IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00210-LTB

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.

DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR PROTECTIVE ORDER

Defendants Knights of Columbus (the "Order"), Thomas P. Smith, Jr. and Matthew A. St. John, through Lewis Roca Rothgerber Christie LLP, respond to Plaintiffs' Emergency Motion for Protective Order [Doc. No. 16] dated February 14, 2017 ("Motion") as follows. In doing so, Messrs. Smith and St. John expressly preserve their defense of lack of personal jurisdiction raised in their Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2) filed February 22, 2017 [Doc. No. 20].

INTRODUCTION

This is – or should be – a garden-variety business dispute. Plaintiffs claim that on September 10, 2011, "a contract was formed" whereby Plaintiff UKnight, a vendor of website templates (First Amended Complaint [Doc. No. 15] ("Am. Compl.") ¶ 12), would be chosen "as designated vendor for the entire Knights of Columbus fraternity" and "formally announce[d] . . .

as such" (*id.* ¶ 18). There is no written contract. According to Plaintiffs, a contract either "was confirmed by numerous emails," or "[i]n the alternative, . . . must be implied in fact." (*id.* ¶¶ 105-108.) Plaintiffs say the Knights of Columbus breached this purported contract, and claim to have sustained lost profits and other economic damages as a result. (*Id.* ¶ 110.)

Plaintiffs, however, have festooned their breach-of-contract case with baseless, scandalous allegations made under the pretext of a federal RICO claim. Those allegations were published in *The Denver Post* on the same day this case was filed, under the headline "Denver lawsuit calls Knights of Columbus life insurance pool a racketeering scheme." The article, quoting from Plaintiffs' Complaint filed January 24, 2017 [Doc. No. 1], says the Knights of Columbus insurance program "is only one step removed from a classic Ponzi scheme," and that the Knights of Columbus "may very well be on the verge of financial collapse."[1] Plaintiffs' counsel promptly "re-tweeted" this smear from his Twitter account.[2]

The Knights of Columbus is a Catholic fraternal service organization founded in 1882 to provide charitable outreach, strengthen the faith of its members, and care for Catholic families, particularly widows and orphans. In furtherance of that mission, it provides member Knights access to life insurance and other benefits, providing security to their families residing in the United States and Canada. The Order's insurance program has A.M. Best's highest rating, A++ (Superior), and holds Standard & Poor's highest rating currently given to U.S.-based insurers, AA+.

Following the filing of the complaint, Plaintiff Leonard Labriola sent email communications to several members of the Order, attaching the Complaint and making series of

---

[1] http://www.denverpost.com/2017/01/24/lawsuit-knights-of-columbus-life-insurance-pool/.
[2] *See* https://twitter.com/jeffreyvail.

statements intended to further smear the Order. Mr. Labriola also sent a summarized version of various allegations of the complaint to approximately 20 members in the form of a fake "push poll" or a "survey" that announced he would thereafter send it to 1,600 council leaders and then to 170,000 additional member Knights.

Upon receiving several inquiries from its members regarding Mr. Labriola's email and the complaint, on February 10, 2017, the Office of the Supreme Advocate of the Order sent a communication to the Order's regional leadership in the United States and Canada notifying them of the lawsuit. The email, attached as Exhibit B to Plaintiffs' Motion, notifies the members that they may be contacted by Plaintiff Labriola or his attorney, and that the members are free to determine, in their discretion, whether to talk to them.

Plaintiffs have now filed an "emergency" motion for a protective order, alleging that the Order's February 10 communication to its regional leadership is "witness tampering," and seek an order compelling a follow-up communication from the Order to its leadership. Plaintiffs further request an order permitting them to disclose witness identities in this litigation "Attorneys' Eyes Only." In support, Plaintiffs present a series of substantially identical form affidavits from "whistleblowers," riddled with speculation, conjecture, and hearsay, and lacking proper foundation.

Plaintiffs' Motion should be denied as it has failed to demonstrate good cause for the issuance of a protective order under Fed. R. Civ. P. 26(c).

ARGUMENT

A protective order may issue only upon a showing of good cause "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ.

P. 26(c); *Flye v. Elizabeth Sch. Dist. C-1*, 2008 WL 4457844, at *1 (D. Colo. 2008). Good cause is proven by a showing that disclosure will result in a "clearly defined and serious injury" to that moving party. *Morrissey v. Allstate Ins. Co*., 2009 WL 2400963, at *2 (D. Colo. 2009) (citing *Klesch & Co. Ltd. v. Liberty Media Corp.,* 217 F.R.D. 517, 524 (D. Colo. 2003)). The good cause standard of Rule 26(c) is not met by conclusory statements. *Klesch & Co*., 217 F.R.D. at 524. "The trial court must balance the non-movant's need for information against the movant's injury from unrestricted disclosure." *Morrissey*, 2009 WL 2400963, at *2 (quotation omitted).

I. An association's communications to its members with information regarding a lawsuit filed against the association is not "witness tampering."

As an initial matter, Plaintiffs' requested relief in conjunction with their "witness tampering" claim – that the Order send a follow-up email to its members – is not a type of relief available under Fed. R. Civ. P. 26(c), and the Motion should be denied on that ground alone. In effect, what Plaintiffs are seeking is an order compelling speech. But the First Amendment imposes exacting requirements before a speaker may be compelled to speak, and Plaintiffs have not met that burden. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 795-97 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and is thus considered content-based regulation.). "Content-based speech compelled by the government is generally subject to strict scrutiny, even where the compelled speech is limited to factually accurate or non-ideological statements." *Id*. at 797-98. Plaintiffs have not shown that the order they are seeking, even assuming it is properly raised in a motion for protective order, passes strict scrutiny.

Further, the Knights of Columbus is the world's largest Catholic fraternal service organization, with approximately 1.9 million members worldwide. As a voluntary member

association, it is free to communicate with its members to advance collective beliefs and ideas. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). It is also "a well-recognized principle in the law of such voluntary associations that there shall be no judicial interference with intra-association affairs or determinations in the absence of special circumstances showing injustice or illegal action." *Green v. Obergfell*, 121 F.2d 46, 55 (D.C.Cir. 1941). An association's communications with its members are afforded special protections under the law. *See, e.g.*, *Perry v. Schwarzenegger*, 591 F.3d 1126, 1142 (9th Cir. 2009) ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private.").

Plaintiffs characterize the Order's email to its regional leadership in response to inquiries regarding the litigation (prompted by Plaintiff Labriola's emails and "surveys" to various members of the Order), as "witness tampering" under 18 U.S.C. § 1512.

First, 18 U.S.C. § 1512 was part of the "Victim and Witness Protection Act of 1982." As is set forth in the congressional findings and declaration of purposes cited in the notes to the Act, the legislation was intended to "enhance and protect the necessary role of *crime* victims and witnesses in the *criminal* justice process," S. REP. 97-532, 39, 1982 U.S.C.C.A.N. 2515, 2543 (emphasis added). Thus, its applicability to civil cases is marginal at best.

Second, courts have rejected similar arguments alleging witness tampering. *See, e.g.*, *I'mnaedaft, Ltd. v. The Intelligent Office Sys.*, LLC, 2009 WL 1011200, at *2 (D. Colo. 2009) ("[F]or purposes of criminal liability under applicable federal statutes (e.g., 18 U.S.C. § 1512), witness tampering requires something other than non-coercive, non-deceptive conduct."). In *I'mnaedaft,* the plaintiff served subpoenas on the defendant's franchisees, seeking production of

voluminous business records. *Id.* at *1. In response, the defendant's principals sent four emails to the franchisees, informing them that the defendant's counsel would review the subpoenas, that responses to the subpoenas were due in fourteen days, that the court had ruled that the franchisees or their attorneys would have to seek protective orders relating to the subpoenas themselves, that "it may be more logical, more economical and efficient to have a single attorney represent all of you in addressing those issues with the Court," and suggesting an attorney. *Id.*

The court rejected the plaintiff's argument that the emails constituted witness tampering, and found that the emails simply allowed the franchisees to make their own decisions about whether to hire an attorney to respond to the subpoenas. *Id.* at *3. "The emails did not advocate non-compliance with the subpoenas, suggest methods for delaying or failing to comply, or provide tools for non-compliance." *Id.*

Likewise, in *San Francisco Unified Sch. Dist. ex. rel. Contreras v. First Student, Inc.*, 213 Cal. App. 4th 1212, 1238-39 (2013), the court held that the trial court's injunction barring plaintiffs in a lawsuit against school bus contractor from discussing the lawsuit with any current employees of the contractor was not justified as an exercise of the court's inherent power to control the proceedings by evidence of witness tampering, absent evidence that the plaintiffs attempted to coerce or intimidate potential witnesses, or that they attempted to improperly influence any employee of the contractor to testify in a particular manner.

Here, Plaintiffs claim that "the clear purpose of [the] language [of the email] is to intimidate and persuade individuals to not speak with Plaintiff." Mot. at 6. Their entire argument is based on speculation and boilerplate statements in the "whistleblower" affidavits (which echo one another almost verbatim). Plaintiffs do not point to any language in the Order's

communication to its members that "advocate[s] non-compliance" or coerces anyone to not testify or testify in a particular manner in an official proceeding. And Plaintiffs conveniently ignore the sentence in the email which states, "Any Knight who is contacted by Mr. Labriola or Attorney Vail may, in his own discretion, speak with them or decline to do so." *See* Mot., Ex. B.

Merely informing a witness that he or she may decline the interview is not improper. *See United States v. Pinto*, 755 F.2d 150, 152 (10th Cir. 1985); *United States v. Black*, 767 F.2d 1334, 1337-38 (9th Cir. 1985) ("[B]oth sides have the right to interview witnesses before trial . . . [but the party's right of access to a witness] exists co-equally with the witnesses' right to refuse to say anything."). That is precisely what the Order's communication did.

Plaintiffs argue that the statement "if you choose to speak with [Plaintiff or his counsel], you may become a witness in this lawsuit" is misleading under the witness tampering statute. Mot. at 5. There can be no dispute that the above sentence is a true statement. If, based on a conversation with a Knight, Plaintiffs determine that the Knight has knowledge or information relevant to the claims or defenses in this litigation, Plaintiffs can – indeed, they have the obligation to – disclose the Knight as a potential witness in this litigation. *See* Fed. R. Civ. P. 26(a)(1). Plaintiffs' extrapolations from that statement that it is intended to convey that a Knight will not become a witness if he chooses not to speak with Mr. Labriola or his attorney are pure speculation and argument, none of which is competent evidence of witness tampering. *See I'mnaedaf*, 2009 WL 1011200, at *2 ("[F]or purposes of criminal liability under applicable federal statutes (e.g., 18 U.S.C. § 1512), witness tampering requires something other than non-coercive, non-deceptive conduct.").

In sum, Plaintiffs have not shown that the Order's February 10, 2017 email to its members was deceptive and coercive conduct intended to prevent any person from testifying at an official proceeding. Accordingly, Plaintiffs' requested relief – a compelled "curative" communication from the Order to its members – should be denied.

II. The statements in the supposed affidavits based on speculation or hearsay should be disregarded in evaluating Plaintiffs' motion for protective order, as they are not competent evidence under Fed. R. Evid. 602.

A testifying witness is required to have personal knowledge of the matter. Fed. R. Evid. 602. Under the personal knowledge standard, an affidavit is inadmissible if "the witness could not have actually perceived or observed that which he testifies to." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006). Accordingly, "'statements of mere belief' in an affidavit must be disregarded." *Id.* As this Court put it in *Aludo v. Denver Area Council*:

> Courts should also disregard statements in affidavits that are not based upon personal knowledge, are speculative or otherwise unsubstantiated, or are conclusory and self-serving. Accordingly, affidavits that contain speculation or hearsay without factual support, and statements in an affidavit prefaced by the phrases "I believe" or "upon information and belief" or those made upon an "understanding," are properly subject to a motion to strike.

2008 WL 2782734, at *1 (D. Colo. 2008) (Babcock, J.) (citations omitted).

Further, statements such as "widely known," or "common knowledge" do not meet the personal knowledge requirement under Fed. R. Evid. 602. *See Medina v. Multaler, Inc.*, 547 F. Supp. 2d 1099, 1122 (C.D. Cal. 2007) (portions of the affidavit stating that it was "well-known in the New Jersey office" that the company leaders did not like women of child-bearing age were inadmissible); *Fitzpatrick v. Nat'l Mobile Television*, 364 F. Supp. 2d 483, 495 (M.D. Pa. 2005)

(statements in affidavit that "this was common knowledge within the company" did not establish the affiant's personal knowledge and were "hearsay, rumor, or innuendo").

Here, the affidavits supplied by Mr. Labriola and the "whistleblowers" contain a number of statements based on hearsay, rumors, and speculation, as opposed to their personal knowledge. *See, e.g.*, Mot., Ex. A (Labriola Aff.) ¶ 2 ("I am aware from both personal observations **and conversations with hundreds of fellow Knights, General Agents and Field Agents**, that . . ." (emphasis added)); *id.* ¶ 4 ("According to the August 2, 2016 issue of the National Catholic Reporter . . ."); *id.* ¶¶ 8, 13; Mot., Ex. C, ¶ 2; Mot., Ex. D, ¶ 2 (Knights of Columbus Supreme Counsel and Mr. Smith "are widely known to retaliate against members and agents"); Mot., Ex. F, ¶ 5 ("I believe the email is meant to put members on notice").[3] These statements are not competent evidence and should not be considered by the Court in evaluating Plaintiffs' motion. *See Argo*, 452 F.3d at 1200.

III. Plaintiffs have failed to show good cause for disclosing essential witnesses "Attorneys' Eyes Only."

"The mandatory disclosure requirements under Rule 26(a)(1) are designed to accelerate the exchange of basic information, to 'help focus the discovery that is needed, and facilitate preparation for trial or settlement.'" *Gustafson v. Am. Family Mut. Ins. Co.*, 2012 WL 5904048, at *2 (D. Colo. 2012) (quoting Advisory Committee Notes to Rule 26). "Because the purpose of Rule 26(a)(1) is to accelerate the exchange of basic information and prevent a party from being unfairly surprised, disclosure requirements should, in short, be applied with common sense to help focus discovery and prevent the risk that litigants will indulge in gamesmanship with respect to their disclosure obligations." *Id.* (quotation, alteration omitted).

[3] Exhibits C through E and I are practically identical, as are Exhibit F through H.

Without citing a single authority, Plaintiffs ask the Court for an order preventing disclosure of witnesses' identity to Defendants. Making vague and unsubstantiated claims of "retaliation," Plaintiffs claim that the requested protective order is necessary to protect these witnesses from retaliation. In fact, Plaintiffs are attempting to prevent Defendants from participating in their own defense. As an example, in one of the "whistleblower" affidavits, the unidentified affiant is claiming "false charges" filed against him by the Order. *See* Mot., Ex. D, ¶ 2. The requested order to keep the witness identity secret from the Defendants would effectively prevent Defendants' attorneys from investigating those allegations and preparing a response.

Courts have rejected similar attempts to cut off or interfere with the opposing party's ability to effectively prepare its case. In *Theidon v. Harvard Univ.*, 314 F.R.D. 333, 336 (D. Mass. 2016), the court denied the defendant's motion for protective order to disclose the identities of certain key witnesses "Attorneys' Eyes Only," holding that such restrictive disclosure "is appropriate only in limited circumstances, such as cases involving trade secrets, because 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." The Court found that the defendant had not demonstrated good cause under Fed. R. Civ. P. 26(c) for the requested order.

Likewise, the court in *Quair v. Bega*, 232 F.R.D. 638, 641 (E.D. Cal. 2005), denied the plaintiffs' requested order to disclose witness identities "Attorneys' Eyes Only." The Court held that the requested order would "effectively prevent Respondents from conducting meaningful investigation of Petitioners' claims." *Id.* Indeed, "the requested order would prevent Respondents from discussing the allegations with their client and would leave Respondents with nothing more

than a general denial in the face of Petitioners' specific allegations." *Id*. at 641-42. The court found that good cause was not established for the protective order, and due process required that the defendants be allowed the opportunity to prepare an effective cross- examination. *Id*. at 642; *see also Murray v. Nationwide Better Health*, 2012 WL 1434878, at *4 (C.D. Ill. 2012) (affirming magistrate judge's denial of a motion for protective order seeking to keep the witness's identity confidential from the opposing party based on alleged fear of retaliation).

CONCLUSION

Plaintiffs have failed to carry their burden of showing that disclosure of witnesses will result in a "clearly defined and serious injury" to them and thus have failed to establish good cause for the requested relief. *Morrissey*, 2009 WL 2400963, at *2. Accordingly, Plaintiffs' motion for protective order should be denied.

DATED: February 23, 2017.

Respectfully submitted,

s/ Edward A. Gleason
Edward A. Gleason
L. Martin Nussbaum
Hermine Kallman
Ian Speir
LEWIS ROCA ROTHGERBER CHRISTIE LLP
90 South Cascade Avenue, Suite 1100
Colorado Springs, CO 80903
Telephone: 719.386.3000
Facsimile: 719-386-3070
Email: egleason@lrrc.com

Attorneys for Defendants
Knights of Columbus, Thomas P. Smith, Jr., and
Matthew A. St. John

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2017, a copy of the foregoing was filed with the Clerk of the Court using the CM/ECF System, which will send notification to the following:

Jeffrey S. Vail, Esq.
VAIL LAW LLC
5299 DTC Blvd., Suite 1101
Greenwood Village, CO 80111

s/ Arlene K. Martinez
Arlene K. Martinez