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,
DAVID J. KAUTTER, IN HIS OFFICIAL CAPACITY AS (ACTING) COMMISSIONER OF THE INTERNAL REVENUE SERVICE
Defendants.

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.

DEFENDANT KNIGHTS OF COLUMBUS' MOTION TO DISMISS FOR LACK OF STANDING OR, IN THE ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT— BOTH WITH REGARD TO ALLEGATIONS RELATED TO MEMBERSHIP STATUS

INTRODUCTION

Defendant, Knights of Columbus ("Order"), by Lewis Roca Rothgerber Christie, LLP and pursuant to Fed. R. Civ. P. 12(b)(1) and 56(a), moves the Court to dismiss for lack of standing and bar discovery about plaintiff's claims and allegations related to the Order's membership practices or to membership status within the Order, or, in the alternative, to grant partial summary judgment and bar discovery as to all such claims and allegations.

Plaintiff, LiST Interactive, Ltd. ("plaintiff") has no standing to complain about the Knights of Columbus' membership retention practices. Nor can this Court decide whether the Order wrongfully retained certain members without violating the right of association, the freedom of a religious society, and the Establishment Clause. Any such determination would require assessing, member by member and council by council, whether each past due member was retained pretextually or properly under a compassionate waiver routinely granted for those with special circumstances.

This case is not about the Order's membership retention practices. It is a business dispute brought by a disappointed website vendor whose "best claim" is promissory estoppel. *See* Hearing Transc., 53:13-24 (7/20/17); 2d Am Comp ¶ 168.

Even though irrelevant to plaintiff's promissory estoppel, contract, and trade secrets claims, plaintiff continues to stress the Order's alleged wrongful retention of members.[1] Plaintiff now says that "the *fundamental theory* of [its] 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." Dkt. 76, Plaintiff's Emerg Mtn for TRO, 2-3 (emphasis added); *see also*

[1] Of the 185 numbered paragraphs and nineteen subparagraphs in the second amended complaint, seventy-six focus not on a promise of endorsement but on allegations that the Order exaggerated its numbers by wrongfully retaining too many members. *See* 2d Am. Comp ¶¶ 1, 10, 30-31, 33-40, 41(a)-(e), 42-48, 65, 67, 69-71, 73, 75, 77, 80-85, 100, 101(b)-(m), 102, 105-09, 113-15, 120, 129, 130(a)-(c), 131, 170, 174, 178-81. Plaintiff devotes thirty-seven paragraphs and subparagraphs of its RICO claim, *see* 2d Am. Comp ¶¶ 65, 67, 69-71, 73, 75, 77, 80-85, 100, 100(b)-(m), 102, 105-09, 129, 130(a)-(d), 131; six paragraphs and subparagraphs of its tax exempt status claim, *see* 2d Am. Comp ¶¶ 127, 129, 130(a)-(c), 131; and all paragraphs of its fraud and negligent misrepresentation claims to allege fraudulent membership retention.

Dkt. 84, Plaintiff's Resp to Mtn for Protective Order, 1-2. *But none of those things has anything to do with plaintiff*. The actual issues are:

- Did the Order promise to endorse plaintiff UKnight's web services?
- Did the Order breach that promise or any legally binding promise it made to plaintiff?
- Does the plaintiff have trade secrets? If so, did the Order steal them?
- What, if any, recoverable damages has plaintiff sustained?

The alleged motive, by which plaintiff attempt to tie those allegations to its business dispute with the Order is not an element of plaintiff's claims and is wholly irrelevant.

The Court cannot adjudicate whether the Order's membership retention practices are wrongful both because plaintiff lacks standing to challenge these practices and, in the alternative, because adjudicating membership status violates the Order's First Amendment rights. These rights bar membership-related allegations, discovery of membership information, judicial interpretation of the Order's laws, and judicial determination of membership status.

PART ONE: STANDING

PLAINTIFF LACKS STANDING TO COMPLAIN ABOUT THE ORDER'S RETENTION PRACTICES.

Plaintiff comes to the Court as a vendor of website templates, claiming the Order breached a promise to endorse its UKnight product and then stole its trade secrets. As such, it has no standing to prosecute its "fundamental theory . . . that Defendant has fraudulently inflated its membership, fraudulently sold insurance and extorted local councils." Dkt. 76, Plaintiff's

Emerg Mtn for TRO, 2-3; Dkt. 84, Plaintiff's Resp to Mtn for Protective Order, 1-2. Plaintiff is neither a defrauded insurance member nor an extorted council.[2]

Article III of the Constitution "limits the exercise of the judicial power to 'cases' and 'controversies.'" *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1181 (10th Cir. 2012). An "essential part" of the "case-or-controversy requirement" is standing. *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1255 (10th Cir.2004).

Plaintiff must carry the burden of demonstrating standing. *Colo. Envtl. Coal v. Wenker*, 353 F.3d 1221, 1234 (10th Cir. 2004). Standing is not determined by "a party's commitment, fervor, or aggression." *Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir.1998). Instead, standing requires a plaintiff to establish: "1) injury-in-fact; 2) causation; and 3) redressability." *Utah Animal Rights*, 371 F.3d at 1255. Injury-in-fact requires an "invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent." *Id.* (internal quotation omitted). Plaintiff, a disappointed website vendor, has no legally protected interest with regard to the Order's membership retention practices.

It cannot piggyback the interests of allegedly defrauded insurance members and purportedly extorted councils. Causation requires the injury to be "fairly trace[able] to the challenged action of the defendant." *Id.* (internal quotation omitted). Even a contortionist could not trace the Order's decision to not do business with UKnight to an alleged fraudulent retention of Knights of Columbus members. Redressability requires the plaintiff to show that "a favorable court decision" will "redress the injury to the plaintiff." *Id.* (internal quotation omitted).

[2] Plaintiff says it has standing as the Order's competitor with § 501(c)(8) status. 2d Am Comp ¶¶ 122-26. But plaintiff lacks both constitutional and statutory standing to challenge the Order's tax exempt status. *See* Dkt. 100, Order's Motion to Dismiss First and Second Claims, 9-14.

Awarding damages to plaintiff would do nothing to redress the alleged injury to insured members and councils.

PART TWO: SUMMARY JUDGMENT

I.
PARTIAL SUMMARY JUDGMENT IS A SALUTARY REMEDY

Rule 56 permits partial summary judgment. Fed. R. Civ. Proc. 56(a) (a "party may move for summary judgment [with regard to a] part of each claim or defense"). This is "not a disfavored procedural shortcut," but instead a means "to secure the just, speedy and inexpensive determination of every action.'" *Eburn v. Capitol Peak Outfitters, Inc.*, 882 F.Supp.2d 1248, 1252 (D. Colo. 2012) (internal quotations omitted). When "partial summary judgment is granted, the length and complexity of trial on the remaining issues are lessened, all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general." *Calpetco v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993).

Disposing of plaintiff's membership fraud allegations that have nothing to do with its promissory estoppel, contract, and trade secrets claims will avoid wasting the Court's and the parties' resources and violating the Order's First Amendment rights.

II.
UNDISPUTED FACTS

It is undisputed that the Knights of Columbus is a religious society, an expressive association, and a fraternal benefit association; that it has its own charter, constitution, laws, and procedures; that among those is a membership retention protocol; that the Order's laws and retention practices reflect the Order's Catholic values; and that disclosure of membership information risks adverse actions against some members.

Father Michael J. McGivney, a candidate for sainthood, founded the Knights of Columbus in 1882 "to form a society of Catholic men who would journey in faith together, support their Church, and care for widows and orphans." Ex. A, Caulfield Aff. ¶¶ 2-3, 19. Plaintiff admits the Order "is associated with the Catholic Church and is engaged in charitable work;" is "a Catholic mutual benefit society;" and is a "Catholic charitable fraternity." 2d Am Comp ¶¶ 12, 13, 57, 151.

The Order's Charter ensures that the Order functions as a fraternal benefit association and a hierarchical religious society. Its purposes, "always consistent with Catholic values and doctrine, Ex. A, ¶ 4:

> . . . are the following: (a) through a system of subordinate councils, along with regional, national, and international convocations, to raise up, support and encourage a fraternity whose members are practical Catholics united by their faith and by the principles of charity, unity, fraternity, and patriotism; (b) through common worship, charitable works, meetings, and rites of initiation, to form its members in Catholic faith and virtue; (c) to render pecuniary aid to its members, their families, and beneficiaries of members and their families; (d) to render mutual aid and assistance to its sick, disabled, and needy members and their families; (e) to promote social and intellectual interaction among its members and their families; (f) to promote and conduct educational, charitable, religious, social welfare, war relief, public relief, and other activities; and (g) to unite members in their Catholic identity and the practice of their Catholic faith . . . .

Ex. A, Caulfield Aff. ¶ 4 (quoting the Order's Charter at ¶ 2).

Plaintiff admits members must be Catholic men "in union with the Holy See and . . . in good standing with the Church." 2d Am Comp (unnumbered paragraph after 129). Members should "accept[] the teaching authority of the Catholic Church on matters of faith and morals;" "strive[] to have a greater knowledge of the teaching of Christ and his Church;" and "give[] material and moral support to the Church and her works." Ex. A, Caulfield Aff. ¶ 7 (quoting council officers handbook). As part of rites of initiation, Knights "receive religious instruction

and a rosary imprinted with the Order's emblem" and "lessons on the Eucharist as the source and summit of Catholic life." Ex. A, Caulfield Aff. ¶ 16. They are instructed to pray daily. *Id.* The Order provides "numerous education programs to help [them] and their families increase their understanding of faith and live it out," *id.* ¶¶ 13, 17, and also helps Knights build "a 'domestic church'—a church in the home—where the faith is first learned." *Id.* ¶ 14.

The Order contributes over $175 million and 75 million hours of service annually to charity, including Catholic causes and organizations. *See id.* ¶ 10-11. At the Order's annual Supreme Convention, Knights, cardinals, bishops, and priests begin each day with Mass. *Id.* ¶ 12.

The Order's Charter requires its Supreme Chaplain to steward the Order's Catholic character and faith formation:

> [T]he Supreme Chaplain . . . shall be a Catholic priest or bishop who . . . minist[ers] to the Order in the spirit of Father Michael J. McGivney. He shall . . . serve as a member of the Supreme Board of Directors and its Executive and Finance Committee. He shall serve, *ex officio*, on the Supreme Council. The Supreme Chaplain shall be responsible for forming the members of the Supreme Council and the Board of Directors in Catholic values and doctrine. He shall advise those bodies as to whether their actions are consistent with Catholic values and doctrine and with the corporation's Catholic purposes. The Supreme Chaplain shall guide the chaplains of the subordinate councils, ensuring that they support the Catholic identity and evangelical mission of their councils . . . . He shall be responsible for instructing the members in the Catholic faith and leading the Order in prayer . . .

Id. ¶ 5 (quoting Order's Charter ¶ 7).

Plaintiff admits that the Order has adopted and is governed by its own charter, constitution, and bylaws. Dkt. 84, Plaintiff's Resp to Mtn for Protective Order, 4; 2d Am Comp ¶¶ 79, 86, 129 1/2, 133(c), 133(d). The Order's Charter empowers it to "adopt a constitution, bylaws, rules and regulations for its own government, the management of its affairs, . . . and the

advancement of its own well-being; for the government, suspension, expulsion and punishment of its members." Ex. E, Aff. of Alton Pelowski, ¶ 9 (quoting Charter ¶ 3).

Among other rules, the Order has adopted an Intent to Retain Protocol. Ex. B, Nolan Aff. ¶ 16. Gary Nolan, the Order's Vice President for Fraternal Training, explains how and why the Order works to retain members. *See generally* Ex. B. "[T]he Order encourages our councils to take time to find out what is happening with our brothers when they are not heard from. Our membership recruitment, development, and retention fosters this fraternal spirit, rooted in our Catholic faith." *Id.* ¶ 5. Training of councils regarding "membership retention . . . draw[s] upon the Parable of the Lost Sheep, Luke 15:3-7, when Jesus speaks of the good shepherd who leaves 99 sheep to seek out the one sheep that is lost." *Id.* He teaches councils that "every Knight, regardless of circumstances, deserves dignity" and should "feel he is . . . needed." *Id.* ¶ 7. "When Knights fall behind in their dues, . . . we encourage councils to exercise Christian grace and discernment [and] ease the burden for fellow Knights with extenuating circumstances," such as those who are: disabled; "chronically ill," deployed military, college students, "Catholic school teachers, parish Deacons, or [the] unemployed;" as well as those who are "confined to nursing homes," experiencing "financial hardship," "living on a fixed retirement income," or qualifying for "Honorary Life Membership." *Id.* ¶¶ 10-13; Ex. F. Sometimes one "Brother Knight may volunteer to pay the dues for another Brother," and some councils with substantial resources pay the dues for all their members year after year. Ex. B ¶ 11; *see* Ex. G ¶ 5. The Order encourages councils to imitate Christ by "forgiving past years' dues," and it expels a past due member only after the council complies with the retention protocol and recommends expulsion. Ex. B. ¶¶ 15-16, 22.

The Order also advocates for a just society. Ex. E, Pelowski Aff. ¶ 2. In its early years, it defended Catholic immigrants from the Ku Klux Klan and fought for the freedom of Catholic schools. *Id.* ¶ 3. Today, it advocates for many vulnerable groups, including the unborn, religious and racial minorities, and immigrants. *Id.* ¶ 2. It also supports sound public policy related to religious liberty, human life, and the family. *Id.* ¶ 4.

Because it is a faithful Catholic institution, attacks on the Catholic Church often become attacks on the Order. *Id.* ¶ 5. The Catholic Church is subject to regular attacks from both ends of the political spectrum. Recently, Steve Bannon excoriated Catholic bishops for their support of immigration reform, and Democratic senators attacked Seventh Circuit nominee, Amy Barrett, because she believes Catholic "dogma" too "loudly." *Id.* ¶ 6. Protesters defacing statues of Christopher Columbus—the Order's namesake—accuse him and the Order of racism even though the Order has long fought racism. *Id.* ¶ 7. In today's environment, some Knights who are military, business, and political leaders, professional athletes, or judges may wish to keep their affiliation private to avoid reprisals should their membership be disclosed. *Id.* ¶ 8.

The Order advocates for generous immigration laws, and it recruits immigrant Catholics. Ex. C, Martinez Aff. ¶¶ 5-9; Ex. D, Cala Aff. ¶¶ 3-6. Albert Cala, the Order's Membership Development Director, notes: "Many immigrant members . . . are afraid that the information that they provide the Order, such as their full names and addresses, could be divulged to ICE or to other governmental entities who could track them down," and that "the Knights of Columbus would lose many Spanish-speaking members and it would be much harder to recruit new

Spanish-speaking men to the Order if the Knights of Columbus is forced to turn over its membership lists." Ex. D ¶¶ 8, 12; *see also* Ex. C ¶¶ 16, 18-22.[3]

III.
BOTH DISCOVERY OF MEMBERSHIP INFORMATION AND JUDICIAL DETERMINATION OF MEMBERSHIP STATUS VIOLATE THE FIRST AMENDMENT RIGHT OF ASSOCIATION.

Independent associations, like the Knights of Columbus, are part of our constitutional fabric.

> When Americans have a feeling or idea they wish to bring to the world's attention, they will immediately seek out others who share that feeling or idea and, if successful in finding them, join forces. From that point on, they cease to be isolated individuals and become a power to be reckoned with, whose actions serve as an example; a power that speaks, and to which people listen.

Alexis de Tocqueville, DEMOCRACY IN AMERICA 598-99 (Arthur Goldhammer, trans., Library of America ed. (2004)) (1835). This is why "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech [and] freedom to associate." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *In re Motor Fuel*, 641 F.3d 470, 479 (10th Cir. 1981) ("some ideas will only be expressed through collective efforts"). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. And "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters [because in any such circumstance] "state action which may have the effect of curtailing freedom to associate is subject to the closest scrutiny." *Id.* at 460-61. The Knights of Columbus seeks to advance and inculcate beliefs in each of these areas. Ex. A ¶¶ 4-5, 9, 12-17; Ex. E, ¶¶ 1, 4.

[3] The Order seeks a protective order to protect its membership data from disclosure. Dkt. 77.

"Government actions that may unconstitutionally infringe upon this freedom can take a number of forms [including] attempt[ing] to require disclosure of the fact of membership in a group seeking anonymity [or] try[ing] to interfere with the internal organization or affairs of the group." *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984). UKnight invites this Court to engage in both types of such interference.

Disclosure of member information. An expressive association need only make a "prima facie showing of arguable first amendment infringement"—that disclosing membership information "*could* result in chilling constitutionally protected expression" by showing that disclosure would "make it less likely that association will occur in the future." *In re Motor Fuel*, 641 F.3d at 488-89. This showing is made in Exs. C, Martinez Aff. ¶¶ 12-22; and Ex. D, Cala Aff. ¶¶ 6-12 and in the arguments on pages 8 through 11 of Dkt. 88, Order's Amended Opposition to Plaintiff's Mtn for TRO, all of which are incorporated by reference.

Interfering with an association's internal affairs—specifically, membership status. Equally troublesome is what the plaintiff asks this Court to do with the Order's membership information. Plaintiff's "fundamental theory" that the Order fraudulently inflated its membership requires this Court not only to authorize constitutionally impermissible discovery but also to determine who are true members of the Order and who are not. But the Supreme Court has repeatedly held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association therefore plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Accordingly, the Supreme Court struck down an open primary law because it foisted members on political parties, *California Democratic Party v.*

Jones, 530 U.S. 567, 574 (2000) ("a corollary to the right to associate is the right not to associate"), and it held that a parade organizer may exclude "parade contingent expressing a message not of the . . . organizers' own choosing." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566 (1995). A decision to retain a member is a decision to continue to associate with that individual. These cases make clear that the First Amendment powerfully protects that prerogative.

Government interference with the right to associate survives legal review only when the party seeking such interference carries the burden of proving strict scrutiny. In *Roberts*, the Supreme Court found that the state had a compelling interest to eradicate sexual discrimination and that the state's public accommodation statute constituted the least restrictive means for accomplishing that objective. *Roberts*, 468 U.S. at 623, 626. Here, there is no governmental interest in rejecting the Order's compassionate approach of permitting councils to waive dues requirements for members with special circumstances.

Furthermore, it is difficult to imagine a more restrictive means for this Court to adjudicate whether Order's member retention policy is pretextual than to have it adjudicate plaintiff's theory here. For this Court to determine whether the Order has wrongfully retained a member, it will have to assess whether a council's decision to waive the dues requirement for particular individuals reflected the Order's Catholic values and its values of unity, charity, and fraternity or whether it was a pretext to defraud insurance members and extort fees from councils. Jerome Schaefer, Grand Knight of Colorado Springs Council 14805, illustrates precisely how taxing litigation of plaintiff's membership claims would be. His council has forty-eight members. Ex. G, ¶ 2. It has waived dues for nine. *Id.* ¶¶ 3-5. Adjudicating plaintiff's

membership claims requires this Court to assess each of these waivers—one by one—and then to repeat that process for each of the Order's members in 10,000 councils in the U.S. and Canada.

IV.
THE FIRST AMENDMENT FREEDOM OF A RELIGIOUS SOCIETY PRECLUDES JUDICIAL DETERMINATION OF MEMBERSHIP STATUS.

The First Amendment Freedom of a Religious Society (also known as the "abstention doctrine" or the "church autonomy doctrine") precludes civil adjudication of who is and who is not a member of the Knights of Columbus, a Catholic religious society. Three branches of religious liberty jurisprudence grow from the trunk of the First Amendment: Free Exercise, Establishment, and the Freedom of Religious Societies. The latter is rooted in both the Free Exercise Clause and the Establishment Clause. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 702 (2012).

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871), the fountainhead of the Freedom of a Religious Society, involved a post-Civil War intra-church dispute between pro- and anti-slavery factions of a Presbyterian congregation in Kentucky. Each faction claimed that its leaders and its members were the leaders and the members of the church, and each claimed a right to the congregation's property. *Watson* reversed the Kentucky Court of Appeals that had "overrule[d] the decision of the highest judicatory of [the denomination] and substitute[d] its own judgment for that of the ecclesiastical court." *Id.* at 734. *Watson* held that disputes within hierarchical religious societies should be decided by a rule of deference.

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them.

Id. at 727.

The holding *Watson* rested on three principles. First, civil courts are not allowed to invade a religious society's doctrine, *id.* at 727-28; second, civil courts are "incompetent judges of matters of faith, discipline, and doctrine," *id.* at 732, *see also id.* at 729; third, civil adjudication of subject matters within the province of the religious organization inevitably leads to entanglement, *id.* at 733, and finally, the rule of deference was fair because "[a]ll who unite themselves to [a religious society] do so with an implied consent to this government, and are bound to submit to it," *id.* at 729.

While *Watson* was decided on a pre-*Erie*,[4] pre-incorporation[5] basis and, therefore, was not expressly founded upon religious liberty principles, the high court later constitutionalized *Watson*'s principles. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

> [*Watson*] "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. [This f]reedom . . . we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."

Id.

Watson has been cited with approval in over 900 published precedents, and it provided the foundation for the unanimous *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 704 (2012) involving a subset of church autonomy law known as the ministerial exception.

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[4]*See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 1188 (1938).

[5]The religion clauses were not incorporated into the Fourteenth Amendment until later. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947) (incorporating Establishment Clause).

Although often called the "church autonomy doctrine," this principle protects not just churches but "a spirit of freedom for religious organizations" in general. *Kedroff*, 344 U.S. at 116. In *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309-10 (4th Cir. 2004), for example, the U.S. Court of Appeals for the Fourth Circuit applied the church autonomy doctrine for a Jewish nursing home with similar characteristics to the Order. The Court described it as follows:

> The Hebrew Home is a non-profit religious and charitable corporation whose mission, according to its By-Laws, is to serve "aged of the Jewish faith in accordance with the precepts of Jewish law and customs, including the observance of dietary laws." The Hebrew Home accepts persons of all faiths, but approximately 95% of its residents are Jewish. All members of its board of directors are Jewish. The Hebrew Home maintains a synagogue on its premises and holds twice-daily religious services conducted by an ordained rabbi, who serves as a full-time employee.

Id. Courts have applied the church autonomy doctrine to other non-church religious entities. [6]

One of the hallmarks of the Freedom of Religious Societies is that this doctrine, unlike the right of association, is applied without strict scrutiny or a balancing test. *See, e.g., id.* and *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002).

Several subject matters within the province of a religious society that require this Court's deference are implicated by plaintiff's membership allegations here: (1) doctrine, *Kedroff*, 344

[6] *See also EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283-85 (5th Cir. 1981) (seminary); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) (non-denominational campus ministry); *Order of St. Benedict v. Steinhauser*, 234 U.S. 640 (1914), (religious order); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) (charitable trust); *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (religious college); *EEOC v. Catholic University of America*, 82 F.3d 455 (D.C. Cir. 1996) (religious college); *Curl v. Beltsville Adventist School*, No. GJH-15-3133 (D. Md. 2016) (religious school).

U.S. at 116, (2) members, *Watson*, 80 U.S. at 714 (discussing the allegation that "plaintiffs are not lawful members" of the church), (3) discipline, and (4) internal law.

Doctrine. By questioning whether the Order and its councils have conspired to retain too many members, plaintiff has also put at issue the religious values of charity, unity, fraternity, forgiveness, human dignity, and compassion that inform the Order's membership retention policies. *See* Ex. B, Caulfield Aff. ¶¶ 5-7, 10-11, 13, 15, 19, 21.

Members. Watson made it clear that membership and the discipline of members were subject matters squarely within the province of a religious society by noting that the fundamental questions raised by the dispute before it were these:

> In these matters of religious doctrine, discipline, and church order, who is to be the judge? Who has the right to say conclusively, in case of controversy, that one or the other party has departed from the doctrines of the church? **Who shall determine upon the validity of an act or judgment of a church court; upon the status of a member or officer; upon the legality or otherwise of a voluntary or enforced severance of a part from the body of the general organization?** (Emphasis added).

80 U.S. at 707. And it answered these questions by stating that it was the religious officials and not the civil court that had final say.

> [T]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and . . . for the *ecclesiastical government of all the individual members*, congregations, and officers within the general association, is unquestioned. (Emphasis added).

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 711 (1976).

Discipline. Just as there are many decisions establishing that a church-minister relationship is a subject matter within the province of a religious society that is off limits to a secular court, *Hosanna-Tabor, supra*, *Bryce, supra*, there are also many precedents holding that

the discipline and expulsion of members of a church or religious society are removed from civil courts.[7]

Religious Society's Internal Law. Plaintiff, invoking the Laws of the Knights of Columbus § 168, alleges that the Order did not properly apply its so-called *ipso facto* expulsion rule for delinquent members as part of its alleged tortious retention of members. This allegation is mistaken because Law § 118 and the Order's retention protocol specifically allows for dues waivers for members in special circumstances and Law § 164 states that this rule, with regard to delinquent members, applies only after the conservation committee contacts and seeks to retain the delinquent member in accordance with the Order's values and member retention protocol. Ex. E, ¶ 11. **But even if it were true**, this Court cannot substitute its interpretation of the Order's laws for the Order's own interpretation without violating the freedom of a religious society. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 17-18 (1929) (deferring to archbishop's interpretation of church law); *Milivojevich*, 426 U.S. at 712-13 (deferring to denomination's interpretation of church law even if it was arbitrary).

[7]*See, e.g., Sreng v. Trairatanaram Temple, Inc.*, 696 S.E.2d 405, 407 (Ga. App. 2010) (civil "courts are prohibited by the First Amendment . . . from 'determining issues of expulsion of members, pastor, and the internal procedures of a religious entity'"); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994) (tort claims arising excommunication of parishioner not reviewable by civil court); *Davis v. Church of Jesus Christ of Latter-day Saints*, 852 P.3d 640 (Mont. 1993) (same); *Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992) ("Within the context of ecclesiastical discipline [of members], churches enjoy an absolute [First Amendment] privilege from scrutiny by the secular authority."); *Park Slope Jewish Center v. Stern*, 128 A.D.2d 847, 848 (N.Y. App. Div. 1987) ("membership requirements are strictly an ecclesiastical matter and decision of the church or synagogue are binding on courts"); *Rodyk v.Ukrainian Autocephalic Orthodox Church of St. Volodimir*, 31 A.D.2d 659 (N.Y. App. 1968) ("church has a right to determine the qualifications for membership [and] whether one is a member in good standing is a matter of an ecclesiastical nature[, and] the church's decision as to such a matter is binding on the courts.).

V.
ADJUDICATION OF MEMBERSHIP STATUS CONSTITUTES EXCESSIVE ENTANGLEMENT AND VIOLATES THE ESTABLISHMENT CLAUSE.

Plaintiff's "fundamental theory" becomes even more constitutionally infirm because plaintiff also alleges that the Order fraudulently retained members by failing to properly apply its requirement that members be "practical Catholics." Plaintiff asks this Court to adjudicate whether "more than half the remaining 'members' of the Order [are not] 'Practical Catholics in union with the Holy See." 2d Am Comp ¶ 133. It contends that many members are not Catholic, have married outside the Church; do not have canonical annulments of former marriages, and do not attend Mass on Sundays or holy days. *Id.*

Discovery and adjudication of such issues, just like discovery and adjudication of whether the Order pretextually applied its religious values when retaining members, will necessarily entangle this Court in religion in violation of the Establishment Clause. That clause prohibits not only judicial resolution of such issues but "the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see also id.* at n.10 and related appendix; *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (the excessive entanglement "doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices" and from the related intrusive inquiry into such subjects).

CONCLUSION

For the reasons above, the Order respectfully requests that the Court dismiss for lack of standing and bar discovery about plaintiff's claims and allegations related to: (1) the Order's and its councils' administration of member relations and status (including collection and waiver of dues, retention practices, and assessment of "practical Catholic" status), and (2) the Order's purportedly fraudulent inflation of its membership numbers, sale of insurance, and extortion of fees from its councils or, in the alternative, to grant partial summary judgment and bar discovery as to all such claims and allegations.

Respectfully submitted,

s/ L. Martin Nussbaum
L. Martin Nussbaum
LEWIS ROCA ROTHGERBER CHRISTIE LLP
90 South Cascade Avenue, Suite 1100
Colorado Springs, CO 80903
o:719.386.3000; f:719.386.3070
Email: mnussbaum@lrrc.com

Attorneys for Defendant Knights of Columbus

CERTIFICATE OF SERVICE

On January 25, 2018, I filed the foregoing using the CM/ECF System which will send notice to:

Jeffrey S. Vail, Esq.
VAIL LAW LLC
5299 DTC Blvd., Suite 1101
Greenwood Village, CO 80111

s/ Amy McGuire

sdg