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 QUASH SUBPOENAS AND TO STAY DISCOVERY

Plaintiffs List Interactive, Ltd. d/b/a UKnight Interactive ("UKnight") and Leonard S. Labriola file this Response to Defendant Knights of Columbus' ("Supreme") Motion to Quash and for a Protective Order, [Doc. No. 37] ("Motion"), and in opposition thereto state as follows:

INTRODUCTION

Supreme's Motion is, to say the least, confusing. Supreme asks the Court to *allow* discovery to proceed where it has a "focus on Plaintiff's breach of contract claim," Motion at 5, *which Supreme has moved to dismiss*. Motion to Dismiss, [Doc. No. 23] at 10-14. Supreme also asks this court to stay discovery with respect to Plaintiff's RICO claim, on the grounds that Supreme has moved to dismiss that claim, and that staying discovery with respect to a claim it has moved to dismiss will "preserve significant

resources and prevent waste in the event the Court grants the motion to dismiss." Motion at 5. The only sense Plaintiffs can make of this request is that Supreme, following review of Plaintiffs' Response to Supreme's Motion to Dismiss, [Doc. No. 36], concedes that the breach of contract claim should not be dismissed. Furthermore, Supreme provides no workable distinction between discovery "focus[ing] on Plaintiff's breach of contract claim," and that is "directed at Plaintiffs' RICO claim." Motion at 5. The reason, during conferral, that Plaintiffs asked Supreme to put their request in writing was to clearly define the dividing line between these two concepts, so that Plaintiffs and the Court would know what, specifically, Supreme was asking for. Supreme has not done this.

Regardless, as Plaintiffs explained during conferral, discovery related to Plaintiff's RICO claim and that related to Plaintiffs' theft of trade secrets, fraud, negligent misrepresentation, and intentional interference claims (none of which Defendant has moved to dismiss) are almost entirely overlapping because (1) concealing and continuing the broader fraudulent scheme addressed in the RICO claim is the *motivation* for all of Defendants' tortious conduct and breach of contract, and (2) because the theft of trade secrets and fraud allegations in the RICO claim are directly incorporated into Plaintiff's separate theft of trade secrets and fraud claims.

ARGUMENT

A. SUPREME'S MOTION TO QUASH IS INAPPROPRIATE

Supreme styles its motion as a "Motion to Quash and for a Protective Order." Indeed, most of the motion is focused on its request to quash four subpoenas, but Supreme does not have standing to move to quash these subpoenas. A motion to quash a subpoena may be made only by the party to whom the subpoena is directed. *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975); *see also Wells Fargo Bank,*

N.A. v. Invy, 2014 U.S. Dist. LEXIS 62381 (D. Nev. May 6, 2014) ("As a general rule, a party has no standing to seek to quash a subpoena issued to a non-party to the action."). However, even if Supreme had standing to move to quash these subpoenas, they have filed this motion in the wrong district—Fed. R. Civ. P. 45(d)(3)(A) and (B) state that only the court "where compliance is required" (here, the United States District Court for the Southern District of New York) can quash the subpoena, unless that district transfers a motion to quash to this district pursuant to Fed. R. Civ. P. 45(f). Finally, the Motion is premature as the subpoenas in question have not been signed or served, but were simply sent to Defendant in unissued form to provide notice. Attempting to construe the nature of the Motion leniently, and because Defendants cannot move to quash the subpoenas, the Motion is essentially a request to stay discovery generally. However, as argued below, Supreme's request to "quash" the subpoenas and to stay discovery should be denied.

B. THE SUBPOENA TO EARL SEITZ IS DIRECTLY RELEVANT AND NOT PRIVILEGED

First, Supreme asks this Court to "quash" Plaintiffs' subpoena to Earl Seitz, a former General Agent for the Knights of Columbus. Motion at 4-5. Supreme advances two arguments here—that the requested documents are "protected by Fed. R. Evid. 408," and that the information is "wholly irrelevant to the claims . . . in this action." *Id*. at 4, 5. Initially, the information sought is in no way irrelevant. Plaintiffs understand that Mr. Seitz was fired by Supreme for, among other things, refusing to participate in the very fraudulent inflation of membership numbers alleged by Plaintiffs. While it is understandable that Supreme wants to conceal these materials, communications received

from Supreme on this topic and documents related to the resulting lawsuit are highly relevant to all of Plaintiffs' claims, including those Supreme has not moved to dismiss.

Additionally, Rule 408 does not protect the requested documents. First, all of the *factual* material and communications requested of Mr. Seitz are plainly outside the scope of Rule 408. Second, to the extent any of the material may be inadmissible at trial under Rule 408, that does not pertain to its discoverability. *See In re MSTG, Inc*., 675 F.3d 1337, 1348 (Fed. Cir. 2012) (rejecting request to "prevent discovery of litigation-related settlement materials"); *see also* Fed. R. Civ. P. 26(b)(1) (to be discoverable, relevant information "need not be admissible at the trial."). Third, "Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, *not some other claim*." *UForma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293-94 (6th Cir. 1997) (emphasis added). Accordingly, this request should be denied.

C. THE OTHER SUBPOENAS SHOULD BE PERMITTED, AND PERTAIN TO ALL OF PLAINTIFFS' CLAIMS

Next, Supreme asks this Court to "quash" subpoenas to the Connecticut Department of Insurance, Standard & Poors, and A.M. Best. Motion at 5. Supreme claims that this information "contains significant sensitive, proprietary, and confidential business and financial information," Motion at 5, but nowhere does it make a particularized showing of how this is so, nor does it provide any authority for the restriction of discovery of such material. On the contrary, this "sensitive, proprietary, and confidential . . . information" is actually public information pursuant to Conn. Dept. Ins. Reg. § 103(b)(11). *Id*. ("The Connecticut Insurance Department makes all product filings, whether pending, disapproved, withdrawn, or approved, available upon request.").

The crux of Supreme's argument appears to be its claim that "the information has no relevance to Plaintiffs' breach of contract claim." Motion at 5. Again, it is unclear what rationale Supreme has for focusing discovery on one claim it has moved to dismiss, while preventing discovery on another claim it has moved to dismiss. Regardless, the requested information is directly relevant to all of Plaintiffs' claims. Supreme's need to continue and conceal its fraudulent scheme to inflate its membership numbers is the *sine qua non* of all of Plaintiffs' claims—without this, there would have been no motive to engage in any of the tortious conduct or breach of contract alleged. Accordingly, because establishing that Supreme had a motive to engage in all of these activities makes each of Plaintiffs' claims more likely to be true, the subpoenas seek relevant information on claims that Supreme has not moved to dismiss.

D. SUPREME'S REQUEST TO STAY DISCOVERY SHOULD BE DENIED

Finally, Supreme asks this Court to stay discovery "that implicate[s] production of confidential information" until the Court grants a general protective order. Motion at 5-6. As this Court states in its Practice Standards, "it is unlikely that [the Court] will grant a motion for a protective order of the usual type," and Supreme offers no argument as to why this case should be an exception.

In sum, between its inappropriate requests to "quash" subpoenas and its requested stay, Supreme appears to be asking for a protective order establishing some un-defined stay of discovery. "A party seeking a protective order under Rule 26(c) has the burden of demonstrating good cause and cannot sustain that burden simply by offering conclusory statements." *Tr. of Springs Transit Co. Emp. Ret. and Disability Plan v. City of Colorado Springs*, No. 09-cv-02842-WYD-CBS, 2010 WL 1904509, at *4 (D. Colo. May 11,

2010). Accordingly, the party moving for a protective order "must make a particular and specific demonstration of fact in support of its request." *Id.* Here, Supreme has provided no particular demonstration of fact, and offers only conclusory statements.

The underlying principle in determination of whether to grant or deny a stay is that "[t]he right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Com'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)). In other words, stays of the normal proceedings of a court matter should be the exception rather than the rule. Supreme's failure to outline the boundaries of what discovery should be permitted and what should not is effectively a request for a stay of all discovery, which is generally disfavored in this District. *Chavez v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007) (citation omitted). Such a request *may only* be appropriate if "resolution of a preliminary motion may dispose of the entire action." *Nankivil v. Lockheed Martin Corp.,* 216 F.R.D. 689, 692 (M.D. Fla. 2003) (citations omitted). That is not the case here—indeed, to the extent it is possible to glean the boundaries of the requested stay at all, Supreme is specifically requesting that discovery be allowed to proceed on claims that <u>are</u> subject to its motion to dismiss. Worse, to the extent this is not a request for a stay of all discovery, it is an open invitation to ongoing discovery disputes as to what discovery does or does not "focus on Plaintiffs' contract claims" versus what discovery is "directed at Plaintiffs' RICO claim." Motion at 5.

CONCLUSION

For all of the reasons and authorities cited above, Plaintiffs respectfully request

the Court deny Supreme's Motion.

Respectfully submitted this 12th day of March 2017.

/s/ Jeffrey S. Vail

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2017, the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO QUASH SUBPOENAS AND TO STAY DISCOVERY** 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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