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,
LEONARD S. LABRIOLA,

Plaintiffs,

v.

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

Defendants.

DEFENDANT KNIGHTS OF COLUMBUS' REPLY IN SUPPORT OF MOTIONS TO (*1*) DISMISS FIRST CLAIM (RICO), (*2*) DISMISS SECOND AND THIRD CLAIMS (BREACH OF CONTRACT AND PROMISSORY ESTOPPEL), (*3*) DISMISS EIGHTH CLAIM (SLANDER *PER QUOD*), AND (*4*) STRIKE IMMATERIAL, IMPERTINENT, AND SCANDALOUS MATTER

Defendant Knights of Columbus (the "Order"), through Lewis Roca Rothgerber Christie LLP and pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), submits this reply in support of its motions to dismiss and strike [Doc. 23] filed February 23, 2017 ("Motion").

I. The Court Should Dismiss the RICO Claim.

A. Plaintiffs' "Enterprise" Allegation Is Insufficient Under RICO.

The RICO racketeering enterprise alleged by Plaintiffs is "the Knights of Columbus fraternity as a whole, including the KC Supreme council, its officers and directors, the state councils, local councils, assemblies, independent insurance agents, and members." (Am. Compl. ¶ 64.) That fails to state a claim under RICO. The Tenth Circuit, other circuits, and this Court

have repeatedly held that the requisite enterprise distinct from the RICO defendant (here, the Order) is not shown by allegations that an organization committed a pattern of predicate acts in the conduct of its own affairs. *See* Motion at 5-7.

Plaintiffs' Response dismisses all of these cases with the statement that "*all but one* of the cases cited by Defendants [sic] predates the seminal Supreme Court ruling on the person-enterprise dichotomy defense," *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001). (Pls.' Resp. to Def.'s Mot. to Dismiss [Doc. 36] ("Response") at 5 (emphasis in original).) *Kushner*, however, is inapposite. It "focuses upon a person who is the president and sole shareholder of a closely held corporation." 533 U.S. at 160. That individual, "Don King, the president and sole shareholder of Don King Productions, a corporation," was the RICO defendant and the subject of the court's decision. *Id*.

The issue in *Kushner* was whether "a claim that a corporate employee is the 'person' and the corporation is the 'enterprise,'" *id*. at 164, satisfies RICO's requirement of "two separate enterprises, a 'person' and a distinct 'enterprise,'" *id*. at 160. The Supreme Court answered in the affirmative, holding that "the need for two distinct enterprises is satisfied . . . when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner." *Id*. at 166.

Here, the movant is the corporation, *i.e.*, the Knights of Columbus, not a corporate employee distinct from the corporation as in *Kushner*. This case therefore is governed by the authority cited in the Motion at 5-7, not the holding in *Kushner*.

Plaintiffs also rely on *George v. Urban Settlement Services*, 833 F.3d 1242 (10th Cir. 2016). That reliance, too, is misplaced. As explained in the Motion at 7-8, *George*, unlike this

case, involved two separate entities, BOA and Urban. Urban was not "a BOA subsidiary, a BOA agent, even part of the BOA corporate family." *Id*. at 1250. Therefore, a RICO association-in-fact between distinct entities was held to be sufficiently alleged in *George*. Here, on the other hand, Plaintiffs allege "the Knights of Columbus fraternity as a whole," *i.e*., the entire Knights of Columbus organization, consisting of "the KC Supreme council, its officers and directors, the state councils, local councils, assemblies, independent insurance agents, and members." (Am. Compl. ¶ 64.)

The several cases cited in the Motion at 5-7, which the Response does not address, make clear that this does not suffice. So does *Kushner*, which holds that a RICO plaintiff must allege "an 'enterprise' that is not simply the same 'person' referred to by a different name," and that RICO liability "depends on showing that the defendants conducted or participated in the conduct of the *enterprise's* affairs, not just their *own* affairs." 533 U.S. at 161, 163 (emphasis in original, quotations omitted).[1] Having alleged merely acts of the Order in the conduct of its own business, Plaintiffs have failed to state a RICO claim against the Order.

B. Plaintiffs Have Failed to Show Proximate Cause.

The Response does not dispute that to state a RICO claim, "[t]he connection between the racketeering activity and the injury can be neither remote, purely contingent, or indirect. When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." Motion at 8 (quoting *Ray v. Spirit Airlines, Inc*., 836 F.3d 1340, 1349 (11th Cir. 2016)) (internal quotation marks omitted).

[1] See also *Kushner*, 533 U.S. at 162, which cites with approval the Tenth Circuit's decision in *Board of County Commissioners of San Juan County v. Liberty Group*, 965 F.2d 879, 885 (10th Cir. 1992). As the Motion argues (p.6), *Liberty Group* likewise supports dismissal of the RICO claim.

The only injuries Plaintiffs claim are those resulting from (i) the parties' failed contract negotiations and (ii) the Order's alleged theft of Plaintiffs' alleged trade secrets. (*See* Am. Compl. ¶ 102 ("Proximate Injury to Plaintiff UKnight").) These are not RICO injuries. And even if it could be said that there was *indirect* injury somehow flowing from the racketeering activity that Plaintiffs claim – namely, allegations of inflation of insurable membership numbers and misrepresentation of the Order's Standard & Poor's insurance rating (*id*. ¶¶ 31, 46) – this would likewise be insufficient to satisfy the proximate cause requirement of RICO. For this reason, too, the RICO claim must be dismissed.

II. The Breach of Contract and Promissory Estoppel Claims Are Time-Barred.

The requirement, at the Rule 12(b)(6), stage that all well-pleaded allegations be accepted as true is subject to two limitations. First, "purely conclusory allegations are not entitled to be presumed true." *Brown v. Premier Roofing, LLC*, 173 F. Supp. 3d 1181, 1184 (D. Colo. 2016). Second, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *FirsTier Bank, Kimball, Neb. v. FDIC*, 935 F. Supp. 2d 1109, 1126 (D. Colo. 2013) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). In their Response regarding the breach of contract and promissory estoppel claims, Plaintiffs rely on conclusory assertions and legal characterizations to try to get around what a plausible reading of their First Amended Complaint reveals: these claims are now time-barred.

A. A Three-Year Statute of Limitations Applies.

Plaintiffs do not contest that their promissory estoppel claim is subject to a three-year statute of limitations. (*See* Motion at 12; Response at 11.) They contend, however, that Connecticut's six-year statute of limitations for "implied contracts" applies to their breach of

contract claim. (Response at 10.) In Connecticut, "[c]ontracts may be express or implied. If the agreement is shown by the direct words of the parties, *spoken or written*, the contract is said to be an express one." *Boland v. Catalano*, 521 A.2d 142, 144 (Conn. 1987) (emphasis added). "But if such agreement can *only* be shown by the acts and conduct of the parties, . . . then the contract is an implied one." *Id.* (emphasis added). Plaintiffs clearly have pled an *express oral* contract. (*See, e.g.*, Am. Compl. ¶ 18 ("[The Order] *told* UKnight that it was their choice as designated vendor . . . and *offered* to formally announce UKnight as such." (emphases added)); *id.* ¶ 105 ("[The Order] and UKnight entered into an express contract . . . .").) Plaintiffs' single conclusory assertion of a "contract . . . implied in fact" in paragraph 106 of the First Amended Complaint is a legal characterization unadorned by factual averment, and should not be taken as true.

Regardless of whether Colorado or Connecticut law applies to the alleged oral contract, the contract claim, like the promissory estoppel claim, is subject to a three-year statute of limitations. (*See* Motion at 12 & n.2.)

B. The Breach of Contract Claim Accrued in February 2012, or at the Latest in August 2012, and Is Now Time-Barred.

The First Amended Complaint already does some creative tip-toeing to avoid a Statute of Frauds problem. (*See* Motion at 11.) Now, to avoid a statute of limitations problem, Plaintiffs' Response gets even more creative, asserting that the Order "could have performed on the contract at any time" and "nowhere do Plaintiffs allege that there was a firm date required for the designated vendor announcement." (Response at 9.) Plaintiffs say there was "a series of broken promises" by the Order, which "culminat[ed] finally in a breach when [the Order] suddenly and affirmatively disclaimed the existence of any contract on January 4, 2016." (*Id.* at 9-10.)

None of these arguments is a plausible reading of the First Amended Complaint. First, if there really was no "firm date" for the designated vendor announcement, then the contract claim must fail as a matter of law for lack of an essential term, as it would be impossible to determine "whether or not it has been breached." *Jorgensen v. Colo. Rural Properties, LLC*, 226 P.3d 1255, 1260 (Colo. App. 2010); *Gallogly v. Kurrus*, 905 A.2d 1245, 1249 (Conn. 2006) (agreement unenforceable where it is "so vague and indefinite" such that defendant "could not be in default of his obligation"). Indeed, on Plaintiffs' newly minted theory, the Order might still perform the alleged contract today simply by making the announcement. Clearly, if there was no firm announcement date, then the Order cannot have committed a breach. By contrast, if the Order *had* committed a breach, as Plaintiffs allege (Am. Compl. ¶ 108), that breach must have occurred on a particular date.

Of course, Plaintiffs understood this when they filed their Complaint, and they *affirmatively pled* the announcement date, alleging that the Order promised that "***the announcement of UKnight as designated vendor would take place in February 2012***." (Am. Compl. ¶ 112(b) (emphasis added).)[2] In their Response, Plaintiffs now alternatively suggest that the announcement should have come sometime in August 2012, after UKnight had completed its own performance. (*See* Response at 9.) Either way, whether the accrual date is February 2012 or August 2012, the alleged breach occurred well outside the three-year period of the statute of limitations. Indeed, it is only because there was a specific date set for the announcement that Plaintiffs can speak of a "clear" agreement being reached (Am. Compl. ¶¶ 19, 22) and the

[2] Plaintiffs point out that this allegation appears as part of their promissory estoppel claim, Response at 9, but that does not matter. Paragraph 112(b) is the same alleged promise that forms the basis of the breach of contract claim (*see* Am. Compl. ¶ 105), and Plaintiffs do not argue otherwise.

Order's repeated "delays" in fulfilling its promise (*id*. ¶¶ 30, 49, 88). The First Amended Complaint simply does not make sense otherwise.

Plaintiffs try a final maneuver, arguing that the alleged breach occurred on January 4, 2016, when the Order "disclaimed the existence of any contract." (Response at 10.) But Plaintiffs' Response is conflating two very different things: breach of a contract, and the assertion that a contract does not exist. Plaintiffs plainly allege a breach based on the Order's "never formally announcing that UKnight was its designated vendor." (Am. Compl. ¶ 108.) Under both Colorado and Connecticut law, that claim accrued when Plaintiffs discovered or reasonably should have discovered the alleged breach, not when they later learned that the Order denied the contract's existence. *See* C.R.S. § 13-80-108(6); *Tolbert v. Conn. Gen. Life Ins. Co.*, 778 A.2d 1, 5 (Conn. 2001) ("[T]he cause of action is complete at the time the breach of contract occurs . . . ." (quotation omitted)).

C. The Promissory Estoppel Claim is Time-Barred.

Plaintiffs' promissory estoppel arguments fare no better. Again, to avoid being ensnared by the Statute of Frauds, it is crucial to Plaintiffs' theory of the case that there was *not* a continuing obligation to perform and that the alleged agreement could have been performed instantaneously ("in a single day," Am. Compl. ¶ 21). Plaintiffs thus refer to the Order's promise in September 2011 to announce UKnight as the designated vendor as the "the original September 2011 agreement." (*Id*. ¶ 26.) This is the promise that forms the basis of the contract claim, and it is the only promise on which Plaintiffs allege to have relied. (*See id*. ¶ 18 (alleging that by August 2012, "UKnight had done everything it had promised, and all that was left was [the

Order's] obligations to make the announcement and instruct the Knights of Columbus to adopt the UKnight system").)

In their Response, Plaintiffs concede that their promissory estoppel claim, as predicated on the September 2011 promise, is now time-barred. (*See* Response at 11.) Plaintiffs try to salvage the claim by pointing to the other purported "promises" in paragraphs 112(c)-(g) of the First Amended Complaint. These promises, however, all relate back to the original September 2011 deal. They are not separate promises on which Plaintiffs claim to have relied.

Like the breach of contract claim, the Court should dismiss the promissory estoppel claim as barred by the three-year statute of limitations.

III. The Eighth Claim, Slander *Per Quod*, Should Be Dismissed.

A. The Slander Claim Is Time-Barred.

Plaintiffs concede that Connecticut's two-year statute of limitations applies to their slander *per quod* claim. (*See* Response at 12.) Since that statute says a slander claim accrues on "the date of the act complained of," Conn. Gen. Stat. § 52-597, the Connecticut Supreme Court has held that "[t]he statute of limitations for a defamation claim begins on the date of publication," *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759, 767 (Conn. 2004); *see also Gianetti v. Conn. Newspapers Pub. Co.*, 44 A.3d 191, 195 (Conn. 2012) ("The period began when the article in question was published . . . ."). The allegedly slanderous statement in this case was made on January 24, 2014 (Am. Compl. ¶ 140) and is now time-barred.

Plaintiffs argue that the "discovery rule" should apply, citing a 1986 Connecticut Supreme Court case involving a medical malpractice claim under a different statute of limitations. (*See* Response at 12-13 (citing *Catz v. Rubenstein*, 513 A.2d 98, 101 (Conn. 1986)).)

That case plainly does not apply here. Indeed, the federal district court in Connecticut has firmly rejected the notion that a discovery rule applies to libel and slander claims. *See L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1428 (D. Conn. 1986) ("The 'discovery' rule urged by the plaintiff is inconsistent with the express language of C.G.S. § 52-597, which requires that actions for libel or slander be brought 'within two years from the date of the act complained of.' It cannot be disputed that 'the act complained of' in this suit is the defendant's distribution of the allegedly defamatory credit report to other businesses and *not the plaintiff's discovery of that report*." (emphasis added)).

Because the discovery rule does not apply to a slander claim and because Plaintiffs failed to file their slander *per quod* claim by January 24, 2016, the claim must be dismissed.

B. Plaintiffs Do Not Adequately Plead Special Damages.

The slander *per quod* claim should be dismissed for the additional reason that Plaintiffs do not adequately plead special damages. In their Response, Plaintiffs point to ¶¶ 48-52, 124(a), and 143 of the First Amended Complaint (Response at 12), but these allegations are not sufficient. These allegations are no different than those in *Learning Care Group, Inc. v. Armetta*, 2014 WL 12651264, at *16 (D. Conn. 2014), where the court dismissed a defamation claim under Rule 12(b)(6) because plaintiffs did not plead "any particular business opportunity lost" or identify "any actual lost sales, contract or customer" as a result of the alleged statement. Dismissal is warranted here for the same reason.

IV. Plaintiffs Admit Their Allegations Are Scandalous, and They Should Be Stricken.

Plaintiffs admit to making scandalous allegations in the First Amended Complaint. (*See* Response at 13.) These allegations – specifically, paragraphs 1, 31-47, 84-86, and 89-101 – should be stricken along with the Court's dismissal of the RICO claim.

Plaintiffs contend that the allegations are relevant to "demonstrating Defendants' motive with regard to all of Plaintiffs' claims." (*Id*. at 13.) This is the same ploy attempted in *Xerox Corp. v. ImaTek, Inc*., 220 F.R.D. 244, 245 (D. Md. 2004), where the counterclaimant argued that allegations about Xerox's accounting practices "shed light on Xerox's motivation to breach its contract and commit fraud." The court rightly struck those allegations as an "attemp[t] to use entirely unrelated legal controversies involving Xerox to 'muddy the waters' in this relatively straightforward case." *Id*.

The gravamen of Plaintiffs' First Amended Complaint is a business dispute that centers on an alleged oral contract for web and IT services. The Order's "motive" has no bearing on this controversy. The motion to strike should be granted.

CONCLUSION

As set forth in its Motion, the Order respectfully requests that the Court (1) dismiss the RICO claim for failure to state a claim, (2) dismiss as time-barred the claims for breach of contract and promissory estoppel, (3) dismiss the slander *per quod* claim both for failure to state a claim and as time-barred, and (4) strike from Plaintiffs' First Amended Complaint the immaterial, impertinent, and scandalous matter pled as paragraphs 1, 31-47, 84-86, and 89-101.

DATED: March 22, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 2017, a copy of the foregoing was filed with the Clerk of the Court using the CM/ECF System, which will send notification to the following:

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