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' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs List Interactive, Ltd., d/b/a UKnight Interactive, and Leonard S. Labriola hereby file their Response to Defendant Knights of Columbus' Motion to Dismiss, [Doc. No. 23] ("Motion"), and in opposition thereto state as follows:

INTRODUCTION

Defendant Knights of Columbus ("Supreme") moves to dismiss Plaintiffs' first, second, third, and eighth claims for relief against it. Despite not moving to dismiss Plaintiffs' claims for misappropriation of trade secrets, intentional interference with contract, fraud, and negligent misrepresentation, Supreme argues that this is but a "garden variety" breach of contract claim, and that Plaintiff's RICO claim is nothing but a scandalous smear. Motion at 2. While it is understandable that Supreme would like to re-cast the complaint to shine a more favorable light on its actions, wishing does not

make it so. Here, Plaintiff's RICO claim is the core of this case because Defendants' need to conceal their pattern of racketeering was the motive for all of their tortious acts and breach of contract.

As the Supreme Court has clearly stated, "RICO is to be read broadly," and "is to be liberally construed to effectuate its remedial purposes." *Sedima S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3285-86 (1985). With RICO, Congress expressly intended to provide a civil cause of action for "both 'legitimate' and 'illegitimate' enterprises." *Id*. at 3286. Indeed, as the Supreme Court has stated, "[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). This is why civil RICO was enacted by Congress in the first place, and is a critical function of Plaintiff's civil RICO claim: hundreds of thousands of insured individuals are at risk of devastating financial loss if Plaintiff's RICO claim is not permitted to proceed to reveal Defendants' racketeering behavior. As argued below, Plaintiffs' RICO, breach of contract, promissory estoppel, and slander claims are all properly pleaded, and this Court should deny Defendant's Motion in its entirety.

LEGAL STANDARD

When reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (*citing David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). A motion to dismiss for failure to state a claim "is viewed with disfavor, and is rarely granted." *Lone Star Industries, Inc. v. Horman Family Trust*,

960 F.2d 917, 920 (10th Cir. 1992) (quoting *Tanglewood-East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988).

ARGUMENT

A. Plaintiffs' RICO Claim Is Properly Pleaded

Defendant raises only two issues with Plaintiff's RICO claim—their claim that there is no proximate cause, and that the Defendants and the alleged enterprise are one-in-the-same. Motion at 5-10. Defendants do not argue that the conduct, pattern, racketeering activities, or damages are improperly pleaded. Each of Defendant's arguments fails, as argued below.

i. Defendants' pattern of racketeering activities is the direct and proximate cause of Plaintiff's damages.

Defendant's proximate cause argument hinges on their incorrect assertion that "[Plaintiffs] plead no injury to them proximately caused by the racketeering they allege." Motion at 9. This argument is plainly contradicted by the allegations in the Amended Complaint. As Plaintiffs explain, Defendants' pattern of racketeering activity is the central cause of all of their damages. As alleged, Defendants have been engaged for several years in an elaborate scheme to inflate their membership numbers to artificially improve the demographic structure of their insurance risk-pool—the very core aspect of their business. Amend. Compl. ¶¶ 31-47. While Defendants and the local councils and agents of the Knights of Columbus were very impressed with UKnight's system, *id*. at ¶¶ 15, 17, 53, 55, 60, at some point in 2013 Defendants realized that implementation of UKnight's system across the entire Order would necessarily reveal their inflated membership numbers, and expose their scheme. *Id*. at ¶¶ 61, 87. Accordingly, as stated in the plain language of the Amended Complaint, and certainly when construing the

allegations in the light most favorable to Plaintiffs, all of Plaintiffs' damages were caused by Defendants' efforts to continue and conceal this scheme. *Id*. at ¶¶ 61, 87, 102. Indeed, both the motivation for and the racketeering acts of Defendants' wire fraud, theft of trade secrets, and transportation of stolen goods—which are plainly alleged to have been the *but-for* and *proximate* cause of Plaintiffs' damages, are the result of Defendants' efforts to kill the UKnight program and keep their fraudulent scheme concealed. *Id*. Plaintiffs could not have stated this any more directly:

> [Defendants] found themselves stuck between a rock and a hard place in light of their fraud noted above, because the UKnight system would have necessarily resulted in the identification and elimination of "phantom members" and duplicate members who had moved councils . . . Defendants knew that they had to stall the UKnight system deployment until they could ultimately kill it and recreate its functionality under their own control in order to cover up the fraud while still delivering the benefits of the system.
>
> . . .
>
> As a result of Defendants' violations of 18 U.S.C. §§ 1962(c) and (d), Plaintiff UKnight has been directly, concretely, and proximately injured in its business and property as a result of the foregoing overt acts in furtherance of the conspiracy, and as a result of the racketeering acts outlined above.

Amend. Compl. ¶¶ 87, 102.

Incredibly, Defendant argues that "[t]he only injury pled in the First Claim is . . . misrepresentation, and misappropriation of trade secrets . . . they plead no injury to them proximately caused by the racketeering they allege." Motion at 9. Here, the misrepresentations (constituting wire fraud) and theft of trade secrets are both racketeering predicate acts under 18 U.S.C. § 1961, *et seq*.! Perhaps unintentionally, Defendant *admits* that Plaintiffs have pleaded damages caused by Defendants' racketeering acts. This is all that is required, as "a RICO verdict can be sustained when a

pattern of racketeering acts existed, but when only one act caused injury.") *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988) (emphasis added); *see also Just Film, Inc. v. Buono*, 2017 U.S. App. LEXIS 2164 (9th Cir. Feb. 7, 2017) (citing *Deppe*).

While Defendants seek to re-cast this case as a "garden-variety business dispute," Motion at 2, the racketeering acts and RICO claim are the very *crux* of the case. But for Defendants' fraudulent scheme and their pattern of racketeering designed to kill the UKnight deployment and conceal that scheme, the UKnight roll-out would have gone as planned, and the parties would not be in court at all. As the Ninth Circuit has stated, "a civil RICO plaintiff must show that his injury was proximately caused by the [prohibited] conduct." *Fireman's Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir. 2001). Here, this is exactly what Plaintiffs have done—the prohibited conduct of wire fraud (convincing Plaintiff to bear with Defendants' delays and to commit all of their focus on serving Defendants) and theft of trade secrets (by which Defendants were able to obtain Plaintiff's technology without paying for it, leading them to breach their contract) were the direct and proximate causes of Plaintiff's damages. Accordingly, Defendant's argument regarding lack of causation must fail.

ii. The alleged enterprise is distinct from Defendants.

The only other argument Defendant raises to counter Plaintiff's RICO claim is their claim that there is no distinction between the Defendants and the alleged enterprise. Motion at 4-8. However, *all but one* of the cases cited by Defendants predates the seminal Supreme Court ruling on the person-enterprise dichotomy defense. In June 2001, the Supreme Court's "unanimous decision in *Cedric Kushner Promotions, Ltd. v. King* narrowed, but did not eliminate, the concept that the RICO 'person' had to be clearly and completely differentiated from the RICO 'enterprise.'" Civil RICO Practice Manual 3d.

(2012), § 4.09[A] (citing *Kushner*, 121 S. Ct. 2087 (2001)). In *Kushner*, where the defendant was boxing promoter Don King, *and the enterprise was nothing more than his wholly-owned boxing promotions company*, the Supreme Court held that the legal fiction that the individual and the corporation were separate was sufficient to distinguish the defendant from the enterprise. *Kushner*, 121 S. Ct. at 2091. As the Supreme Court stated, "we can find nothing in the statute that requires more separateness than this." *Id*. "After all," the Court stressed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers and privileges different from those individuals who created it, who own it, and whom it employs." *Id*. (emphasis added). The Court continued that RICO "protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" *Id*. at 2091. The Court concluded that "the statute requires no more than the formal legal distinction between 'person' and 'enterprise' (namely, incorporation) that is present here." *Id*. at 2092 (parenthetical in original).

Here, the Defendants, consisting of the Knights of Columbus, Inc. (the "Supreme Council" in New Haven, Connecticut)[1], Mr. Smith, and Mr. St. John,[2] are starkly distinct from the Order of the Knights of Columbus as a whole, consisting of thousands of local councils (each separate legal entities), roughly 130 general agents (each legally separate

[1] Defendant Knights of Columbus, Inc. labels itself "the 'Order,'" Motion at 2, in an attempt to conflate the "Supreme Council," a wholly separate legal entity that does not own any of the local councils or agents, with the entirety of the *Order* of the Knights of Columbus as described in this Response.

[2] Plaintiffs also allege an alternative enterprise consisting of only Mr. Smith and Mr. St. John. Amend. Compl. ¶ 67. Mr. Smith and Mr. St. John do not make a special appearance to join the Supreme Council's Motion, and there is no question that Mr. Smith and Mr. St. John are distinct from any interpretation of the "Knights of Columbus" as an enterprise.

individuals and separate companies that only contract with Supreme), over 1,000 field agents (each legally separate individuals who, in turn, contract with their general agent), and over 1 million legally distinct individual members. Defendants Mr. Smith and Mr. St. John are both employees of Supreme—the exact employee/corporation distinction stated by the Supreme Court in *Kushner*. *Id*. Plaintiffs plainly and clearly plead this distinction. *See* Amend. Compl. ¶ 66 ("Defendants are separate and distinct from the enterprise itself. KC Supreme is a separate legal entity from the Knights of Columbus fraternity (itself comprised of over 15,000 distinct legal entities)"), and ¶ 5 n.1 ("Defendant KC Supreme refers to the parent 501(c)(8) entity . . . thousands of local councils are, under IRS guidance, independent lodges . . . that must obtain their own EINs and file their own tax returns . . . are separate legal entities which can bring suit and be sued, raise and control their own monies, own their own property, etc. . . . [they] are not subsidiaries or part of the same corporate family tree as Defendant."). Indeed, the Eighth Circuit Court of Appeals has held, with respect to the Knights of Columbus, that its insurance agents are "independent contractor[s], not [] employee[s]." *Birchem v. Knights of Columbus*, 116 F.3d 310, 311 (8th Cir. 1997). As indicated by the Eighth Circuit in *Birchem*, Mr. Birchem sued the Knights of Columbus as one of its contracted insurance agents—he (as with all of their General Agents and Field Agents) *must* be distinct from Supreme if he is able to sue them, otherwise this would be a case of the Knights of Columbus suing themselves. *Id*.

The only relevant case cited by Defendants since *Kushner* is misstated, and actually strongly supports Plaintiff's allegations of an enterprise separate from Defendants. *See George v. Urban Settlement Services*, 833 F.3d 1242, 1250 (10th Cir.

2016). In reversing Judge Brimmer's granting of a motion to dismiss based on the person-enterprise dichotomy, the Tenth Circuit held that where the plaintiff alleged an "association-in-fact enterprise" (as is the case here), and where the various parts of that enterprise are "separate legal entities" (as is the case here with all of the constituent local councils and insurance sales agencies being separate legal entities from Knights of Columbus, Inc.), the two are "sufficiently distinct." *Id*. at 1250-1251. In attempting to distinguish *George*, Defendant argues that the distinction existed *there* because "Urban was not a BOA subsidiary, a BOA agent, or even part of the BOA corporate family," but that "[n]o such circumstances are alleged here." Motion at 8 (citing *George*, 833 F.3d at 1250). That is simply not the case: Plaintiffs plainly allege that the local councils and agents are "separate legal entities" which are "not subsidiaries or part of the same corporate family tree as Defendant." Amend. Compl. ¶ 5 n.1. Indeed, with regard to the General Agents, the only relationship between them and Supreme is one of contract—identical to the relationship between Urban and Bank of America in *George*. *Id*., 833 F.3d at 1248-49 (holding that the defendants were distinct from the association-in-fact enterprise where "BOA contracted with Urban," but where they were not subsidiaries or part of the same corporate family tree).

In light of the Supreme Court's ruling in *Kushner*, the Tenth Circuit's ruling in *George*, and when viewing the allegations in the light most favorable to Plaintiffs, it is clear that Defendants are separate and distinct from the RICO enterprise in this case. If there is any issue at all here, it is a dispute as to fact that is not appropriately resolved on a Motion to Dismiss.

B. Plaintiff's Contract And Promissory Estoppel Claims Are Not Time-Barred

Next, Supreme argues that Plaintiff's breach of contract and promissory estoppel claims are time-barred. In support of that argument, Supreme attempts to misconstrue the plain allegations in the Amended Complaint in order to claim that Plaintiffs allege a clear date of breach in February 2012. This is not the case, and certainly is not supported when construing the allegations in the Amended Complaint in the light most favorable to Plaintiffs. At most, this is a disputed issue of fact that cannot be resolved on a Motion to Dismiss.

i. Plaintiff's breach of contract claim is not time-barred based on the accrual date.

The Amended Complaint alleges that a contract was formed on September 10, 2011. Amend. Compl. ¶¶ 18, 105. Nowhere does Plaintiff allege that performance of that contract was due in February 2012, as Defendant suggests. Motion at 11. The "February 2012" date only arises in the separate claim for promissory estoppel, where Plaintiffs state that Defendants promised *later* in "September 2011" that the announcement would take place in February 2012. Amend. Compl. ¶ 112(b). Indeed, the Amended Complaint makes it clear that the announcement date had to follow the completion of two requirements, "adding legal disclaimers to the websites" and "mak[ing] certain graphic design changes," which were not completed until June and August 2012, respectively. Amend. Compl. ¶ 18. While Supreme could have performed on the contract at any time, nowhere do Plaintiffs allege that there was a firm date required for the designated vendor announcement. Ultimately, as the Amended Complaint makes clear, there were a series of broken promises by Supreme about when

this announcement would occur, culminating finally in a breach when Supreme suddenly and affirmatively disclaimed the existence of any contract on January 4, 2016. *Id*. ¶ 58.

When viewed in the light most favorable to the Plaintiffs, as is required on a motion under Rule 12(b)(6), it is clear that the breach occurred on January 4, 2016, well within the three-year statute of limitations argued for by Defendant. Despite Defendants' efforts to re-plead the breach of contract claims to fit their statute of limitations defense, the actual allegations in the complaint require that their motion to dismiss Plaintiff's breach of contract claim as time-barred be denied.

ii. Connecticut's six-year statute of limitations applies for implied contracts.

However, even if the Court reads a definitive date of breach of February 12, 2012 into the Amended Complaint, Plaintiff's breach of contract claim is still not time-barred. Plaintiffs allege that the parties entered into a contract "implied in fact." Amend. Compl. ¶ 106. Here, as Defendant argues persuasively in its Motion at 14 with regard to the slander claim, Connecticut law also applies to the breach of contract claim—the contract was formed in Connecticut, and the place of performance was Connecticut. In Connecticut, the statute of limitations for an action based on an implied contract (as here) is 6 years. Conn. Gen. Stat. § 52-576 ("No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues.") (emphasis added). In *Jenkins v. Haymore*, 208 P.3d 265, 267 (Colo. App. 2007), the Colorado Court of Appeals explained that Colorado, following adoption of the UCL-LA, "treats limitation periods as substantive law subject to Colorado's choice of law rules." Accordingly, as argued by Defendants, Motion at 14,

Connecticut law applies and Plaintiff's breach of contract claim is not barred by the six-year limitations period.

iii. Plaintiffs' promissory estoppel claim is not time-barred.

Similarly, Plaintiff's promissory estoppel claim is not time-barred. Admittedly, two of the promises alleged in the Amended Complaint did occur more than three years before the filing of the Complaint, and if this Court finds that a three-year statute of limitations applies, those elements individually may be time-barred. Amend. Compl. ¶¶ 112(a) and 112(b). However, the promise alleged in Paragraph 112(c) took place in 2014, and is clearly not time-barred. *Id*. at ¶ 112(c). The promise alleged in Paragraph 112(e) was that Mr. Anderson would personally make the announcement at an unspecified later date, and is therefore similarly not time-barred. *Id*. ¶ 112(e). The promise alleged in Paragraph 112(g) was made on December 12, 2013, but there is no allegation as to when the promise was known to be broken other than the affirmative statement made on January 4, 2016. *Id*. ¶ 112(g). And while the promises alleged in the Amended Complaint at ¶ 112(d) that the announcement would be made in November 2013 was broken more than three years before the filing of the Complaint, it is not time-barred because the parties entered into a tolling agreement on October 24, 2016 which tolled the applicable statute of limitations until January 31, 2017. *See* Tolling Agreement and Extension, *attached hereto at* **Exhibit A**. Accordingly, other than the promises alleged in Paragraphs 112(a) and (b), Plaintiffs' claim for promissory estoppel is not time-barred.

C. <u>Plaintiffs' Slander Claim Is Properly Pleaded And Not Time-Barred</u>

Defendant argues that Plaintiffs' slander claim should be dismissed for two reasons: that Plaintiffs have not adequately pleaded damages, and that the claim is time-

barred. Contrary to Defendant's assertion, however, Plaintiffs have clearly pleaded economic damages, stating that Defendants' slander "poisoned the relationship between Mr. Labriola and UKnight and many of its prospective customers causing them to not subscribe to the UKnight system." Amend. Compl. ¶ 143. Plaintiffs have clearly alleged that they have lost subscribers in the form of local Knights of Columbus councils that did not subscribe because of the slanderous statement. The case cited by Defendants, *Learning Care Group, Inc. v. Armetta*, 2014 WL 12651264, at *16 (D. Conn. 2014), can be readily distinguished, because here Plaintiffs have "allege[d] facts that would enable the Court to discern how the breakdown of this relationship has proximately led to pecuniary loss," specifically in the form of local councils not subscribing to UKnight. *Id.*; *see* Amend. Compl. ¶¶ 48-52, 124(a), 143.

Defendant also claims that Plaintiffs' Slander claim is barred by the statute of limitations—which is two years in Connecticut. Motion at 17-18. As with Plaintiff's breach of contract claim, Plaintiffs did not know the impact of Mr. Smith's slanderous statement—or that there was any impact at all—until January 4, 2016 when Defendants emailed Plaintiffs to state they would not be announcing UKnight as their designated vendor, well within the two year statute of limitations. Amend. Compl. ¶ 58. Defendants argue that this statute of limitations runs strictly from the date of the slanderous statement. Motion at 18, citing *Cweklinsky v. Mobil Chemical Co.*, 837 A.2d 759, 765 (Conn. 2004) *and Gianetti v. Conn. Newspapers Pub. Co.*, 44 A.3d 191, 195 (Conn. App. 2012). However, neither of these cases address the discovery rule, which Connecticut courts have held must be considered when applicable. *See, e.g.*, *Catz v. Rubenstein*, 201 Conn. 39, 47 (1986) ("the statute of limitations begins to run when the claimant has

knowledge of facts which would put a reasonable person on notice of the *nature and extent of an injury* and that the injury was caused by the wrongful conduct of another.") (emphasis added). Accordingly, because here Plaintiffs did not know the fact or extent of their injuries until January 4, 2016, the claim is not time-barred.

D. <u>While Supreme's Actions *Are* Scandalous, Plaintiffs' Allegations Are Not Impertinent Or Immaterial And Should Not Be Stricken</u>

Defendant's request that the Court strike "redundant, immaterial, impertinent, or scandalous matter" from the Amended Complaint hinges on their assumption that the Court will dismiss the RICO claim. Motion at 18. Even if that were to be the case, <u>all</u> of the allegations in the Amended Complaint still have "bearing on the controversy." *Seybold v. Weld Cnty. Sheriff's Office*, 2008 WL 4489269, at *1 (D. Colo. 2008). As Defendants recognize, they must show that the allegations are "so unrelated to plaintiff's claims as to be unworthy of any consideration." Motion at 19 (citing *United States v. Shell Oil Co*., 605 F. Supp. 1064, 1085 (D. Colo. 1985). Here, Defendants ask that the Court strike "paragraphs 1, 31-47, 84-86, and 89-101." Motion at 21. These paragraphs contain an overview of the complaint, Amend. Compl, ¶ 1, the entire description of Defendants' fraudulent scheme, *id.* ¶¶ 31-47, Defendants' fraudulent statements, *id.* ¶¶ 84-86, and a description of Defendants' racketeering acts. *Id.* ¶¶ 89-101. Even if the RICO claim were to be dismissed, the description of Defendants' fraudulent scheme and their fraudulent statements are directly incorporated into Plaintiff's fraud and negligent misrepresentation claims, which Defendants do not seek to dismiss. *Id*. ¶¶ 127, 135. Additionally, the description of the fraudulent scheme and the racketeering acts are central to demonstrating Defendants' motive with regard to all of Plaintiffs' claims. Certainly, none of these statements are "so unrelated to plaintiff's claims as to be

unworthy of any consideration." *Shell,* 605 F. Supp. at 1085. Accordingly, Defendants' request should be denied.

CONCLUSION

For all of the reasons and authorities cited above, Plaintiffs respectfully request this Court deny Defendant's Motion in its entirety. While Plaintiffs are more than willing to assist the Court through oral argument, Plaintiffs submit that the Court has sufficient allegations and authority to deny the Motion on the briefs alone.

Respectfully submitted this 8th day of March 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

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2017, the foregoing **RESPONSE TO DEFENDANT'S MOTION TO DISMISS** 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
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 Defendants Knights of Columbus, Thomas P. Smith, Jr., and Matthew A. St. John.

/s/ Jeffrey S. Vail