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,
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 BAR CONSIDERATION OF MEMBERSHIP FRAUD

Plaintiff List Interactive, Ltd. d/b/a UKnight Interactive ("UKnight") responds to Defendant Knights of Columbus's ("KC") 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 (the "Motion"), [Doc. No. 107], and in opposition thereto states as follows:

INTRODUCTION

Despite the fact that this Court has already ordered KC produce the requested discovery, Trans. 9/12/17 Discovery Conference at 15:10-12, 19-24, *attached hereto* at **EXHIBIT 1**, Defendant now asks this Court for a license to defraud and extort as it sees fit, claiming that even an *inquiry* into this fraud would violate its Constitutional rights. In reality, KC knows that its

membership is massively inflated based on its own statements and actions, and is now making one last-ditch effort to cloak this wrongdoing with the First Amendment. All of KC's arguments fail, as argued below:

ARGUMENT

I. THE COURT HAS ALREADY RULED THAT KC MUST PRODUCE ITS MEMBERSHIP DATA

Despite the fact that this issue has already been ruled on by the Court, KC has not produced the required, basic membership data in the nearly five months since the Court's ruling, yet has only now claimed the First Amendment bars this discovery. In a hearing on September 12, 2017, the Court ordered KC "produce to the plaintiff what he calls membership information, meaning the members of the local councils . . . [if] 20 to 40 percent of the members actually aren't even paying dues . . . then he's got something." Trans. 9/12/17 Discovery Conference at 15:10-12, 19-24, *attached hereto* at **EXHIBIT 1**. Five months later, KC has not done so, and now for the first time argues that complying with the Court's order would violate its Constitutional rights.

II. KC'S MEMBERSHIP FRAUD IS RELEVANT TO ALL OF PLAINTIFF'S CLAIMS

First, KC mislabels the relevance of its membership number fraud as a "standing" issue—it is a question of relevance and discovery, and one the Court has already ruled on. *See* **EXHIBIT 1** at 15:19-24 (if Membership fraud can be shown, "then [Plaintiff's] got something."). KC claims there is no potential link between its membership fraud and the claims in this case, but that is simply not so. As UKnight alleges, the desire to cover-up its membership fraud was the motive for KC's breach of contract and tortious actions. Demonstrating the

existence of this fraud—and therefore KC's motive for taking the alleged actions—makes elements of every claim more likely to be true: it makes it more likely that, despite knowing there was a valid contract (or promise), KC decided to breach it anyways; it makes it more likely that KC chose to steal UKnight's trade secrets; it makes it more likely that KC intentionally deceived UKnight as to these membership numbers when negotiating their partnership. KC has not moved to dismiss any of these claims.

However, to the extent KC is arguing that there is not sufficient evidence to link KC's fraud with its breach of contract with and tortious actions against UKnight, this is solely because to date no discovery on this issue has been provided. Pursuant to Fed. R. Civ. P. 56(d), before any ruling on summary judgment, KC should at least be required to produce the information the Court already ordered it to produce for this very reason five months ago, **EXHIBIT 1**, permit UKnight to conduct follow-up depositions on this topic, and brief the issue at that time.

III. KC'S ACTIONS ARE NOT SHIELDED BY THE FIRST AMENDMENT

KC now requests a blanket license to defraud and extort grounded, ostensibly, in the First Amendment, including not only the right to defraud its own membership, but also third-parties such as UKnight, AM Best, Standard & Poors, the Connecticut Department of Insurance, and non-member purchasers of its mutual funds. If the Court granted this license, among numerous similar examples, it would permit KC to:

- Deny insurance death benefits by claiming an insured was never "properly a member" due to not being a "Catholic in good standing" as determined by KC, a required representation to obtain insurance, and that the insured therefore lied on its application for insurance. Because such a denial pertains to the question of membership, KC suggests the Court could never question this determination.

- Claim to the ratings agencies AM Best and Standard & Poors that it actually has *30 million* "members" – every adult male Catholic in the US – and obtain inflated ratings

> based on the financial strength this implies. Neither the ratings agencies nor its insurance customers could ever question this in court.

This is clearly not the law, yet this is the natural extension of exactly what KC is asking for here.

A. KC's "Right of Association" Argument Fails

Next, KC argues that UKnight's claims require the Court to engage in interference with its Constitutional right of Freedom of Association, claiming that the instant case would require "[d]isclosure of membership information" and "[i]nterfer[e] with an association's internal affairs—specifically, membership status." Motion at 11.

First, even if it were protected from disclosure, there is no need for KC to disclose the names of its members (the only data point that could possibly cause a First Amendment concern). Counsel for UKnight and KC conferred on this issue well before the instant Motion was filed, and there is a simple solution: every member of the Knights of Columbus is assigned a unique membership ID number, and the requested data can be provided anonymously and indexed by this member ID number. If no personally identifying information is disclosed, there cannot be a First Amendment concern in disclosure of the identity of members. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

Second, KC argues that this case seeks to impermissibly "force[KC] to accept members it does not desire." *Id*. at 11. There is clearly no such request here, and all of the cases cited by KC are inapposite. KC can associate with, or not associate with, whoever it wants. As explained in more detail below, UKnight is simply seeking to present the factual issue that the statements made by KC directly misstate the actions taken by its local councils, and constitute fraud. KC attempts to disguise this simple fact by claiming it would require the Court to *individually* determine whether KC appropriately applied Catholic principles in issuing waivers for non-

payment of dues to some of its members. But as argued below, whether or not this would be Constitutionally permissible need not be determined for the simple reason that it is not necessary for Plaintiff to prove its claims.

B. KC's "Church Autonomy Doctrine" And Establishment Clause Arguments Fail

Lastly, KC argues that if the Court were to make any determination about KC's representations about its membership, it would violate KC's First Amendment rights under the "Church Autonomy Doctrine" and the Establishment Clause. Motion at 13-18. Contrary to KC's argument, however, UKnight does not ask the Court or jury to resolve any questions of internal, church doctrine. At issue here is whether KC's efforts to cover-up the massive discrepancy between its own representations of membership and the local councils' own issuance of membership cards drove KC to harm UKnight as alleged. Demonstrating this requires delving into these representations further (and certainly requires discovery to determine what those competing representations were):

KC—and specifically its insurance division—advertises that the Order has over 1.9 million members, and that this is an indicator of the strength of their insurance business.[1] *See* Second Amended Complaint ("SAC") ¶ 45. Presumably (though no discovery has been provided yet), KC then sends billing statements to its local councils for some number of members that add up to this total. *See* Example KC Billing Coupon, *attached hereto* at

[1] KC's secrecy—and refusal to provide discovery—about how many of these 1.9 million members are even within the United States and Canada (the only members allowed to purchase insurance), and how fast *that* number is growing or shrinking, raises a separate question that is also at issue in this litigation. *See* SAC ¶ 46. UKnight alleges that discovery will show that while the worldwide number of claimed members may be growing, the number of *insurable* members in the US and Canada is shrinking. *Id*. Again, showing that this is a fraudulent misrepresentation requires only showing discrepancies between KC's own statements, and does not require the Court substitute its judgment for any *religious* determinations made by the Order.

EXHIBIT 2. The local councils, however, issue membership cards to their members. The numbers on KC's billing statements do not match the numbers of membership cards issued by local councils:

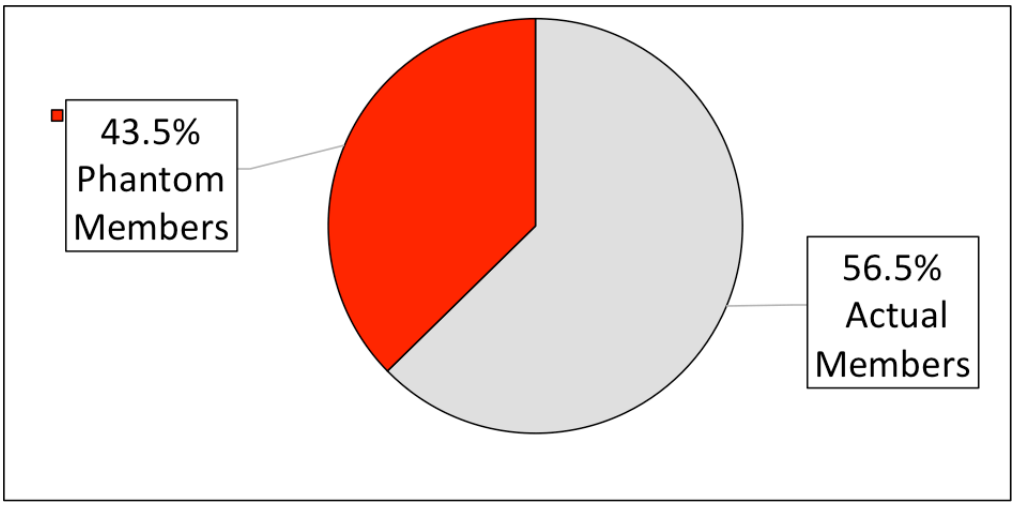

Figure 1: Sampling showing massive discrepancy between membership claimed by Defendant and number of membership cards issued by local councils – 1037 of 2382 (43.5%) of "members" billed by Defendant have not been issued membership cards by local councils because they have not paid dues, and therefore cannot attend any meeting or event, or purchase insurance.

This is not a case where UKnight is asking the Court to determine whether KC correctly applied *religious* doctrine in determining the number of members in the Order. Rather, it is a case where the huge discrepancy between the statements already made compared to the actions already taken by the Order demonstrate fraud. Without the Court or a jury substituting their judgment for any "religious" determinations made by Defendant, a reasonable jury could conclude that "the Defendant advertised 43.5% more members than its councils issue membership cards to—and *because* they didn't want that fact getting out, they breached a valid contract with UKnight and stole its trade secrets to cover it up." *See, e.g., Herx v. Diocese of Fort Wayne-South Bend, Inc.*,

772 F.3d 1085, 1091 (7th Cir. 2014) (jury instruction may appropriately instruct focus on fact question and therefore avoid "weigh[ing] or evaluat[ing] the Church's doctrine.").

Regardless, the "Church Autonomy Doctrine" certainly does not protect Defendant from this fraud. Defendant does not cite, and UKnight has been unable to locate, any case where the "Church Autonomy Doctrine" protects religious organizations outside the narrow "Ministerial Exception" (the right of churches to decide who ministers to its members) or the determination of church property ownership between competing internal factions (e.g. whether the original or breakaway sect is the "true" church and owns the church building). Neither applies here.

With respect to discovery, "[t]he Free Exercise and Establishment Clauses of the United States Constitution's First Amendment do not preclude the exchange of any documents." *Krystal G. v. Catholic Diocese of Brooklyn*, 933 N.Y.S. 2d 515 at 543 (2011). On the broader issue of whether the Court can try this case at all, the issue has been considered by numerous courts, and outside the narrow issues of the Ministerial Exception and determinations of the "rightful" sect within a church, courts have not found religious institutions immune from suit. The United States District Court for the Northern District of California, for example, stated that:

> Although the Archdiocese argues that Catholic 'principles' influenced its actions and that 'any review by the court . . . would entail a review of the reasonableness of Catholic principles' . . . this reasoning would immunize it from judicial review of almost any cause of action. **This is clearly not the law**.

Bohnert v. Roman Catholic Archbishop of San Francisco, 136 F. Supp. S3d 1094, 1116 (N.D. Cal. 2015) (emphasis added). Simply put, determining whether KC issued far fewer membership cards than it claims to have members is permissible because that action does not "necessarily require [the court] to decide among competing interpretations of church doctrine, or other

matters of an essentially ecclesiastical nature." *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999).

At issue here is the fundamentally *commercial* insurance business of Defendant, and whether its affiliation with the Catholic Church gives it free license to engage in fraud and extortion as part of this *business*. KC has already submitted to this scrutiny. It claims to be a 501(c)(8) non-profit corporation, and as such has submitted its membership and membership practices to IRS review. *See Polish Army Veterans Post 147 v. Comm'r*, 24 T.C. 891 (IRS must review validity of membership practices for fraternal insurance companies). And it has made representations as to its membership as part of its insurance business to private ratings agencies and government regulators like the Connecticut Department of Insurance. Indeed, if a fraternal insurance company could simply claim a religious affiliation and thereby escape all scrutiny and regulation concerning representations as to its membership, such a ruling would create a wholly untenable loophole. KC could literally claim anything it wanted without repercussion.

Marci Hamilton, a professor of constitutional law at Cardozo Law School, explained the issue succinctly over a decade ago, addressing the Catholic Church's efforts to use this *same argument* to avoid liability for the sexual abuse of children:

> The Church . . . is attempting to cloak itself with the First Amendment, hoping the Constitution will somehow provide a blanket of protection for its institutional wrongdoing. Though it's not a winning strategy, it's one that does have some history behind it. Over the years, those fond of this approach have tried to make it law, by dubbing it the 'church autonomy doctrine.' *In fact, there is no such doctrine. To claim such a doctrine exists is either wishful thinking, or willful misinterpretation of the Constitution*.[2]

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[2] Marci Hamilton, "The Catholic Church, the Insurance Carriers, and Why the First Amendment's Religious Freedom Guarantees Provide No Defense in the Clergy Abuse Cases" (emphasis added), Jan. 16, 2003, available

While some courts have now adopted the Catholic Church's phrase "Church Autonomy Doctrine," they have never extended it, as Defendant requests in its Motion, beyond the Ministerial Exception or the determination of the "rightful" church sect. And the Supreme Court has been very clear, stating that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law." *Employment Div., Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878 (1990) (Scalia, J.). "Laws," as the Supreme Court stated:

> are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id. at 879 (internal quotations and citations omitted). To enter into business relationships, sell insurance, and obtain ratings based on representations that are contradicted by Defendant's own prior actions (*e.g.,* issuance of membership cards), and to not disclose this contradictory information so that third-parties rely on the representation alone, is not an action protected by the First Amendment. To grant Defendant free license to do so as requested in the Motion is a bridge too far, and would dramatically expand the 'protections' provided by the First Amendment, making every business with even a claimed religious affiliation effectively "a law unto himself." *Id*.

CONCLUSION

For all of the reasons and authorities above, the Court should deny Defendant's Motion.

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online at http://supreme.findlaw.com/legal-commentary/the-catholic-church-the-insurance-carriers-and-why-the-first-amendments-religious-freedom-guarantees-provide-no-defense-in-the-clergy-abuse-cases.html

Respectfully submitted this 1st day of February, 2018.

s/ *Jeffrey S. Vail*
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CERTIFICATE OF SERVICE

On February 1, 2018, I filed the above **RESPONSE TO MOTION TO BAR CONSIDERATION OF MEMBERSHIP FRAUD** with the Clerk of the Court using the CM/ECF System. It will send notification to:

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