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.

PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR PROTECTIVE ORDER

Plaintiffs List Interactive, Ltd., d/b/a UKnight Interactive, and Leonard S. Labriola hereby file their Reply in support of Plaintiffs' Emergency Motion for Protective Order, [Doc. No. 16] ("Motion"), and in support thereof state as follows:

INTRODUCTION

Defendants Knights of Columbus ("Supreme"), Thomas P. Smith, Jr., and Matthew A. St. John ask this Court to deny Plaintiffs' request for an Attorney Eyes-Only protective order to protect the identity of whistleblower witnesses in this case. Fed. R. Civ. P. 26(c), however, expressly permits the Court to require certain information "be revealed only in a specified way . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Here, Plaintiffs have shown good cause why the identities of whistleblower witnesses should be disclosed "Attorney

Eyes-Only" to protect these witnesses from a demonstrated pattern of intimidation, fear, and retaliation by Defendants.

ARGUMENT

A. Supreme's Statements Constitute Witness Tampering

Here, Defendants correctly assert that witness tampering under 18 U.S.C. § 1512 "requires something [more] than non-coercive, non-deceptive conduct." Motion at 5 (*citing I'mnaedaft, Ltd. v. The Intelligent Office Sys., LLC*, 2009 WL 1011200, at *2 (D. Colo. 2009)). And that is exactly what Plaintiffs have demonstrated—behavior that is both coercive and deceptive. Eight separate individuals all with personal knowledge of the corporate culture of the Knights of Columbus swear under oath that Defendants' 2/10/17 Email was coercive. *See* **Exs. A, C, D, E, F, G, H, I**. Additionally, as argued in the Motion at 6, the 2/10/17 Email was deceptive as it implied (falsely) that individuals would not become witnesses in this case if they chose not to speak with Plaintiffs.

While Plaintiffs' Motion offers specific testimony in the form of eight[1] sworn affidavits addressing intimidation, fear, retaliation, and witness tampering by Supreme, Defendants provide only attorney argument—but no testimony or admissible evidence—that this is not the case. Plaintiffs' Motion does not, and should not prior to the commencement of discovery, consist of the same kind of evidence required to prove the RICO predicate act of witness tampering at trial. However, this uncontroverted evidence more than meets Plaintiffs' burden to show, for purposes of a protective order, that open disclosure of the names of these whistleblowers to Supreme will result in "clearly defined

[1] Many more current Knights of Columbus officers and agents expressed a desire to testify on UKnight's behalf, but refused to do so without some protection against retaliation.

and serious injury," *Morrisey v. Allstate Ins. Co.*, 2009 WL 2400963, at *2 (D. Colo. 2009), such as the termination of field agency contracts and general agency contracts.

B. The Whistleblower Affidavits Are Properly Considered

Defendants next contend that the Whistleblower Affidavits "are not competent evidence and should not be considered by the Court" because they contain "hearsay, rumors, and speculation, as opposed to [the affiants'] personal knowledge." Motion at 9. In fact, each of the affidavits contain admissible evidence supporting Plaintiffs' Motion:

> Whistleblower Affidavit #1 is from a current State Officer of the Knights of Columbus. **Ex. C** at ¶ 1. He expresses personal knowledge of his State Deputy's concern about expressing even "neutrality without permission from Supreme." *Id*. ¶ 2. He explains his personal knowledge of the loyalty oath required of members toward Supreme. *Id*. ¶ 4. Furthermore, he expressed his understanding that the 2/10/17 Email was "an attempt to intimidate and silence members and agents," and that he formed this opinion "before any contact with anyone from the UKnight organization." *Id.* ¶ 5.
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> Whistleblower Affidavit #2 expresses the affiant's personal knowledge of being retaliated against by being fired from his job with the Knights of Columbus when he raised the same "phantom member" and "phantom council" issues alleged in the Amended Complaint. **Ex. D** at ¶ 2. He also expresses his personal knowledge, based on his understanding of Supreme's corporate culture, that the 2/10/17 Email was "an instruction to not cooperate with or testify on behalf of UKnight." *Id*. ¶ 5.
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> Whistleblower Affidavit #3 expresses the affiant's personal knowledge of "several current agents of the Knights of Columbus that would like to speak up about the Knights' illegal or unethical behavior, but have not done so out of fear of retaliation." **Ex. E** ¶ 2. He continues that, "[w]ith my experience working with the Knights of Columbus and my understanding of their corporate culture, I understand [the 2/10/17 Email] to be an instruction to not cooperate with or testify on behalf of UKnight in this case." *Id*. ¶ 5.
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> Whistleblower Affidavit #4 expresses the affiant's personal knowledge, based on "10 years . . . to understand the organizational culture [of Supreme], and I believe [the 2/10/17 Email] was sent to intimidate recipients." **Ex. F** ¶ 3.

Whistleblower Affidavit #5 expresses the personal knowledge of the affiant, a current officer with the Knights of Columbus, based on "10 years [in which he has] come to understand the organizational culture," and that "this email was sent to intimidate recipients." **Ex. G** ¶ 3.

Whistleblower Affidavit #6 expresses the personal knowledge of the affiant, a current officer with the Knights of Columbus, based on "11 years [in which he has] come to understand the organizational culture," and that "this email was sent to intimidate recipients." **Ex. H** ¶ 3.

Whistleblower Affidavit #7 also expresses his personal knowledge and personal experience of being retaliated against, and being fired from his job as a general agent with the Knights of Columbus, because he raised issued alleged in the Amended Complaint. **Ex. I** ¶ 2.

These affiants plainly speak from personal knowledge, and express their personal experiences, conversations with other officers of the Knights of Columbus, and their fears and beliefs about retaliation and intimidation. To the extent that any of these statements are hearsay, they are admissible hearsay because they show the affiants' subjective beliefs about retaliation, their present sense impression upon receiving the 2/10/17 Email, the reputation concerning the character of Defendants, and the plan, motive, and intent of Defendants. *See, e.g.,* Fed. R. Evid. 803. Indeed, the plan, motive, intent, and character of Defendants are the key issues when evaluating the 2/10/17 Email.

C. Plaintiffs Have Shown Good Cause For Entry Of An Attorney's Eyes-Only Protective Order.

In ruling on Plaintiffs' Motion, the Court must "balance the non-movant's need for information against the movant's injury from unrestricted disclosure." *Morrissey*, 2009 WL 2400963, at *2. The risk from unrestricted disclosure of the names of whistleblowers in this case is clear, as argued in **Section A**, *supra*. The Defendants' need for information is less clear—here Plaintiffs propose that Defendants' counsel have full access to this information, and only ask that the names be withheld from Defendants themselves due to the track record of retaliation set forth in the Whistleblower Affidavits.

While Defendants argue that this would "prevent Defendants from participating in their own defense," it is unclear how that is the case. If the Defendants themselves were given the names of the whistleblowers (and not just their counsel), what use would this information be to them *other* than to create targets for retaliation? Any investigation of these individuals, background checks, review of employment files, interviews, depositions, etc. could be just as easily conducted by counsel, investigators hired by counsel, and by giving counsel access to corporate records. The suggestion that the Defendants must personally have these names to effectively participate in their defense simply rings hollow.

Where, as here, "there is a risk of witness tampering, keeping the identity of witnesses from a defendant helps uphold the integrity of the judicial process by making it more difficult — and ideally, impossible — for a defendant to access and intimidate or otherwise attempt to influence the witness." *U.S. v. Tarango*, 760 F. Supp. 2d 1163, 1169 (D.N.M. 2009) (emphasis added). Protecting witness identities is appropriate where "forced disclosure of witness lists would discourage witnesses from testifying and would inject a risk that some defendants would interfere with testimony." *Id*. at 1170 (citing J. Moore's *supra* § 616.02[3][a], at 616-15 (citing H.R. Conference Rep. No. 414, 94th Cong., 1st Sess. 11-12 (1975))).

Additionally, the cases cited by Defendants in opposition to the Motion can be easily distinguished from the instant case. For example, Defendants cite *Theidon v. Harvard Univ*., 314 F.R.D. 333, 336 (D. Mass. 2016), for the notion that an "Attorney Eyes-Only" protective order is inappropriate where it "hinders the plaintiff's ability to aid counsel in the review of the evidence and to determine her litigation strategy in light of

it." *Id*. The facts of that cases were starkly different than those presented here. In *Theidon*, Harvard sought to disclose as "Attorney Eyes Only" a list of "comparand" scholars whose research was used as a point of comparison in reviewing Dr. Theidon's application for tenure. *Id*. Critically, there "[t]he comparands have no knowledge that their scholarship was compared to Theidon's." *Id*. (emphasis added). In *Theidon*, unlike the situation here, there was literally no potential for retaliation. Accordingly, because Harvard had no interest in protecting their names from disclosure, that was automatically outweighed by Theidon's interest, however slight, in accessing this evidence.

Next, Defendants cite to *Murray v. Nationwide Better Health*, 2012 WL 1434878, at *4 (C.D. Ill. 2012). There, the Court denied a requested protective order, but again, under significantly different circumstances. In *Murray*, the Court rejected plaintiff's request to withhold both the identity of an affiant *and the contents of the affidavit* from Defendants where the *affiant's name had already been disclosed* in Plaintiff's 26(a)(1) initial disclosures. *Id*.

Lastly, Defendants cite to *Quair v. Bega*, 232 F.R.D. 638, 641 (E.D. Cal. 2005). There, the court denied plaintiff's extremely broad request to conceal (1) the identity of the witnesses; (2) the identity of the people threatening each witness; and (3) the nature of the intimidation and reason for fear by the witnesses. *Id*. at 640. The court in *Quair* noted that "[i]n determining whether good cause exits for the protective order, the Court must balance the interests in allowing discovery against the relative burdens to the parties and non parties." *Id*. at 641 (citing *In re Coordinated Pretrial Proceedings*, 669 F.2d 620, 623 (10th Cir. 1982)). There, the court held that because petitioners sought an "extremely broad" protective order to withhold the identity and factual allegations related

to "trial witnesses . . . at the very core of Petitioners' case," *id*. at 642, the balancing test did not favor petitioner's request. Here, in contrast, Plaintiffs seek only to withhold the names of whistleblowers, not the content of their testimony, and understand they would have to disclose these witnesses in the event they were to testify at trial.[2]

Plaintiffs' intent with this Motion is, in earnest, to protect whistleblowers from retaliation, and not to prevent Defendants from any participation in their own defense that could possibly be foreclosed by disclosing the names of whistleblowers only to Defense counsel. To the extent Defendants or the Court can propose or fashion an alternative protective order that would adequately protect whistleblowers from retaliation by the Knights of Columbus while simultaneously enabling Defendants to know their identities, Plaintiffs would be accept such a compromise. However, absent adequate protection for these whistleblowers through some alternative proposal, and in light of the evidence before this Court exclusively demonstrating the risk to the whistleblowers, Plaintiffs respectfully request this Court permit disclosure of their identity as "Attorney's Eyes-Only."

CONCLUSION

For all of the reasons and authorities stated above, Plaintiffs respectfully request the Court grant their Emergency Motion for Protective Order.

[2] Indeed, Defendants own response recognizes that the reasons for the court's rejection of the requested protective order in *Quair* was the judge's concern "that the defendants be allowed the opportunity to prepare an effective cross-examination" at trial. Response at 11.

Respectfully submitted this 26th day of February 2017.

/s/ Jeffrey S. Vail

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2017, the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR PROTECTIVE ORDER** was filed with the Court via the CM/ECF system and served via E-Mail on the following CM/ECF participants:

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