

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

KEVIN RYAN,)
)
 Plaintiff,)
)
 v.) **Cause No. 1:06-cv-1770-JDT-TAB**
) **Judge John D. Tinder**
) **Magistrate Judge Tim A. Baker**
)
 UNDERWRITERS LABORATORIES, INC.)
)
 Defendant.)

**PLAINTIFF KEVIN RYAN'S MEMORANDUM IN SUPPORT OF MOTION TO
ALTER AND AMEND THE DISTRICT COURT'S DECISIONS AND ORDERS OF
AUGUST 28, 2007 DENYING PLAINTIFF LEAVE TO AMEND HIS COMPLAINT
AND DISMISSING ALL OF HIS ACTION WITH PREJUDICE**

Pursuant to Fed.R.Civ.Proc., Rule 59, Plaintiff Kevin Ryan, by counsel, hereby respectfully submits his Memorandum in support of his motion to alter and amend the Court's decisions and orders of August 28, 2007 denying Mr. Ryan leave to file his Second Amended Complaint and dismissing all of his action with prejudice.

This Court issued its decision (Entry) denying Plaintiff Ryan leave to file his Second Amended Complaint on August 28, 2007, and issued its decision and Order of Dismissal, dismissing all of Plaintiff Ryan's action against Defendant Underwriters Laboratories (UL) on that same date. In its August 28, 2007 decision denying Plaintiff Ryan leave to file his proposed Second Amended Complaint, the Court noted that the "record" does not contain the letter from Plaintiff Ryan to the National Institutes of Standards and Technology (NIST)

which is referenced in the original Complaint as well as in the proposed Second Amended Complaint. District Court Entry of August 28, 2007 at 2 note 3. The Court's reference to the possibility that Mr. Ryan's proposed Second Amended Complaint was brought "in a desperate effort to protract the litigation and complicate the defense," *id.* at 2, suggests that the District Court had doubt that such letter actually exists. This doubt may have influenced the decision of the Court to deny Mr. Ryan leave to file his proposed Second Amended Complaint.

The aforementioned Plaintiff's letter to NIST does in fact exist, and is presented herewith as Exhibit B to the attached Declaration of Kevin Ryan, which identifies and authenticates that letter. The notice of termination letter presented to Mr. Ryan by UL which references Mr. Ryan's letter to NIST is also presented herewith as Exhibit A to Mr. Ryan's Declaration.

The Court also noted in its August 28, 2007 decision denying Plaintiff Ryan leave to file his proposed Second Amended Complaint that Mr. Ryan had "not provided any evidence" of the fact asserted by Mr. Ryan that UL had tested the steel components used to construct the World Trade Center (WTC) towers, such as the written acknowledgment from UL's chief executive officer to that effect which Mr. Ryan referenced in his original Complaint as well as in his proposed Second Amended Complaint. District Court Entry of August 28, 2007 at 2. Again, the Court's reference to the possibility that Mr. Ryan's proposed Second Amended Complaint was brought "in a desperate effort to protract the litigation and complicate the defense," *id.* at 2, suggests that the District Court also had doubt that the UL CEO's communication with Mr. Ryan stating that UL had tested these steel components, and the other communications between Ryan and UL referenced in the

proposed Second Amended Complaint, actually exist. This doubt also may have influenced the decision of the Court to deny Mr. Ryan leave to file his proposed Second Amended Complaint.

The aforementioned UL CEO communication with Plaintiff Ryan, and the other referenced communications between Ryan and UL, do in fact exist. The UL CEO statement to Ryan that the UL tested the WTC steel components is presented herewith as Exhibit C to the attached Declaration of Kevin Ryan.

Plaintiff believes that the conflict of interest in UL applying for a government contract to investigate the WTC tragedy which may have been related to adequacy of building construction, and particularly related to fire resistance of the materials used, where UL had historically been involved in testing the construction materials used in those very buildings for fire resistance, is manifest. Further, knowing failure of an applicant for a government contract to disclose an organizational conflict of interest is a viable basis for an action under the False Claims Act. *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003).

The District Court may have believed that Plaintiff's proposed amendment was futile on factual grounds because the Court saw no evidence supporting the key fact allegations referenced above. However, as reflected in the accompanying Declaration of plaintiff Ryan and the documents attached as exhibits thereto, such a fact basis does exist. Although Plaintiff recognizes that the Court may well be justified in demanding some demonstration that the proposed amendment will not be futile due to an inability of Plaintiff to provide evidentiary support for his fact allegations, the Court here did not request such documentation from Plaintiff before denying leave to amend, and Plaintiff did not perceive

the need to offer such evidence at this stage of the case, absent a motion for summary judgment being filed by UL, given that UL's filings in this matter admit that Ryan did send the referenced letter to NIST, Ryan did have communications with UL regarding his WTC concerns, and UL did perform work for NIST. For example, in its memorandum in support of its motion to dismiss Ryan's amended complaint, UL states as follows:

Plaintiff's string of outrageous comments regarding the terrorist attacks of September 11, 2001 began in 2003 when he informed UL's Chief Executive Officer of his "competing explanation" as to why the World Trade Center ("WTC") buildings had collapsed. Most significantly, Plaintiff wrote to the CEO that the three WTC towers in New York City had been intentionally blown up by explosive devices placed inside the buildings. Later, Plaintiff sent a letter containing further bizarre and baseless assertions about September 11th to the National Institute of Standards and Technology ("NIST"), a former and current client of UL. In this letter, Plaintiff commented on the inadequacy of the NIST report and stated that the report contained both "[s]ignificant flaws" and internal inconsistencies. Moreover, Plaintiff represented that UL had tested and certified the steel used in the WTC towers and insinuated that he had proof that the building had not collapsed because of the impact of the hijacked airplanes. His letter implied that the collapse was actually the result of something more sinister, a belief he made clearer by sending the letter to a group claiming that the United States government had intentionally plotted to destroy the WTC buildings, killing thousands of Americans in the process. To further highlight the connections Plaintiff tried to make between UL, September 11th, and outrageous conspiracy theories, the organization to whom Plaintiff sent his letter posted it on the Internet where it could be viewed by the public at large. UL then terminated Plaintiff's employment because his letter (1) clearly created the impression that the outrageous opinions contained therein were those of the company and (2) commented on testing performed by UL for a client, thereby harming the company's relationship with that client. ...

After learning of Plaintiff's letter and the fact that it was publicly accessible on the Internet, UL ended its employment relationship with Plaintiff. Compl. at 8, ¶ 28. UL explained to Plaintiff that he had misrepresented the opinions contained in his letter as being those of the company. *See* Compl. at 8, ¶ 32. Furthermore, UL indicated that it considered Plaintiff's actions to have been inappropriate because they involved testing that UL had done for a client, Compl. at 8, ¶ 30, and Plaintiff had harmed UL's relationship with that client. Compl. at 8, ¶ 31.

UL memo at 1-4. UL took many of these fact assertions from the Amended Complaint given the nature of its motion to dismiss but UL has not filed evidence contesting these facts.

Under the circumstances, Plaintiff did not perceive the need to file evidence to support his fact allegations for the purposes of his proposed second amendment.

Under the Federal Rules of Civil Procedure, leave to amend a complaint "shall be freely given when justice so requires." Here there is an absence of undue delay, undue prejudice to the opposing party, or futility of amendment. These are the common bases for denying leave to amend. *See e.g., Sanders v. Venture Stores*, 56 F.3d 771 (7th Cir. 1995) (citing *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1298 (7th Cir. 1993) quoting *Foman v. Davis*, 371 U.S. 178 (1962)). In light of this standard and the above considerations, and because the District Court's analysis may have been impacted by a misperception that there was no fact basis for Ryan's allegations and that the documents filed herewith did not exist, Plaintiff respectfully asks the Court to consider altering or amending its decisions and orders of August 28, 2007.

CONCLUSION AND RELIEF REQUESTED

Wherefore, for all these reasons, Plaintiff respectfully requests that the Court alter its decisions and orders of August 28, 2007 to grant Plaintiff leave to file his proposed Second Amended Complaint, or, in the alternative, amend its Entry of that date to clarify the extent to which the Court's decision to deny leave to amend was based on the Plaintiff's failure to offer evidence of the above referenced facts and on any presumption by the Court that the above referenced documents did not exist.

Respectfully submitted,

/s Mick G. Harrison

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Dated: September 7, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Memorandum in Support of Motion to Alter and Amend the Court's decisions and orders of August 28, 2007 was electronically filed and thereby automatically served on the parties indicated below. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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All done September 7, 2007.

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