IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00210-RBJ

LIST INTERACTIVE, LTD. D/B/A UKNIGHT INTERACTIVE,
LEONARD S. LABRIOLA,
Plaintiffs,

v.

KNIGHTS OF COLUMBUS,
Defendant.

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.

RESPONSE TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiff LiST Interactive, Ltd. ("UKnight") hereby submits this Response in Opposition to Defendant's Motion to Dismiss its Second Amended Complaint ("Motion") [Doc. No. 100], and in opposition thereto state as follows:

I. Motion to Dismiss Claim Against IRS

Defendant moves to dismiss Plaintiff's second claim for relief against the Commissioner of the Internal Revenue Service ("IRS"). Motion at 9-14. Defendant Knights of Columbus ("KC") is not a defendant on that claim, and accordingly has no right to move to dismiss it. If

and when the IRS moves to dismiss that claim, it may be reasonable for Defendant to file an *amicus* brief in support of the IRS, and Plaintiff would not oppose this brief being considered as such at that time. However, until such time, Defendant's Motion concerning the IRS claim should not be considered—aside from Defendant's wholesale lack of standing, duplicative briefing and consideration of these arguments would be a gross waste of the resources of both Plaintiff and the Court. However, in the event the Court rejects this request, Plaintiff requests the Court grant it leave to address these arguments on the merit.

II. Motion to Dismiss RICO Claim

In its arguments to dismiss Plaintiff's RICO claim, Motion at 1-9, Defendant raises the new arguments that the alleged predicate acts sounding in fraud fail under Rule 9(b), and that the witness tampering claim fails. These arguments were not raised in its initial Motion to Dismiss, [Doc. No. 23], and do not address *new* allegations asserted in the Second Amended Complaint ("SAC"). Accordingly, these arguments are barred by Fed. R. Civ. P. 12(g)(2), which states that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." While, on occasion, judicial economy may favor considering successive motions to dismiss each raising new arguments, here Defendant had full opportunity to raise these issues previously but chose not to—if they had any merit, Defendant should not have waited until now to raise them.

Defendant also raises the entirely new arguments that Plaintiff's RICO claim fails the "pattern" and "continuity" requirements—arguments that could have been, but were not, raised in Defendant's prior Motion to Dismiss. These new arguments do not involve any *new* allegations contained in the SAC, but rather are predicated entirely on Defendant's belated

argument that the predicate acts sounding in fraud and witness tampering should not be considered in evaluating the pattern or continuity issues. As argued below, none of these arguments are valid. However, because all of these arguments could have been raised in the prior Motion to Dismiss, but were not, they should be barred by application of Rule 12(g)(2).

A. Plaintiff Adequately Pleads Wire Fraud, Bank Fraud, And Funds Obtained By Fraud

Defendant now raises for the first time the argument that Plaintiff's fraud-based predicate act allegations do not comply with Rule 9(b).[1] Motion at 4-5. Defendant does not argue any failure with respect to the "who, what or when" of the fraud allegations, but rather argues that Plaintiff does not allege "how these statements were fraudulent." *Id*. at 4. In fact, the alleged acts of wire fraud clearly allege that KC falsely claims to have 1.75 to 1.9 million members, SAC ¶¶ 104(b), (g-l), that it is falsely representing that its membership is growing, *id*. ¶ 104(c), that it has over 1,500 "full time" field agents, *id*. ¶ 104(d), and that it has the highest possible S&P "AAA" rating. *Id.* ¶ 104(n). The SAC makes clear how these statements are fraudulent because KC's membership is only "1.4 million" members, *id*. ¶ 45, its membership is actually "shrinking," *id*. ¶¶ 35-36, that its field agent number is lower than 1,500, *id*. ¶ 47, and that it does not have a "AAA" rating. *Id*. ¶¶ 49, 104(n). The SAC ¶ 106 also plainly states both additional fraudulent statements made by wire *and how they are false*.

[1] Underscoring that this is nothing more than a Hail Mary to dismiss the RICO claim, Defendant does not move to dismiss Plaintiff's fraudulent misrepresentation claim which incorporates the exact same allegations of fraud. SAC at ¶¶ 181-188.

Next, Defendant argues that Plaintiff does not explain how anyone relied on these statements, or how anyone was injured as a result. Motion at 4. While the issue of causation is addressed below, it is important to note that third-party reliance is sufficient for fraud-based RICO predicate acts. *See Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639 (2008). Here, again, Plaintiff plainly states who relied on these acts of fraud, and how they were injured. *See, e.g*., SAC ¶¶ 104(b) (fraudulently inducing members to purchase insurance products), 104(m) (fraudulently inducing AM Best to rely on false representations to issue A++ rating), 104(n) (fraudulently inducing Peter Droege to rely on misrepresentation of "AAA" ratings by its web postings), 106 (fraudulently inducing Plaintiff to reveal its trade secrets), 108 ("fraudulently induced hundreds of thousands of members of the Knights of Columbus to send monthly insurance premium payments"), 111 (fraudulently inducing "hundreds of thousands of members of the Knights of Columbus [to] make monthly payments").

To the extent some of Plaintiff's bank fraud allegations, including names, amounts, and dates of these individuals making these payments are not specifically alleged, that is only because "Defendant maintains sole custody and control of the vast majority of the details," *id*. ¶ 112, and Defendant has actively sought to defer discovery on this topic to date. Rule 9(b) permits such details to be omitted when they are exclusively within the custody and control of the opposing party, as here. *George v. Urban Settlement Svcs*., 833 F.3d 1242, 1255 (10th Cir. 2016) (9(b) relaxed due to "plaintiff's inability to obtain information in the defendant's exclusive control"). Additionally, the purpose of Rule 9(b) is "to afford [a] defendant fair notice of a plaintiff's claims," *George*, 833 F.3d at 1255, and Defendant does not claim (nor can it in good faith) that it does not understand or have fair notice of Plaintiff's allegations. *See, e.g., id*. at

1257 ("Rule 9(b) does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim.").

B. Plaintiff Adequately Pleads Extortion And Witness Tampering

Next Defendant argues that Plaintiff's extortion allegations, based on Defendant's "use[of] economic fear of wrongfully withholding death benefits," are insufficient. Motion at 3; *see* SAC ¶ 87. In fact, Plaintiff clearly alleges the method, perpetrator, victims, and amounts extorted by Defendant, which at this stage are assumed to be true. SAC ¶¶ 83-88.

Defendant also claims that extortion fails because it has a "legally-colorable claim" to wrongfully extort funds from its own councils. Motion at 3. Here, Defendant conflates two critical concepts—it *does* have the legal authority to obtain membership dues, but it *does not* have the legal authority to *fraudulently* obtain membership dues for *non-existent members* based on local councils' economic fear of losing access to death benefits! SAC ¶ 85. Accepting these allegations as true, as the Court must at this stage, Plaintiff has properly pleaded the predicate acts of extortion.

Next, Defendant claims that Plaintiff's allegations of the predicate act of witness tampering fail. Motion at 5. The witness tampering allegations, SAC ¶¶ 113-114, are identical to those in the First Amended Complaint but were not addressed in Defendant's first Motion to Dismiss. Regardless, here Defendant does not actually advance any reason why these allegations are insufficient other than the statement that the Court "declined to find witness tampering." Motion at 5. The Court did not, in fact, make any affirmative finding that witness tampering <u>did not</u> occur. Rather, in the March 2, 2017 hearing, the Court stated that "I don't like that

communication [the hundreds of emails alleged to be witness tampering]," but that the Court was not yet "prepared to say," less than two months into this litigation, that witness tampering had in fact occurred. Defendant's attempt to twist these words into an affirmative, definitive rejection of the witness tampering allegation is overreaching.[2]

C. Plaintiff Properly Pleads The "Pattern" Requirement

Next, Defendant raises for the first time the argument that Plaintiff's RICO allegations fail to meet the "pattern" and "continuity" requirements. Motion at 2. The entirety of these arguments could have been raised in Defendant's first Motion to Dismiss, but were not. And these arguments also require the Court accept Defendant's claim that all of Plaintiff's predicate acts sounding in fraud, as well as extortion and witness tampering, are legally insufficient and should be ignored. For all of the reasons argued above, each of these predicate acts is properly pleaded, and Defendant's arguments about "pattern" and "continuity" similarly fail.

Establishing a "pattern" of racketeering activity requires only continuity plus relationship. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Ignoring Defendant's ill-founded attempts to eliminate the dozens of predicate acts discussed above fail, there is no question of continuity—these acts are alleged to span the period from 2011 to present, and are specifically alleged to pose a threat that they will continue into the future.[3] *See, e.g.*, SAC ¶¶ 115, 125. The only remaining question is whether there is a "relationship" between them. *H.J., Inc.*, 492 U.S. at 239. As the *H.J., Inc*. Court said, relatedness exists where acts "have the same

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[2] *See also* [Doc. No. 76], outlining Defendant's subsequent and ongoing witness tampering.

[3] In fact, Defendant's felony witness tampering is ongoing. *See* Emergency Motion for TRO, [Doc. No. 76], filed September 25, 2017.

or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id*. at 241. All of the predicate acts alleged comprise either the scheme to inflate membership numbers or the efforts to cover up that scheme—plainly related in terms of "purposes, results, participants, victims," and they "are not isolated events." *Id*. These actions all shared Defendant as a participant, had the shared purpose of inflating membership numbers to improve its insurance sales, and resulted in the same set of thousands of victims harmed by these inflated numbers—including individuals purchasing overvalued insurance policies, local councils extorted to pay per capita fees on non-existent members, and UKnight committing itself based on the prospects of these inflated numbers and then being harmed in the cover-up.

This is precisely the kind of long-term pattern of continuing criminal behavior that RICO was designed to address. Furthermore, as the single entity with the most damages caused by this pattern (most of the thousands of individual and local council victims likely have only hundreds to tens-of-thousands of dollars in damages each), Plaintiff is the only victim with a sufficient economic motive to take on the role Congress envisioned as a "private attorney general" to put an end to this ongoing, widespread pattern of harm.

D. Plaintiff Properly Alleges Proximate Cause

Defendant next re-raises its argument that Plaintiff's injuries were not the proximate result of the racketeering conduct alleged. This argument still fails, because, unlike all of the cases cited by Defendant, there was no intervening party (or parties) between Defendant's actions and Plaintiff's damages. For example, Defendant cites *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), claiming it supports lack of causation. In fact, the Court in *Hemi*

highlighted that proximate cause was only lacking there because "the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to [a fifth party] the plaintiff (the City)." *Id*. at 990 (parentheticals and emphasis in original). Here, there is no intervening party at all—Defendant directly caused Plaintiff's damages in order to cover up its scheme. While there is admittedly little case law directly addressing cover-ups and standing, the Seventh Circuit has held that an action taken to cover up a RICO scheme gives the victim of the cover-up (even where the Plaintiff *there* was not directly harmed by the underlying scheme) standing to sue. *Schiffels v. Kemper Financial Services, Inc*., 978 F.2d 34 (7th Cir. 1992). Here, the situation is even more clear-cut, as Plaintiff was not only directly harmed by the cover-up, but also directly harmed by the scheme itself. SAC ¶¶ 22, 117 (relying on fraudulent misrepresentations of membership numbers in committing all its resources to serving the Knights of Columbus). The only logical conclusion is that a cover-up directed at and directly harming the Plaintiff constitutes a proximate injury-in-fact, and confers standing.

The Tenth Circuit's most recent opinion on RICO causation further supports that proximate cause exists here. In *Safe Streets*, the court noted that "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [i]s generally said to stand at too remote a distance to recover." *Safe Streets v. Hickenlooper*, Case No. 16-1048 (10th Cir. June 7, 2017). However, the *Safe Streets* court continued found that standing existed because it did not matter whether the plaintiff there was a "victim of the alleged § 1962 violation" (the Controlled Substances Act violation) because it was still damaged by defendant's actions. *Id*. Here, while Plaintiff was not defrauded into purchasing an insurance

policy, it was directly harmed by Defendant's pattern of racketeering activity and was both the direct target of and damaged by Defendant's efforts to cover up that scheme.

E. Plaintiff's First Enterprise Is Not A "Cut-And-Paste," Rather It Addresses And Resolves The Court's Prior Concerns

Lastly, Defendant challenges both of the alternative enterprises pleaded by Plaintiff. Defendant calls the first enterprise a simple "cut-and paste from the First Amended Complaint," and argues that therefore it must still fail. Motion at 7. Defendant, however, ignores several critical changes to this first enterprise. For example, the SAC adds the allegation that "KC knowingly and intentionally used the legal separateness of its local councils to 'independently' certify its membership numbers as the vehicle for its fraudulent scheme," SAC ¶ 67, and that "[t]he relationship between KC and the legally and functionally distinct local councils which certify the membership numbers enhanced the enterprise's ability to thrive and avoid detection." *Id*. The SAC also adds the critical, 16-line explanation of exactly how independent "local councils play a critical and central role in the enterprise's ability to thrive and avoid detection . . . ." *Id*. at ¶ 69. Defendant simply ignores these additions. Motion at 7-9. In fact, these amendments directly address and satisfy the framework set forth by the Court in its Order, [Doc. No. 54], as outlined below:

F. Plaintiff's SAC Directly Addresses the Court's Concerns In Its Prior Order

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 set forth in the SAC.

The proposed restatement of Plaintiff's RICO claim directly addresses the legal framework set forth by the Court in its Order, as outlined below:

i. 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

a. <u>Local councils "independently certify" fraudulent membership numbers</u>.

As set forth in the SAC, 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. SAC ¶ 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 internally for self-serving purposes by KC. *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 in **Section B**, *supra*, these councils are extorted by KC to provide these inflated membership numbers, creating the false the perception that these numbers are merely aggregated from thousands of self-governing, independent legal entities. This is the only reason the overall

numbers as self-reported by KC are accepted by ratings agencies without question or audit. SAC ¶ 69.

Accordingly, these local councils are substantially "different for purposes of RICO than employees of [KC]," and together constitute an "'enterprise' separate and distinct from [KC] itself." [Doc. No. 54] at 27 (*citing Fitzgerald*, 116 F.3d at 227-28); *see also* SAC ¶ 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 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* SAC ¶ 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* SAC ¶ 69.

b. 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 on every member they report. SAC ¶¶ 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 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. SAC ¶ 87.

The economic framework for this extortion is that KC 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. *Id*. ¶ 84. KC 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* to remove these individuals from the number of members for which the local council must pay dues. *Id*. ¶ 86. KC 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, they lose their status as a "council in good standing," and their members lose access to these death benefits. *Id*. ¶¶ 83-88. Accordingly, KC 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, 18 U.S.C. § 1961, but it also further demonstrates that the enterprise including the local councils is separate and distinct from the Defendant KC 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]").

G. Plaintiff's Second Enterprise is Properly Pleaded

Regardless of the validity of the first enterprise, however, Plaintiff's proposed amendment also includes a second, alternative, enterprise that directly invalidates the person-enterprise distinctiveness defense raised previously by Defendant. *See* SAC ¶¶ 70-81. Defendant now claims that this second enterprise fails to adequately allege that it functions with a 'common purpose.'" Motion at 8 (citing *Boyle v. U.S.*, 556 U.S. 938, 948 (2009)). Defendants, notably, admited that the Knights of Columbus plus AM Best do have a "common purpose," Response to Motion to Amend, [Doc. No. 66] at 31, but make the conclusory argument that an enterprise including AM Best would fail on causation grounds. *Id*. They do not explain *why* this is the case, and this argument fails for the same reasons as their broader causation argument as argued above.

Next, Defendant attempts to attack the inclusion of IDI within the second enterprise. Motion at 8. Defendant has already admitted, however, that while "again [this enterprise] might satisfy the distinctness and common purpose requirements," it would now somehow fail on continuity grounds. [Doc. No. 66] at 31 (internal quotation marks omitted); Motion at 8. Initially, Defendant's continuity argument is based on their *new* attempt to exclude virtually all of the alleged predicate acts, which should be rejected as argued above. As set forth in the SAC, IDI plays a critical role in concealing the entirety of the pattern of racketeering activity, and profits thereby, therefore sharing a common function and purpose. *See* SAC ¶¶ 72-73, 89-96. As explained by the Supreme Court in *Kushner*, the enterprise may consist of "the person and the victim, or the person and the tool"—here, AM Best is both a victim and a tool, and IDI is a key tool of the enterprise facilitating the cover-up of the racketeering scheme, along with Defendant as the RICO person. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001).

Accordingly, because both of Plaintiff's alternative enterprise allegations are valid RICO enterprises, Defendant's argument must fail.

WHEREFORE, Plaintiff respectfully requests this Court deny Defendant's Motion to the extent it seeks to dismiss Plaintiff's RICO claim for the reasons and authorities stated above, and requests this Court defer consideration of Defendant's argument to dismiss the claim against the IRS and consider it an *amicus* brief if and when the IRS moves to dismiss that claim.

Respectfully submitted this 13th day of January, 2018.

s/ *Jeffrey S. Vail*
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CERTIFICATE OF SERVICE

On January 13, 2018, I filed the above **RESPONSE TO MOTION TO DISMISS SECONE AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF System. It will send notification to:

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