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 TO AMEND COMPLAINT AND REVISE CAPTION

Plaintiff List Interactive, Ltd., d/b/a UKnight Interactive hereby files its Motion to Amend Complaint and Revise Caption ("Motion"), and in support thereof state as follows:

CERTIFICATE OF CONFERRAL

Plaintiff's counsel has conferred with counsel for Defendant in accordance with D.Colo.LCivR 7.1(A), who have stated that they oppose the relief requested herein.

INTRODUCTION

In the Court's recent order on Defendant Knights of Columbus, Inc.'s ("KC Inc.") Motion to Dismiss, [Doc. No. 54], as well as during oral argument on that motion, [transcript available at Doc. No. 55], the Court made several comments and rulings that are the genesis of this requested amendment. Specifically, the Court expressed confusion

over the identity of the Defendant, and dismissed Plaintiff's RICO claim without prejudice due, at least in significant part if not entirely, to Defendant's claim that it is legally and functionally unified with its local councils by virtue of its 501(c)(8) status as existing under the "lodge structure." In order to directly address these concerns of the Court, as well as to align the allegations to conform to facts revealed during discovery to date and to address Defendants concerns expressed in their Motion to Strike, UKnight respectfully requests leave of the court, pursuant to Fed. R. Civ. P. 15(a)(2) and Fed. R. Civ. P. 21, to file the Second Amended Complaint, attached hereto at **EXHIBIT 1 ("Ex. 1")**, in order to accomplish the following:

- Correct any misnomer in the caption and Complaint by clearly identifying the Defendant as the Knights of Columbus, Inc., chartered and headquartered in New Haven, CT, as well as to remove those Plaintiffs and Defendants no longer participating in this case by virtue of this Court's Order on the Motions to Dismiss.

- Directly challenge KC Inc.'s wrongfully-claimed 501(c)(8) status, which has directly injured Plaintiff through wrongfully increased competition from KC Inc. and enabling KC Inc. to avail itself of the person-enterprise distinction defense and escape RICO liability, by adding as a Defendant John A. Koskinen, in his official capacity as the Commissioner of the Internal Revenue Service.

- Amend and re-assert Plaintiff's RICO claim against KC Inc. to (1) add factual allegations to show that the local councils, and specifically their separate nature from KC Inc., are a critical part of KC Inc.'s ability to use the enterprise to perpetrate and conceal the fraudulent scheme; (2) allege an alternative enterprise including two companies wholly separate from the Order of the Knights of Columbus; (3) add additional factual allegations based on information revealed to date in discovery and continued investigation, demonstrating that KC Inc. has substantially diversified away from its fraternal benefit model, does not operate under the "lodge system" and is therefore not functionally or legally unified with the rest of the Order; and (4) add the predicate act of extortion, as revealed during discovery to date, which further demonstrates that KC Inc. must be legally and functionally separate from the entities (the local councils) which it extorts for more than $2.5 million per year.

- Modify certain language in the Complaint to address Defendant's concerns about potentially "inflammatory language" as raised in their Motion to Strike.

LEGAL STANDARD

After an initial responsive pleading is filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). This includes a motion to amend that proposes to add a party. *See United States ex rel. Precision Co. v. Koch Industries, Inc.,* 31 F.3d 1015, 1018 (10th Cir. 1994). "The purpose of the Rule is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Minter v. Prime Equip. Co.,* 451 F.3d 1196, 1204 (10th Cir. 2006) (internal citations and quotations omitted). The standard for leave to add a party pursuant to Rule 21 is the same as that under Rule 15(a). *See Koch*, 31 F.3d at 1018-19.

Where, as here, Plaintiff seeks leave to amend after the deadline set forth in the scheduling order entered by the Court, the liberal standard set forth in Rule 15 still applies because of the "rough similarity" between Rule 15 and the "good cause" standard under Fed. R. Civ. P. 16, and because it is "unlikely that applying Rule 16 would lead to a different outcome" than applying the standard under Rule 15. *Bylin v. Billings*, 568 F.3d 1224, 1231-32 & n.9 (10th Cir. 2009) (declining to adopt other circuits' rulings that Rule 16 imposes a more stringent standard).

ARGUMENT

I. PLAINTIFF SHOULD BE PERMITTED TO AMEND THE CAPTION TO CLARIFY THE IDENTITY OF THE DEFENDANT

The Court, in statements made during oral argument on Defendants' Motions to Dismiss on July 20, 2017, expressed confusion about the identity of the defendant in this case. [Doc. No. 55] at 3:12-18 (stating "Who is it that you think is the defendant in this case?"); *see also* [Doc. No. 54] at pp. 3-4. This is particularly important, because clearly distinguishing the Defendant from the broader fraternity of the Order of the Knights of Columbus is a critical consideration in the person-enterprise distinction defense upon which this Court dismissed Plaintiff's RICO claim. Accordingly, as stated in the proposed Second Amended Complaint, **Ex. 1**, Plaintiff has more clearly identified the defendant as "Knights of Columbus, Inc." Defendant objects to this naming as it is listed only as "Knights of Columbus" pursuant to its charter with the Connecticut Secretary of State. However, due to the potential confusion from thousands of other local entities registered with secretaries of state around the country using the name "Knights of Columbus," and the fact that Defendant is officially registered with the IRS as a 501(c)(8) corporation, Plaintiff submits that the caption "Knights of Columbus, Inc." will lead to the least confusion.

Additionally, Plaintiff has shortened this to "KC Inc." rather than the more confusing "KC Supreme," because the "Supreme Council" is an unincorporated group within Defendant that does not accurately overlap with the bounds of the Defendant entity. [Doc. No. 55] at 4:6-8:12. There is clear authority to "amend a pleading to correct a misnomer," MOORE'S FEDERAL PRACTICE 3D at § 15.16[2], especially when there is the "potential for confusion." *Roberts v. Michaels*, 219 F.3d 775, 779 (8th Cir. 2000). Here, because the requested change will only serve to decrease confusion and improve clarity in Plaintiff's allegations, the Court should grant this request.

II. PLAINTIFF SHOULD BE PERMITTED TO AMEND THE COMPLAINT TO ADD IRS COMMISSIONER KOSKINEN AS A PARTY TO DIRECTLY CHALLENGE DEFENDANT'S TAX-EXEMPT STATUS

In its Order dismissing Plaintiff's RICO claim, the Court stated that, pursuant to the 501(c)(8) tax-exempt status, the Knights of Columbus operate under the "lodge system," which consists of an integrated group including the parent organization and its subordinate lodges, [Doc. No. 54] at 3, a point which the Court highlights is "a relevant one" to the validity of Defendant's person-enterprise distinction defense. *Id*. In analogizing this fact pattern to that in *Fitzgerald v. Chrysler Corporation*, 116 F.3d 225 (7th Cir. 1997), the Court accepted Defendant's person-enterprise distinction defense in large part due to its existence under IRS's definition of a "lodge system" unifying the parent (KC Inc.) and its local councils. *See* [Doc. No. 55] at pp. 25-31. Accordingly, as a direct result of the Court's Order, the question of whether Defendant actually operates under the "lodge system" as endorsed by the IRS, or whether it only fraudulently claims to do so, has become an issue of potentially dispositive importance in this case. Additionally, as set forth in more detail in **Section III**, *infra*, Defendant's efforts to maintain this fraudulent tax-exemption are a critical economic component to the mail and wire fraud predicate acts of racketeering in their RICO scheme, this status has directly injured Plaintiff, and the validity of that status must be examined. Therefore, Plaintiff seeks leave to amend the Complaint and directly challenge the validity of this claim of operating under the "lodge system" as a 501(c)(8) corporation by adding IRS Commissioner John A. Koskinen as a defendant. As argued below, Plaintiff has both Article III and prudential standing to do so:

A. Plaintiff Has Standing As An Economic Competitor With Defendant

"[A] plaintiff must have standing to seek each form of relief in each claim."

Bronson v. Swensen, 500 F.3d 1099, 1106 (10th Cir. 2007). A plaintiff who has suffered a concrete and particularized injury possesses standing to seek retrospective relief. *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004). While, as outlined below, Plaintiff has suffered significant concrete and particularized injury due to KC Inc.'s tax-exempt status, "the Supreme Court has squarely rejected the argument that one lacks standing unless [it] is 'significantly' injured. Instead, anyone with 'a direct stake in the outcome of a litigation—even though small' has standing." *American Humanist Society v. Douglas County School District, RE-1*, Case No. 16-1049 (10th Cir., June 20, 2017) (*citing U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)).

Here, UKnight is a direct competitor with KC Inc. to provide web platform services to the local councils and agents of the Order. **Ex. 1** ¶ 122. Indeed, as revealed in discovery, KC Inc.'s internal deliberations regarding UKnight included planning to replicate UKnight's services in-house (to conceal its fraudulent scheme) and to provide these services in exchange for a portion of the dues paid by local councils. *Id*. KC Inc. stole UKnight's trade secrets, *id*. ¶¶ 89-96, specifically to enhance its ability to compete with UKnight, *id*. ¶ 123, and ultimately worked with a third-party vendor to produce UKnight's system in-house in direct competition with UKnight. *Id*. ¶¶ 123-24. Further, KC Inc. admits that it is in competition with UKnight by virtue of its trademark and unfair competition counterclaims. [Doc. No. 57]. Because KC Inc.'s revenues on insurance sales are tax-exempt under its 501(c)(8) status, its comparative financial resources and competitive position *vis-a-vis* UKnight was significantly enhanced. *Id*. ¶ 124. This tax-exempt status and the resulting competitive advantage directly resulted in

KC Inc.'s ability to abandon its deal with UKnight and to choose to provide these necessary services internally. *Id*. Therefore, as a direct result of KC Inc.'s fraudulently claimed 501(c)(8) status, UKnight has suffered millions of dollars in lost profits. *Id*. ¶ 125.

The Supreme Court has long held that exactly such injury from enhanced economic competition is sufficient to confer standing. *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Association of Data Processing Serv. Orgs. V. Camp*, 397 US. 150 (1970).[1] Further, courts have clarified that this concept of economic competitor standing also permits direct challenges to tax-exempt status when that status confers an unfair advantage. *See, e.g., Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989) (establishing "competitive advocate standing" to directly challenge third party tax-exemption). Here, as argued above, UKnight's injury falls within this standard. Additionally, it is squarely within the zone of injury contemplated by the strict boundaries of KC Inc.'s claim to tax-exemption under 26 U.S.C. § 501, and the unfair competitive advantage conferred on KC Inc. would be directly redressed by Plaintiff prevailing on this claim. **Ex. 1** ¶¶ 126, 128, 129.

B. Plaintiff Has Standing Because Defendant's Fraudulent 501(c)(8) Status Allowed It To Inflict Racketeering Injury On Plaintiff Without Liability

In addition to the above-stated basis for standing, Plaintiff has been directly and concretely injured here because KC Inc.'s fraudulent claim to 501(c)(8) status has permitted it to avail itself of the person-enterprise distinction defense and escape RICO

[1] *See generally*, Jordana G. Schwartz, Standing to Challenge Tax-Exempt Status, 58 FORDHAM L. REV. 723 (1990).

liability. *Id*. ¶ 127, s*ee also* **Section III.C**, *infra*, and **Section II**, *supra*. This injury also falls squarely within the zone of injury contemplated by both Section 501 and the RICO Act, and would be directly redressed by Plaintiff prevailing on this claim.

C. Plaintiff Will Prevail On The Merits Of Its Challenge To Defendant's 501(c)(8) Tax Status

As set forth in the proposed Second Amended Complaint, **EXHIBIT 1**, Plaintiff will prevail on the merits in its challenge of KC Inc.'s 501(c)(8) status. As the Supreme Court has stated, "[q]ualification for tax exemption is not perpetual or immutable; some tax exempt groups lose their status when their activities take them outside the classification . . . ." *Waltz v. Tax Comm'r of City of New York*, 397 U.S. 664, 673 (1970). Here, KC Inc. fails to demonstrate the required "common tie" between its members for qualification as a 501(c)(8) corporation; no longer primarily provides benefits within its own purported "fraternity"; and provides impermissible private inurement of tax-exempt profits to its insiders. Each of these failures, *independently*, is basis for revocation of its tax-exempt status.

i. <u>KC Inc. does not meet the "common tie" standard for exemption as a fraternal beneficiary society under § 501(c)(8).</u>

Section 501(c)(8) requires that the members of the purported fraternity share a "common tie." *See* IRS Memo on 501(c)(8) Organizations, 2004 EO CPE at p. 4 (citing *Polish Army Veterans Post 147 v. Comm'r*, 24 T.C. 891, *rev'd on other grounds*, 236 F.2d 509 (3rd Cir. 1956). Here, the Order defines its "common tie" as being "Practical Catholic men over the age of 18 in union with the Holy See." **Ex. 1** ¶ 130. While the Order could have simply required its members "self-identify as Catholic," it instead chose to impose the highly specific requirement of "Practical Catholic in union with the Holy See." This sets forth an objective standard that is precisely defined by the Vatican.

Id. ¶ 131. In recognition of this, the Constitution of the Order requires that all prospective members are carefully interviewed by a panel of seven members to ensure that they meet these requirements. *Id*. ¶ 133(c). In fact, however, these interviews never occur. *Id*. Indeed, KC Inc.'s economically-driven motive to acquire and keep as many "members" as possible has resulted in its complete elimination of any auditing of its members to determine whether they meet these standards, either at the time of admission or afterward. *Id*. As numerous local council officers have complained to UKnight, even when a member has expressly disavowed Catholicism, KC Inc. will not permit them to remove these members from their rolls. *Id*. ¶ 133(a).

In fact, less than 50% of the purported members of the Order actually share the common tie as required by their Constitution. *Id.* ¶ 133. Accordingly, KC Inc. does not meet the "common tie" requirement for qualification as a 501(c)(8) organization, and its status should be revoked.

ii. KC Inc. impermissibly provides benefits and services outside the purported fraternity in violation of § 501(c)(8) and the Commerciality Doctrine.

As the Supreme Court has stated, "the presence of a single . . . [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of . . . truly [exempt] purposes." *Better Business Bureau of Washington, D.C. v. United States*, 326 U.S. 279, 283 (1945). Here, KC Inc., through its wholly-owned subsidiary Knights of Columbus Financial Advisors LLC, not only operates substantial non-exempt activities, but it provides these services entirely outside of the fraternal structure in direct contravention of the requirements of § 501(c)(8). **Ex. 1** ¶ 136. For example, KC Inc. sells "Knights of Columbus" branded mutual funds to the public at large in an entirely commercial enterprise in direct competition with for-profit financial

firms. *Id*. Additionally, KC Inc. owns a 20% stake in Boston Advisors, LLC, an expressly for-profit company that provides financial advisory services to the market at large. *Id*. ¶ 137. Each of these activities violate the Commerciality Doctrine because each meets all of the tests for impermissible activity as set forth by the Seventh Circuit in *Living Faith Inc. v. Comm'r*, 950 F.2d 365, 373 (7th Cir. 1991); *see also* **Ex. 1** ¶ 138.

Additionally, implicit in § 501(c)(8) is the requirement that KC Inc. provide benefits exclusively to members of the fraternity. **Ex. 1** ¶ 135. In addition to the fact that its purported fraternity does not meet the "common tie" requirement, as argued in **Section II.C.i**., *supra*, KC Inc. blatantly provides benefits to those outside this purported fraternity, stating "it was an easy step to open these funds to the public," which "profits get up-streamed to [KC Inc.]." **Ex. 1** ¶¶ 136, 140. Accordingly, its tax-exempt status should be revoked.

iii. KC Inc.'s executives' compensation constitutes impermissible private inurement.

Finally, KC Inc. collects revenues by virtue of its tax exemption that impermissibly inure to insiders for their private benefit, including its Supreme Knight Carl Anderson and its Director of Insurance Tom Smith. *Id*. ¶¶ 143-58. The Private Inurement Doctrine prohibits tax-exempt organizations from paying unreasonable salaries and benefits to its officers and directors. *See* TAX-EXEMPT ORGANIZATIONS AND CONSTITUTIONAL LAW, Bruce R. Hopkins (2012) at § 1.4. Salaries and benefits are unreasonable when they are in excess of what is paid "for like services by like enterprises under like circumstances." *Id*. Here, its senior executives receive salaries and benefits far in excess of those provided by equivalent tax-exempt organizations. **Ex. 1** ¶¶ 143-58. For example, its Supreme Knight Carl Anderson receives a salary of over $2 million per

year as well as a dedicated limousine to drive him to and from work. *Id*. This salary alone is *several times that* of the salary paid to like executives. *Id*. Here, the appropriate "sanction for [such] violation of the private inurement doctrine is revocation . . . of the tax-exempt status of the organization involved." TAX-EXEMPT ORGANIZATIONS at § 1.4.

III. PLAINITFF SHOULD BE PERMITTED TO AMEND AND REASSERT ITS RICO CLAIM TO ADDRESS THE COURT'S ORDER ON DEFENDANT'S MOTION TO DISMISS AND TO INCLUDE INFORMATION REVEALED IN DISCOVERY

Initially, in its Order on Defendants' Motions to Dismiss, [Doc. No. 54], this Court dismissed Plaintiff's RICO claim "without prejudice" in order to permit Plaintiff to replead and address the legal framework set forth by the Court in that Order. *Id*. at p. 31 (emphasis added). As argued below, Plaintiffs have adequately addressed these concerns in several ways, and accordingly the Court should permit Plaintiff to replead its RICO claim as stated in **Ex. 1**. The proposed restatement of Plaintiff's RICO claim directly addresses the legal framework set forth by the Court in its Order, as outlined below:

A. The Local Councils Play Far More Than An "Incidental Role" In The Enterprise, And Their Independence Enhanced The Enterprise's Ability To Thrive And Avoid Detection

i. Local councils "independently certify" fraudulent membership numbers.

As set forth in the Second Amended Complaint, **Ex. 1**, the local councils of the Order play a critical and central role in the enterprise's ability to thrive and avoid detection. *Id*. ¶ 69. The central theme of the enterprise's pattern of racketeering activity is to fraudulently misrepresent its membership numbers in order to improve the perception of its insurance risk-pool, to obtain superior insurance ratings, and to capture increased and illicit profits thereby. Unlike the dealerships in *Fitzgerald*, 116 F.3d at 227, which only served an incidental role in the parent Chrysler's sales of warranties,

here the local councils are the ones that serve the critical role of certifying the membership numbers for aggregation by KC Inc. **Ex. 1** ¶ 69. The legal and functional separateness of these local councils, which are self-governing, is critical in that it creates the perception that these numbers are "independently certified" by thousands of separate entities, rather than generated for self-serving purposes by KC Inc. *Id*. Accordingly, this legal and functional separateness of the local councils directly enhances the ability of the enterprise to thrive and avoid detection of its fraudulently inflated membership numbers. *Id*. While in reality, as argued below in **Section III.A.ii**, *infra*, these councils are extorted by KC Inc. to provide these inflated membership numbers, the perception that these numbers are merely aggregated from thousands of self-governing, independent legal entities is the only reason the overall numbers as self-reported by KC Inc. are accepted by ratings agencies without question or audit. **Ex. 1** ¶ 69.

Accordingly, these local councils are substantially "different for purposes of RICO than employees of [KC Inc.]," and together constitute an "'enterprise' separate and distinct from [KC Inc.] itself." [Doc. No. 54] at 27 (*citing Fitzgerald*, 116 F.3d at 227-28); *see also* **Ex. 1** ¶ 69. This independent certification of membership numbers by the local councils creates exactly the kind of unique and separate "relationship between [local councils] and [KC Inc. that] allowed [the enterprise] to perpetrate or conceal the alleged mail fraud." [Doc. No. 54] at 27 (*citing Brannon v. Boatmen's First Nat. Bank of Okla*., 153 F.3d 1144, 1149 (10th Cir. 1998); *see also* **Ex. 1** ¶ 69. The local councils, by "independently certifying" these inflated membership numbers as legally and functionally separate entities, play a central and critical role in the enterprise, rather than

just "an incidental one in perpetuating these alleged crimes." [Doc. No. 54] at 28; *see also* **Ex. 1** ¶ 69.

ii. Defendant extorts local councils, and one cannot extort oneself.

The critical component of this fraud is the perception that the local councils actually have an economic motive not to inflate the membership numbers they certify because they must pay *per capita* dues to KC Inc. on every member. **Ex. 1** ¶¶ 83-88. This results in the perception that these "independently certified" membership counts must be accurate, and therefore they escape scrutiny. *Id*. In reality, KC Inc. extorts the local councils into inflating their membership numbers in violation of 18 U.S.C. § 1951 by using fear of economic harm to obtain their consent to "certify" inflated numbers. **Ex. 1** ¶ 87.

The economic framework for this extortion is that KC Inc. pays death benefits for all members of the Order, as well as for their children, *but only if the local council to which the member belongs is a council in good standing as determined by KC Inc*. *Id*. ¶ 84. KC Inc. maintains a count of members for each local council, and requires that each council pay *per capita* dues for this number, amounting to extortion of more than $2.5 million per year. *Id*. ¶ 83. When members die, move to a different council, stop paying dues individually to the local councils, or actively seek to quit the Order, the local council must obtain permission *from KC Inc*. to remove these individuals from the number of members for which the local council must pay dues. *Id*. ¶ 86. KC Inc. routinely, wrongfully, and intentionally denies this permission even in clear-cut cases. *Id*. Even though the local councils "independently certify" their membership numbers, if they fail to pay dues on the quota demanded by KC Inc., they lose their status as a "council in

good standing," and their members lose access to these death benefits. *Id*. ¶¶ 83-88. Accordingly, KC Inc. extorts the local councils into consenting to certifying inflated membership numbers and paying excessive *per capita* dues thereon out of fear of wrongful economic reprisal—namely, the improper denial of death benefits to their members. *Id*. ¶ 87.

Not only is this extortion an additional predicate act of racketeering by KC Inc., 18 U.S.C. § 1961, but it also further demonstrates that the enterprise including the local councils is separate and distinct from KC Inc. because it is legally and logically impossible to extort oneself. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001) ("the person and the victim . . . are different entities, not the same."); *see, also, Copperweld Corp. v. Independence Tube Corp*., 467 US 752, 777 (1984) (for analogous proposition that "[parent] and its wholly owned subsidiary [] are incapable of conspiring [with each other]").

B. Plaintiff's Alternative Enterprise Allegation Directly Invalidates The Person-Enterprise Distinction Defense

Additionally, Plaintiff's proposed Second Amended Complaint, **Ex. 1**, alleges, in the alternative, a broader enterprise that directly vitiates Defendant's person-enterprise distinction defense. *Id*. ¶¶ 70-77. This alternative enterprise includes two additional key participants in the racketeering scheme: AM Best, Inc. ("AM Best"), which is a ratings agency and a primary target and tool of Defendant's fraudulently inflated membership numbers; and Information Design, Inc. ("IDI"), a software consulting firm that directly facilitated the concealment of this scheme by participating in the theft of Plaintiff's trade secrets. *Id*. ¶¶ 72-73; *c.f. Kushner*, 153 U.S. at 162 (stating that a RICO enterprise may consist of "the person and the victim, or the person and the tool . . . .").

Here, both AM Best "*enhanced* the enterprise's ability to thrive" by providing an independent rating for its insurance products, and IDI "enhanced the enterprise's ability to . . . avoid detection" by facilitating the theft of Plaintiff's trade secrets to allow Defendant to replicate these services in-house without revealing its scheme. [Doc. No. 54] at 30 (*citing Fitzgerald*, 116 F.3d at 228); *see also* **Ex. 1** ¶¶ 72-73. Additionally, because each is an "entirely separate business," [Doc. No. 54] at 30, the enterprise including them is necessarily separate and distinct from KC Inc. *George v. Urban Settlement Servs*., 833 F. 3d 1242, 1248-51 (10th Cir. 2016) (finding sufficient distinction where defendant joined together with an entirely separate business).

C. Defendant's Committed Additional Acts Of Wire Fraud As Part Of Their Pattern Of Racketeering Activity To Fraudulently Maintain Their Tax Exemption

Finally, KC Inc.'s fraudulent tax filings each year wrongfully claiming 501(c)(8) tax exemption constitute additional predicate acts of wire fraud pursuant to 18 U.S.C. § 1343. **Ex. 1**, ¶ 104.o. Because these fraudulent filings are part of the pattern of racketeering activity as they advance the economic motivation behind KC Inc.'s scheme, and because determination of this matter requires resolution of the validity of Defendant's 501(c)(8) status, justice requires that this Court permit Plaintiff to amend the Complaint to add the IRS Commissioner to determine this issue, as argued in **Section II**, *supra*.

IV. PLAINTIFF SHOULD BE PERMITTED TO AMEND THE LANGUAGE IN THE COMPLAINT TO ADDRESS DEFENDANT'S CONCERNS AS STATED IN THEIR MOTION TO STRIKE

In order to address the Court's concern that "some of the colorful language" in the First Amended Complaint may not belong in the pleading, [Doc. No. 54 at p. 37], Plaintiff has endeavored to address the concerns raised by Defendant in its Motion to

Strike as reflected in the proposed Second Amended Complaint, **Ex. 1**. For example, Plaintiff has removed any reference to "Ponzi," "Enron," and "Arthur Anderson." Additionally, Plaintiff's counsel wrote to counsel for Defendant on August 1, 2017, and asked them to list, in priority order, the specific language and phrasing to which they object. Defendant has declined to do this, instead simply referring Plaintiff to "the paragraphs of the first amended complaint identified in our motion to strike."

V. DEFENDANT WILL NOT BE PREJUDICED BY THE PROPOSED AMENDMENT, AND JUSTICE REQUIRES IT BE PERMITTED

Here, Defendant Knights of Columbus, Inc. will be in no way prejudiced, let alone unduly prejudiced, by the acceptance of the proposed Second Amended Complaint. To date, only limited written discovery has been conducted, and a significant portion of the discovery Plaintiff will seek in this case has been stayed pending the Court's recent ruling on Defendants' Motions to Dismiss. No depositions have been taken. Accordingly, acceptance of the proposed Second Amended Complaint will not result in any duplicative discovery or the reopening of discovery. *See, e.g., Krumme v. Westpoint Stevens, Inc.*, 143 F.3 71, 88 (2d Cir. 1998) (denying leave to amend where "undue prejudice" result as amendment would require reopening of discovery years after case initiated). In the Tenth Circuit, "courts will find prejudice only when an amendment unfairly affects non-movants in terms of preparing their [response] to the amendment." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (affirming leave to amend where non-moving party had several days to respond and trial was still weeks away). Here, Defendant will be in no way prejudiced in its ability to respond to the proposed Second Amended Complaint. Defendants have received "adequate notice" of the proposed

amendment long before the close of discovery, let alone before trial, and will have "ample opportunity to respond." *Id*. at 1230.

Additionally, prejudice to Plaintiff and judicial economy should be considered by the Court in determining a motion to amend. *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985); *see also Bell v. Allstate Life Ins. Co*., 160 F.3d 452, 454 (8th Cir. 1998) ("Any prejudice to the nonmovant must be weighed against the prejudice to the moving party by not allowing amendment."). Here, Plaintiff would be substantially prejudiced by denial of their most significant claim for relief. Further, considerations of judicial economy strongly support granting leave to amend. Because six of Plaintiff's eight claims survive and will continue to resolution on the merits, denial of Plaintiff's request to amend its RICO claim to conform to the framework set forth by the Court, and denial of Plaintiff's ability to challenge Defendant's 501(c)(8) status as a critical component of its person-enterprise distinction defense, would significantly increase the likelihood that a second resolution on the merits would be required following appeal of dismissal of the RICO claim. Permitting Plaintiffs to squarely address the legal framework set forth by the Court will increase the probability that resolution of this case—whether on merits-based or legal grounds—will be final.

Finally, "justice requires" the acceptance of the proposed Second Amended Complaint. Fed. R. Civ. P. 15(a)(2). There is a strong preference in the courts for claims to be decided on their merits, and indeed the very purpose of Rule 15 "is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Minter,* 451 F.3d at 1204. Here, every proposed change in the Second Amended Complaint, **Ex. 1**, either serves the beneficial purpose of clarifying and

"toning down" the allegations, or is necessary to permit a determination on the merits concerning the devastating racketeering injury suffered by Plaintiff, as well as hundreds of thousands of insured members of the Knights of Columbus.[2]

CONCLUSION

Based on the arguments and authorities stated above, Plaintiff respectfully requests this Court GRANT its Motion, accept Plaintiff's Second Amended Complaint, attached hereto at **EXHIBIT 1**, as filed, and revise the case caption as reflected in **EXHIBIT 1**.

Respectfully submitted this 16th day of August 2017.

/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 PLAINTIFFS

[2] Where, as here, a significant component of the intent of Congress in enacting the RICO statute is to facilitate plaintiffs acting as private attorneys general to rectify broader wrongs, there is an especially strong argument that justice requires Plaintiff be afforded "the maximum opportunity" to resolve its RICO claim on the merits. *Minter,* 451 F.3d at 1204.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, the foregoing **MOTION TO AMEND COMPLAINT AND REVISE CAPTION** was filed with the Court via the CM/ECF system and served via E-Mail on the following CM/ECF participants:

L. Martin Nussbaum, mnussbaum@lrrc.com
Edward Gleason, egleason@lrrc.com
Joy Woller, jwoller@lrrc.com
Ian Speir, ispeir@lrrc.com
Hermine Kallman, hkallman@lrrc.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
90 S. Cascade Ave., Suite 1100
Colorado Springs, CO 80903
Telephone: 719-386-3000
Facsimile: 719-386-3070
Attorneys for Defendant Knights of Columbus, Inc.

/s/ Jeffrey S. Vail