be pierced]," or that would otherwise suffice to allege that any of the Counterclaim Defendants may be the *alter egos* of UKnight. *Id*.

Under Colorado Law, to pierce the corporate veil and hold the members of an LLC individually liable for the acts of that LLC, KC must allege:

> (1) the corporate entity is an alter ego or mere instrumentality; (2) the corporate form was used to perpetrate a fraud or defeat a rightful claim; and (3) an equitable result would be achieved by disregarding the corporate form.

*Martin v. Freeman*, 272 P.3d 1182, 1184 (Colo. App. 2012). Here, because KC has entirely failed to make these required allegations, its claims for relief number one through five and seven against Mr. Labriola and Messrs. Michlik (the current or former members of UKnight) must be dismissed.

### B. Counterclaim Plaintiff's Civil Conspiracy Claim Fails As A Matter Of Law.

KC's allegations of civil conspiracy also fail as a matter of law because their claim consists of nothing more than the formation of UKnight as an LLC, Counterclaims ¶ 167, and then the alleged actions of UKnight. *Id*. ¶¶ 107-159. As a matter of law, if the formation of an LLC could constitute the "agreement" required in a civil conspiracy claim, then the LLC form would never serve to provide limited liability protection to the members of an LLC where that LLC was alleged to have engaged in tortious activity, and the entire legislative intent and construction behind the Colorado LLC Act would be rendered an impermissible nullity. *See generally* C.R.S. § 7-80-101, *et seq*. Accordingly, because there is no allegation of any agreement sufficient to satisfy the requirements of the tort of civil conspiracy in Colorado, *see* CJI-Civ 27:1, KC's claim of civil conspiracy must fail against all Counterclaim Defendants.

## II. COUNTERCLAIM PLAINTIFF'S FRAUD CLAIMS FAIL THE SPECIFICITY REQUIRED BY RULE 9(B)

KC's second ("False Designation of Origin") and seventh (Civil Conspiracy, to the extent the alleged illegal acts connect to the false designation claim) claims for relief, Counterclaims ¶¶ 115-121, 156-163, sound in "fraud or deception," and accordingly must meet the specificity requirements of Fed. R. Civ. P. 9(b).

Rule 9(b) requires that all claims involving allegations of fraud "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). If, as here, "a claim involves multiple parties . . . the claimant must make specific and separate allegations against each defendant." MOORE'S FEDERAL PRACTICE 3D. § 9.03[1][f]. A claim that simply states false statements were made by "'defendants' will fail because it does not promote the purpose of Rule 9(b), to provide fair notice and to lessen the number of meritless fraud claims."

*Id*.; *see also Viacom, Inc. v. Harbridge Merch. Servs., Inc*., 20 F.3d 771, 777 & n.4 (7th Cir. 1994) ("complaint should inform each defendant of the nature of his alleged participation in the fraud" (emphasis added)). To state a valid claim, a "plaintiff must allege facts with respect to each defendant's participation in the fraud." *American Dental Ass'n v. Cigna Corp*., 605 F.3d 1283, 1291 (11th Cir. 2010) (emphasis added); *see also Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1440 (M.D. Fla. 1998) (complaint failed to satisfy Fed R. Civ. P. 9(b)'s heightened pleading requirements for fraud when it referred only to "defendants" generally and failed to differentiate among them).

Here, KC entirely fails to allege specific facts with regard to each Counterclaim Defendant in any of their claims for relief. Indeed, in every case, KC simply states what "UKnight" allegedly did, and never specifies what actions the individual Counterclaim Defendants other than UKnight were alleged to have taken. None of the other Counterclaim Defendants are even mentioned *at any point* in any of these claims for relief, *see generally* Complaint ¶¶ 107-149, let alone in the KC's second claim for False Designation of Origin. Accordingly, because the second and seventh claims for relief fail to comply with Fed. R. Civ. P. 9(b), those claims should be dismissed.

## III. COUNTERCLAIM DEFENDANT'S PHONE RECORDING CLAIM FAILS AS FEDERAL LAW PREEMPTS CONNECTICUT LAW CONCERNING RECORDED INTERSTATE PHONECALLS

KC's sixth counterclaim, [Doc. No. 101], ¶¶ 150-55, alleges violations of Conn. Gen. Stat. § 52-570d, which is a Connecticut state statute prohibiting recording of phone calls without consent of all parties involved. This claim seeks "nominal damages," and—more importantly—to exclude from these proceedings the damaging evidence contained in recorded phone calls

between UKnight and KC. *See id*., p. 56-57, ¶¶ M, R. All of the recordings in question, however, were made in one-party permission states (Colorado and Texas) where only the permission of one party—here, the party recording the conversation—is required. *See* C.R.S. § 8-9-304; Tex. Penal Code Ann. § 16.02. Additionally, because all of these calls crossed state lines, the Federal Wiretap Act applies. As in Colorado and Texas, federal law requires the permission of only one party to the conversation for lawful recording, 18 U.S.C. § 2511(2)(d), and provides for a civil cause of action for violation of that statute. 18 U.S.C. § 2520. As a result, the federal and Connecticut statutes directly conflict, and, accordingly, federal law pre-empts Connecticut law as to these interstate calls.

Federal statutes can preempt state statutes either by an express statement of preemption or by implication. *Tarrant Regional Water Dist. v. Herrmann*, 656 F. 3d 1222, 1241 (10th Cir. 2011). "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Altria Grp. v. Good,* 555 U.S. 70 (2008). State law is preempted by implication when the state statute stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52 (1941). Here, while Congress certainly could have required all-party permission for the lawful recording of a phone call, it expressly chose to require only one-party permission in order to *facilitate* exactly such recordings with only the permission of the recording party. Because the Connecticut statute stands as an "obstacle to the accomplishment and execution of the full purposes and objective of Congress," *id*., the Connecticut statute is preempted.

While there is limited case law directly addressing the instant situation (and none in the 10th Circuit), two federal court decisions from California have held that state all-party consent

laws are pre-empted by the Federal Wiretap Act. *See In re Google Inc. Street View Elec. Commc'ns Litig*., 794 F. Supp. 2d 1067, 1085 (N.D. Cal. 2011), *and Bunnel v. Motion Picture Ass'n of Am*., 567 F. Supp. 2d 1148, 1154 (C.D. Cal. 2007). As the Northern District of California stated after extensive analysis, "the Court finds that the federal Wiretap Act preempts state wiretap statutory schemes." *In re Google Inc*., 794 F. Supp. 2d at 1085. And, indeed, Congress clearly stated its intent to provide "legal certainty" through the Wiretap Act in order to provide "bright line rules for liability." *Id*. (citing Senate Report 99-541 at 4). Here, UKnight plainly complied with applicable federal law, yet now KC asks this Court to find that it engaged in illegal activity based on a contradictory statute from another state. The policy rationale behind the preemption doctrine exists for exactly cases such as this—where Congress passes a comprehensive legislative scheme intended to provide "legal certainty," *id*., it is unreasonable—and unnecessary—for parties to be required to additionally determine whether any of the 50 states and thousands of municipalities *may* have enacted a contradictory requirement. Accordingly, the statutory basis for KC's sixth claim for relief is preempted and this claim against UKnight, Mr. Labriola, and Mr. Clark must be dismissed.

## III. CONCLUSION

For all of the reasons and authorities stated above, the Court, pursuant to Fed. R. Civ. P. 12(b)(6), should dismiss KC's Counterclaims as argued above.

Respectfully submitted this 15th day of January, 2018.

s/ *Jeffrey S. Vail*
Jeffrey S. Vail
VAIL LAW LLC
5299 DTC Blvd., Suite 1101
Greenwood Village, CO 80111
Tel/Fax: (303) 800-8237
E-mail: jvail@vail-law.com
*Attorney for Plaintiff and Counterclaim Defendant UKnight*

**CERTIFICATE OF SERVICE**

On January 15, 2018, I filed the above **MOTION TO DISMISS COUNTERCLAIMS** with the Clerk of the Court using the CM/ECF System. It will send notification to:

Edward A. Gleason, egleason@lrrc.com
L. Martin Nussbaum, mnussbaum@lrrc.com
Joy Woller, jwoller@lrrc.com
Ian Speir, ispeir@lrrc.com
Hermine Kallman, hkallman@lrrc.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
90 South Cascade Avenue, Suite 1100
Colorado Springs, CO 80903
p:719-386-3000; f:719-386-3070

s/ *Jeffrey S. Vail*
Jeffrey S. Vail