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 RESPONSE IN OPPOSITION TO DEFENDANT UNDERWRITERS LABORATORIES, INC.'S MOTION TO DISMISS

Defendant Underwriters Laboratories asserts in its Motion to Dismiss that Plaintiff Kevin Ryan's Complaint should be dismissed in its entirety and with prejudice because, Defendant asserts, Ryan in his Complaint fails to allege any statute that would support his cause of action and there is no statutory basis for any of his claims. Defendant's assertions in this regard are incorrect.

As explained *infra*, there is an Indiana statute that provides a statutory cause of action for Plaintiff Ryan's statutory wrongful discharge (whistleblower retaliation) claim. In addition, there are also several State and federal statutory and constitutional provisions that supply a source of public policy to support Ryan's common law claim for wrongful discharge under Indiana's public policy exception to the employment at will doctrine. Because Ryan's Complaint states a wrongful discharge claim under one or both of his two legal theories, a statute based whistleblower retaliation claim and a common law based claim under the public policy exception to the employment at will doctrine, Defendant's Motion to Dismiss should be denied.

I. APPLICABLE LEGAL STANDARD OF REVIEW

As the Defendant correctly acknowledges in its Memorandum:

> A motion under Rule 12(b)(6) challenges the [legal] sufficiency of the complaint," *Cler v. Ill. Educ. Ass'n*, 423 F.3d 726, 729 (7th Cir. 2005), and such a motion may be granted by a district court "if 'it is beyond doubt that the non-movant can plead no facts that would support his claim for relief.'" *Palda v. Gen. Dynamics Corp*., 47 F.3d 872, 874 (7th Cir. 1995) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

Def. Mem. at 4 n. 2. The Seventh Circuit has explained that the complaint is sufficient to state a claim if it alleges the necessary elements of any legal theory on which Plaintiff may be entitled to relief, even if that theory is not the theory intended by the Plaintiff or the theory suggested by the Plaintiff:

> [T]he complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.

Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984) (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1216 at 121-23 (1969)). Further, the court must construe the complaint's allegations in the light most favorable to the plaintiff and must accept those allegations as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Bane v. Ferguson*, 890 F.2d 11, 13 (7th Cir. 1989).

> On a motion to dismiss pursuant to Rule 12(b)(6), we must determine whether the plaintiff's complaint states a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). The Court must examine the sufficiency of the plaintiff's complaint, not the merits of his lawsuit. *See Triad Assocs. v. Chicago Housing Auth.,* 892 F.2d 583, 585 (7th Cir.1989). "Accordingly, the motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Craigs, Inc. v. General Elec. Capital Corp.,* 12 F.3d 686, 688 (7th Cir.1993) (citation omitted); *see also Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984); *Jones v. General Elec. Co.,* 87 F.3d 209, 211 (7th Cir.1996). When reviewing a motion to dismiss, we accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the

> plaintiff. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 165, 113 S.Ct. 1160, 1161, 122 L.Ed.2d 517 (1993); *Dawson v. General Motors Corp.,* 977 F.2d 369, 373 (7th Cir.1992).

Bricker v. Federal-Mogul Corp., 29 F.Supp.2d 508, 510 (S.D.Ind. 1998).

A plaintiff's complaint need not contain the legal predicate for his or her claim. *Bricker v. Federal-Mogul Corp.*, 29 F.Supp.2d 508, 512 (S.D.Ind. 1998). However, when presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action. *Id.* at 512 *citing Stransky v. Cummins Engine Co.,* 51 F.3d 1329, 1335 (7th Cir.1995); *Carpenter v. City of Northlake,* 948 F.Supp. 759, 765 (N.D. Ill.1996) (citing *Stransky*); *Teumer v. General Motors Corp.,* 34 F.3d 542, 545-546 (7th Cir.1994). A plaintiff waives a legal theory if he fails to mention it to the district court when the time does come in the proceedings to present legal arguments "linking the claim described in the complaint to the relevant statutory (or other) sources for relief." *Bricker v. Federal-Mogul Corp.*, 29 F.Supp.2d 508, 512 (S.D.Ind. 1998) *citing and quoting Teumer v. General Motors Corp.,* 34 F.3d 542, 545-546 (7th Cir.1994).

II. DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM IMPROPERLY ASSERTS FACTS BEYOND THOSE STATED IN PLAINITFFS' COMPLAINT, AND THEREFORE SHOULD BE STRICKEN OR SUMMARILY DENIED

Defendant asserts in its Memorandum supporting its Motion to Dismiss that it has complied with this legal requirement that the movant, like the District Court, must, on a motion to dismiss for failure to state a claim, assume that all well pled facts in the complaint are true. Defendant asserts its compliance in this regard at least in regard to Defendant's "Statement of Facts." See Defendant's Memorandum (Def. Mem.) at 2 n. 1. Defendant makes no attempt to assert that its "Introduction" comports with this requirement, which it clearly does not. Defendant makes some assertions of fact in its

Memorandum both in the "Introduction" section and in the "Statement of Facts" section, which go beyond the fact asserted in the Complaint and which are disputed by Plaintiff.

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Fed. R. Civ. P. 12©).
> ...
>
> Where a party has moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and matters outside of the pleadings have been presented to the court for consideration, the court must either exclude the material or treat the motion as one for summary judgment . . . . Nichols v. United States, 796 F.2d 361, 364 (10th Cir. 1986).

Alexander v. State of Oklahoma, 382 F.3d 1206 (10th Cir. 2004).

The Defendant makes the following fact assertions in the "Introduction" section of its Memorandum at 1-2 which are not fact allegations made by Plaintiff in the Complaint:

1. Defendant asserts that Plaintiff made "outrageous comments" regarding "his conspiracy theories" about the terrorist attacks of September 11, 2001. Plaintiff, of course, did not allege that his own comments were "outrageous." Plaintiff, of course, did not allege that his concerns or theories were "conspiracy theories" in the sense that term has come to be used in the popular culture – to mean an unfounded paranoid belief. Plaintiff's concerns do include that more than one person may have been involved in planning and committing crimes related to the events of September 11, 2001 (9/11), but of course the fact that there was a "conspiracy" of some kind related to the tragic events of 9/11 has been accepted by all, including the Congress, the 9/11 Commission, and the President. The only controversy is regarding the nature and scope of the "conspiracy" and its participants.

2. Defendant asserts that Plaintiff "created the impression" that "those outrageous comments" were "the opinions of his employer, UL." Plaintiff alleges to the contrary in his Complaint that he was speaking for himself and not for UL in writing the letter to

NIST and that UL's assertion that Plaintiff represented himself as speaking for UL in the letter was simply a pretext by UL to fire Plaintiff in retaliation for his protected whistleblowing and exercise of his legal rights.

3. Defendant asserts that Plaintiff "made statements to UL's Chief Executive Officer" that the three World Trade Center ("WTC") towers in New York City "had been intentionally blown up by explosive devices placed inside the buildings." Plaintiff in his Complaint does not allege that he made such statements but rather that Plaintiff informed UL's CEO in writing that there was substantial evidence to support the conclusion, as a competing theory to the official government explanation, a competing theory worthy of investigation, that a controlled implosion via the engineered use of explosives caused the collapse of the three WTC buildings on 9/11.

4. Defendant asserts that Plaintiff "used his UL e-mail account to send" a letter containing "further bizarre and baseless assertions" about September 11th. Plaintiff, of course, did not allege in his Complaint that his own assertions were "bizarre" and "baseless." Further, Plaintiff, contrary to UL's implication, did not allege that he misused his UL email account or that use of a UL email account for personal email communications was contrary to UL policy or was not approved by UL.

5. Defendant asserts that Plaintiff's letter "implied that the collapse was actually the result of something more sinister," a belief he made clear by sending the letter to "a group claiming that the United States government itself had intentionally plotted to destroy the WTC buildings, killing thousands of Americans in the process." Plaintiff's letter to NIST clearly asserts that there are problems with the official government explanation for the collapse of three WTC buildings on 9/11 (including building 7 which was not struck by any aircraft) and that other explanations may exist, some of which could be "sinister" just as the official explanation involves sinister terrorist attacks via aircraft. However, Plaintiff's letter to NIST does not assert that Plaintiff has formed any

belief or conclusion as to the actual specific cause of the collapses of these three WTC buildings, which Plaintiff asserts needs further investigation by NIST and other government agencies in order to determine the real causes.

Plaintiff does allege and pointed out in his letter that the government investigations and theories to date have been inadequate. Although Plaintiff did allow his letter to be distributed to a citizens group which has a web site addressing their and others' on-going investigations into the events of 9/11, Plaintiff did not allege that he did so, and he did not do so, because Plaintiff or the citizens group in question had concluded that the United States government had plotted to intentionally destroy the WTC buildings. Plaintiff did so because the believed the American public had a right to know the truth about the events of 9/11 and that he, the citizens group, and its website readers had a right to inform themselves, to inform others, and to petition their government for redress through the web and otherwise to obtain a yet to be conducted thorough objective investigation of the causes of the WTC building collapses and related events, and depending on the outcome of such investigation, to obtain needed government reforms.

6. Defendant asserts that "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. Plaintiff, as noted, has not alleged that his own conclusions are outrageous or "conspiracy theories." Further, Plaintiff has not alleged that he attempted to connect UL to any conspiracy theories regarding 9/11 or that he allowed his letter to be posted on the internet to attempt to create the impression that UL was connected to such theories. Plaintiff alleges rather that he pointed out flaws in the official government story and the government's investigations of 9/11, and that UL had a role historically in testing and certifying the steel components used to construct the WTC buildings, and that certification should have reflected the capability of the steel components to have

withstood the temperatures of the fires resulting from the aircraft impacts and jet fuel.

7. Defendant asserts that the letter sent by Plaintiff and posted on the Internet "included no indication that it was merely his personal opinion being expressed." Plaintiff has made no such allegation in his Complaint, and to the contrary has asserted that his letter was written on his own behalf and that UL's assertion that Plaintiff represented himself as speaking for UL in the letter was a pretext for illegal retaliation.

8. Defendant asserts that Plaintiff's letter "clearly bore his company title and was from UL's email system, thus identifying the author" of the "offensive" letter as a UL employee. Plaintiff has not alleged what this UL statement implies, that Plaintiff's letter to NIST gives the impression not just that it was written by someone who works for UL but that it is a letter written for UL to state UL's position. The mere fact that an email shows the company whose system was used to send it and the author's title does not *per se* mean that the letter is written on behalf of the company nor does it mean that the letter states the company's position.

9. Defendant asserts that Plaintiff's letter "clearly created the impression that the outrageous opinions contained therein were those of the company." As noted, Plaintiff in his Complaint never alleged that any opinions in his letter to NIST were "outrageous" and never alleged that any opinions stated in this letter were those of the UL company.

If these fact assertions are intended by Defendant to be read by the Court and relied on for purposes of deciding the instant motion, then Defendant has clearly violated the rule limiting fact assertions made in a motion to dismiss to those facts asserted in the Complaint which are to be taken as true for purposes of the motion. The Defendant makes the following statement in its Memorandum at 2 immediately following the series of mis-statements listed above, which at a minimum suggests its intent in this regard:

> As set out below, the law is clear that UL could terminate Plaintiff's employment for his conduct. None of Plaintiff's claims have any merit whatsoever and his Complaint should be dismissed in its entirety.

Def. Mem. at 2. These Defendant's remarks in concluding the "Introduction" section not only indicate that it wishes the Court to read and accept as true these disputed fact assertions, but also that the Defendant is arguing not that Plaintiff failed to state a claim but that the Plaintiff's claims have no merit, which is improper on a motion to dismiss for failure to state a claim under the legal standard stated *supra*. For these reasons, the Defendant's "Motion to Dismiss" should be stricken or summarily denied.

In the alternative, if these fact assertions are intended by Defendant to be read by the Court but not to be relied on for purposes of deciding the motion to dismiss, then the inclusion of these facts can only be intended to bias the Court in deciding the motion. These particular fact assertions go well beyond an objective statement of undisputed background facts, as well as going beyond the Complaint.

The Defendant makes the following further fact assertions in the "Statement of Fact" section of its Memorandum at 3 which are not found in and are inconsistent with the Complaint:

1. Defendant asserts that on November 19, 2003 and again on December 2, 2003, Plaintiff made various "unsubstantiated" statements to UL's Chief Executive Officer regarding the terrorist attacks of September 11, 2001. To the contrary, Plaintiff did not allege in his Complaint that his own statements to UL's CEO were "unsubstantiated."

2. Defendant asserts that this [November 11, 2004] letter [to NIST] contained "many false or unsubstantiated assertions" by Plaintiff, including that UL had tested and certified the steel used in the WTC towers, and that a scientific analysis of the evidence proved that the buildings had not collapsed from the jet fuel that burned following the impact of the hijacked airplanes. To the contrary, Plaintiff did not allege that his NIST letter contained any "false or unsubstantiated assertions," and specifically did not allege that his own assertion that UL had tested and certified steel components used in the WTC was false or unsubstantiated given Plaintiff's allegation that he was told of such testing

and certification by UL's own CEO. Likewise, Plaintiff did not allege that his own assertion that a scientific analysis of the evidence proved that the WTC buildings had not collapsed from the jet fuel that burned following the impact of the aircraft was a "false" or "unsubstantiated" assertion. Defendant simply may not, on a motion to dismiss for failure to state a claim, pretend to be taking the facts alleged in the Complaint as true as required by law and simultaneously assert that Plaintiff's fact assertions are false or unsubstantiated. In regard to a letter such as Plaintiff's NIST letter, UL may on its motion note the allegations in the letter, but UL may not, on such a motion to dismiss, assert that those allegations in the Plaintiff's letter were false or unsubstantiated unless Plaintiff himself so alleged in the Complaint.

3. Defendant asserts that on November 11, 2004, Plaintiff sent a copy of his letter containing "all of his baseless assertions" to an organization that believed the 2001 collapse of the WTC towers may have been caused by the intentional use of explosives placed within those buildings by criminal elements within the United States government. Again, to the contrary, and to restate the obvious, Plaintiff did not allege in his Complaint that he made any "baseless assertions" in his NIST letter, or otherwise.

4. Defendant asserts that UL explained to Plaintiff that the [NIST] letter had misrepresented the opinions contained therein as being those of the company. Plaintiff does allege in his complaint that UL informed him that a reason he was being discharged was UL's belief that Plaintiff had given the impression through his NIST letter that he was stating UL's position rather than his own personal position. To this extent, this statement by UL in its Memorandum is based on the Complaint. However, to the extent that UL means to assert by this statement that not only did UL assert such a perception, but that this UL perception that Plaintiff had represented himself as speaking for UL was true and correct, then this statement by UL in its Memorandum goes beyond the facts alleged in the Complaint.

Because Defendant has not complied with the legal requirements for a motion to Dismiss under Rule 12(b)(6) of the Fed.R.Civ.P., this motion should be stricken or summarily denied. In addition, Defendant's motion does not comport with the requirements for a motion for summary judgment under Rule 56 of the Fed.R.Civ.P., including the requirements that such a motion be explicitly captioned as a motion for summary judgment, that such a motion assert and make a *prima facie* showing that there are sufficient facts not genuinely in dispute such that Defendant is entitled to judgment as a matter of law, and that such a motion set out specifically in a section so labeled the material facts asserted to not be in dispute. Consequently, Defendant's motion may not be properly converted to and considered as a motion for summary judgment.

III. DEFENDANT'S MOTION TO DISMISS FIRST AMENDMENT AND SECTION 1983 CLAIMS FOR WHICH PLAINTIFF'S CAUSES OF ACTION HAS YET TO ACCRUE AND WHICH THEREFORE HAVE YET TO BE ASSERTED SHOULD BE DENIED

Defendant's motion to dismiss claims under the First Amendment and Section 1983, see Def. Mem. at 4-8, is premature given that Plaintiff has not asserted nor intended to assert any such claims in his complaint at this time. Plaintiff is unaware of facts that would establish the required State action in regard to his discharge and thus, until he discovers such facts, if they exist, his cause of action under the First Amendment will not have accrued and the limitations period for his filing such a claim will not have run. Likewise, Plaintiff is unaware of facts that would establish the requirement that Defendant Underwriters Laboratories acted under color of state or federal law in discharging him and thus, until he discovers such facts, if they exist, his claim under Section 1983 or other applicable federal law will not have accrued and the limitations period for his filing such a claim will not have run.

> In general, under the federal discovery rule, claims accrue and "[t]he statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his

> action." Indus. Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963, 969 (10th Cir. 1994). In particular, "'[a] civil rights action accrues when facts that would support a cause of action are or should be apparent.'" Fratus v. Deland, 49 F.3d 673, 675 (10th Cir. 1995) (internal quotations omitted).

Alexander v. State of Oklahoma, 382 F.3d 1206 (10th Cir. 2004).

> Generally, an antitrust "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." Zenith, 401 U.S. at 338. As in other areas of the law, however, in the absence of a contrary directive from Congress this rule is qualified by the discovery rule, which "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990). "This principle is based on the general rule that accrual occurs when the plaintiff discovers that 'he has been injured and who caused the injury.' " Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004) (quoting United States v. Duke, 229 F.3d 627, 630 (7th Cir. 2000) (emphasis in original)).

In re Copper Antitrust Litigation, No. 04-1713, ____ F.3d ____ (7th Cir. 2006). The same would be true for any yet to be discovered State law tort causes of action, such as wrongful interference with business or contract. *See Barnes v. A.H. Robbins Co.*, 476 N.E.2d 84, 86 (Ind. 1985) ("The [discovery] rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware that a cause of action exists.").

> Under Indiana law, the discovery rule provides that the statute of limitations begins to run on a cause of action when "the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." Horn v. A.O. Smith Corp., 50 F.3d 1365, 1369 (7th Cir. 1995); Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992); Doe v. United Methodist Church, 673 N.E.2d 839, 844 (Ind. Ct. App. 1996). ... Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992) (recognizing that Indiana discovery rule applies to all tort claims) ... .

Nelson v. Sandoz Pharmaceuticals Corp., 288 F.3d 954 (7th Cir. 2002).

Should discovery show material facts of which Plaintiff is currently unaware that establish that government actors or actions were involved in Plaintiff's discharge such that a First Amendment Claim may exist, Plaintiff would seek leave of the Court to

amend his complaint to assert such a claim at that time. Likewise, should discovery show material facts of which Plaintiff is currently unaware that establish that Underwriters Laboratories acted under color of State or federal law in discharging Plaintiff, such that a Section 1983 or analogous claim may exist, Plaintiff would seek leave of the Court to amend his complaint to assert such a claim at that time.

In the meantime, there is certainly no basis for the Court to issue an order dismissing such claims with prejudice prior to completion of discovery and prior to such claims accruing and being asserted. Although Plaintiff only asserts two claims in his Complaint at this time, a claim under Indiana's Common Law Public Policy Exception to the Employment at Will Doctrine and a claim under Indiana's private employer whistleblower statute, Plaintiff reserves his rights under federal and State law to bring any other claims that may accrue in the future as a result of the discovery or currently unknown material facts.

It is important to keep in mind the distinction between the question of whether a plaintiff has a cause of action or claim that has accrued under the State or federal constitutions versus the question of whether State of federal constitutional provisions may establish a public policy that may form the basis for a common law claim under Indiana's public policy exception to the employment at will doctrine. Although, for the moment, Plaintiff Ryan concedes that he has no facts that the government acted to cause his discharge or that UL acted under color or law in discharging him, this does not mean that under the facts of the instant case that the First Amendment or other constitutional provisions do not provide the requisite source of public policy for Plaintiff's common law wrongful discharge claim. As explained *infra*, both the United States Constitution and the Constitution of the State of Indiana provide a source of public policy to support Mr. Ryan's common law wrongful discharge claim here.

IV. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED IN REGARD TO PLAINTIFF'S CLAIM UNDER THE INDIANA COMMON LAW PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE BECAUSE PLAINTIFF'S COMPLAINT ADEQUATELY STATES SUCH A CLAIM

In Indiana, absent a contract for a specified term of employment or other special circumstances establishing a contractual right to continued employment, the employment at will doctrine applies and provides that an employee may be discharged for no reason or any reason (other than an unlawful reason) at any time. *Coutee v. Lafayette Neighborhood Housing Servs., Inc.*, 792 N.E.2d 907, 911 (Ind. Ct. App. 2003).

Indiana law recognizes, however, certain public policy exceptions to the employment at will doctrine in cases where the employee is discharged for exercising a statutory or constitutional right, for performing a duty imposed by a statute or constitution, or for refusing to violate a law which would impose personal liability on the employee for the violation. *See, e.g.*, *Pepsi-Cola General Bottlers, Inc. v. Woods*, 440 N.E.2d 696, 697 (Ind. Ct. App. 1982); *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 76 (Ind. Ct. App. 2002); *Jennings v. Warren County Comm'rs*, No. 4:04-CV-94, 2006 WL 694742, at * 8 (N.D. Ind. Mar. 14, 2006); *Frampton v. Central Indiana Gas Co*., 297 N.E.2d 425, 428 (Ind. 1973); *McClanahan v. Remington Freight Lines, Inc*., 517 N.E.2d 390, 393 (Ind. 1988).

To state a wrongful discharge claim under the public policy exceptions to the employment at will doctrine, an employee need only give notice to the employer via the allegations in the complaint that the employee is alleging that he or she was discharged in violation of public policy and has a right to bring an action under one or more of the public policy exceptions. *Bricker v. Federal-Mogul Corp.*, 29 F.Supp.2d 508 (S.D.Ind. 1998). The Complaint in such a case is still subject only to the notice pleading requirements, no heightened standard for pleading applies. The Complaint need not cite the legal authority relied on for the source of the public policy in order to state a claim for

wrongful discharge under Indiana's public policy exception to the employment at will doctrine. However, as noted *supra*, although a plaintiff's complaint need not contain the legal predicate for his or her claim, *Id.* At 512, when presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action. *Id.* at 512 *citing Stransky v. Cummins Engine Co.,* 51 F.3d 1329, 1335 (7th Cir.1995); *Carpenter v. City of Northlake,* 948 F.Supp. 759, 765 (N.D. Ill.1996) (citing *Stransky*); *Teumer v. General Motors Corp.,* 34 F.3d 542, 545-546 (7th Cir.1994).

Here, the Complaint itself is sufficiently detailed to not only state a claim but to provide a disclosure of the statutory and constitutional bases for the public policies underlying Plaintiff's claim. The fact allegations in the Complaint, which must be taken as true for the purposes of UL's instant motion, include the following:

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Following the tragic events of September 11, 2001, and after a period of study and reflection, on November 19, 2003 and in follow-up on December 2, 2003, Mr. Ryan communicated directly with the CEO and other UL officials and stated the following concerns (see Complaint ¶ 16):

a) UL's had a role historically in testing and certifying the steel components used to construct the WTC, and based on the information available to Mr. Ryan, UL had certified the steel properly as capable of withstanding temperatures from hotter and longer lasting fires than those experienced on September 11, 2001, which raised the serious, and yet to be convincingly answered question as to why three WTC buildings collapsed on September 11, 2001;

b) The official government explanation of the WTC building collapses was flawed, i.e. the government's explanation that the impact of the aircraft and the fires from the jet fuel caused the unprecedented collapse of the steel framed WTC Twin Towers and WTC Building 7 was not supported by a scientific analysis of the evidence;

c) Substantial evidence supported the conclusion that the three WTC buildings that collapsed did so due to a well-engineered controlled implosion resulting from the use of explosives devices placed in the buildings, evidence including the videotaped uniform controlled nature of the collapses of these three WTC buildings into their own footprints at near free fall speeds, and eyewitness accounts, including accounts of firefighters, of bomb-like explosions in the WTC buildings occurring during the time people in the buildings were trying to escape following the aircraft strikes;

d) A scientific analysis of the remains of the collapsed WTC buildings steel would almost certainly provide a definitive answer to the question of which of these two competing explanations for the WTC buildings collapses – the official story that the jet fuel fires softened the steel or otherwise caused the steel to fail versus the alternative explanation that a controlled implosion resulting from use of explosive devices occurred – was the truth; and

e) The steel beams from the collapsed WTC buildings had been immediately removed from the WTC site and shipped for recycling before investigators could examine them, constituting in the opinion of experienced fire investigators and Mr. Ryan the improper destruction and removal of evidence; and

f) UL needed to act on this information at a minimum to protect its reputation in regard to the worst safety-related disaster in the history of the United States, but also to prevent future deaths.

The CEO of UL wrote back to Mr. Ryan, as did one or more other UL officials. The CEO's response included several key assertions of fact regarding the collapse of the three WTC buildings on September 11, 2001 WTC attacks which were erroneous, including (see Complaint ¶17):

a) The assertion that extremely high temperatures were reached almost immediately after the aircraft strikes;

b)These extremely high temperatures were sustained for a very long time;

c) The steel in the three WTC buildings that collapsed "stood longer than expected;"

d) A "cascading effect" (a.k.a. a pancake collapse) was involved in the collapse of these WTC buildings;

e) The WTC towers were designed to withstand the impact of a 707 jet hitting the building but at the same time was not designed to withstand the fire caused by the jet fuel carried by a 707 jet; and

f) A 707 jet impacting the buildings was reasonably foreseeable but the fire resulting from the jet fuel carried by the same 707 jet was not reasonably foreseeable.

Between December 2, 2003 and November 11, 2004, UL took no actions to address the substantial concerns Mr. Ryan had raised. Complaint ¶18

On November 11, 2004, Mr. Ryan wrote a letter to the National Institute of Standards and Technology ("NIST") raising several specific concerns including (see Complaint ¶19):

a) The government's investigation of the September 11, 2001 collapse of the WTC Twin Towers and WTC Building 7 following the crash of two aircraft into the WTC twin towers was inadequate;

b) Significant flaws exist in the official explanation, including NIST's explanation, for the WTC building collapses;

c) UL had tested and certified the steel components used to construct the WTC tower;

d) One or more safety related failures may have caused the majority of fatalities in this tragic event, including the possibility that the WTC steel unexpectedly failed at temperatures of approximately 250C, a fact that should be of great concern to the company that certified the fire-proofed steel components, UL;

e) A scientific analysis of the evidence does not support the conclusion that the building fires or fires from the jet fuel can explain the collapse of the three WTC buildings, a fact which should be of great concern to all Americans (because of the implications for what really did cause these WTC buildings to collapse);

f) The NIST's summary of its investigation report regarding the WTC steel and temperatures to which it was exposed is inconsistent with the NIST's own findings in the body of the investigation report; and

g) The work of the NIST in investigating the collapse of the WTC buildings is critical to the safety and security of the nation and the world because it is the crux of the crux of the crux – i.e. because the NIST investigation could disclose facts material to understanding what really happened in the WTC building collapses, which in turn could shed critical light on the true nature of the events of September 11, 2001, which events in turn are the driving force behind the "War on Terror;" and a failure of the NIST to identify the truth of what really happened will have serious consequences for the nation, and for global peace and justice; and

h) A number of current and former government employees have risked a great deal to help the nation know the truth of what happened on September 11, 2001, and Mr. Ryan has copied one such person on his letter to NIST in support of that effort.

In closing his letter to NIST, Mr. Ryan implored NIST to act quickly to do all it can to eliminate the confusion regarding the cause of the collapse of the WTC buildings on September 11, 2001. Complaint ¶20

On the same day he wrote the letter, Mr. Ryan made his November 11, 2004 letter to NIST available to a citizen's organization that was investigating the events of September 11, 2001, including the possibility that the collapse of three WTC buildings may have been due to the intentional use of explosives placed within those buildings by criminal elements within the United States government. Complaint ¶21.

On the same day, November 11, 2004, the citizen's organization posted Mr. Ryan's letter on the internet. Complaint ¶22.

Mr. Ryan made UL officials aware of the November 11, 2004 letter he wrote to NIST, and that it was posted on the internet. Complaint ¶23.

Upon learning of the letter and its posting on the internet, UL officials inquired with Mr. Ryan as to whether, if they requested or Mr. Ryan requested, the citizens organization would remove Mr. Ryan's letter of November 11, 2004 from the internet site on which it was posted. UL never requested Mr. Ryan to make any public clarifications regarding his November 11, 2004 letter to NIST to make more clear that he was speaking for himself and not for UL. Complaint ¶24.

Mr. Ryan was discharged by UL from his position as Laboratory Manager at EHL/UL on November 16, 2004, five days after Mr. Ryan wrote his letter to the NIST raising the specific concerns stated above regarding the government's investigation of the September 11, 2001 collapse of three buildings at the World Trade Center (WTC) following the crash of two aircraft into the WTC twin towers, and potential causes of those building collapses. Complaint ¶25

In the termination letter UL provided to Mr. Ryan, UL states clearly that Mr. Ryan's November 11, 2004 letter to NIST was the reason UL fired Mr. Ryan. Complaint ¶26. In the termination letter UL provided to Mr. Ryan, UL makes clear reference to the fact that Mr. Ryan's November 11, 2004 letter to NIST was circulated by Mr. Ryan and was posted on the internet. Complaint ¶27. In the termination letter UL provided to Mr. Ryan, UL states clearly that UL believes that it was inappropriate for Mr. Ryan to have commented on UL's tests conducted for its client NIST. Complaint ¶28.

In the termination letter UL provided to Mr. Ryan, UL states clearly that Mr. Ryan's November 11, 2004 letter to NIST caused harm to UL's relationship with NIST. Complaint ¶29. UL's assertion in the termination letter UL provided to Mr. Ryan, that

UL terminated Mr. Ryan's employment because Mr. Ryan in his November 11, 2004 letter to NIST misrepresented that Mr. Ryan was stating UL's opinions rather than his own was a pretext for the illegal firing of Mr. Ryan in retaliation for Mr. Ryan exercising his rights and acting to fulfill his duties under the United States Constitution, the Constitution of the State of Indiana, and under federal and state laws. Complaint ¶30.

After UL had terminated Mr. Ryan's employment, one or more of UL's spokespersons made statements to the press vehemently denying that UL had ever certified materials used in the WTC, Complaint ¶31, to the effect that "there is no evidence" that any firm, including UL, tested the materials used to build the WTC towers. Complaint ¶32; and that UL does not certify structural steel, such as the beams, columns and trusses used in the WTC, Complaint ¶33. After UL had terminated Mr. Ryan's employment, one or more of UL's spokespersons made statements to the press stating that Mr. Ryan's argument regarding the WTC building collapses was "spurious" and "just wrong." Complaint ¶35.

The Complaint identifies the following specific bases of public policy which support Mr. Ryan's claim of wrongful discharge given the facts asserted above:

1. The right of all citizens, specified in the United States Constitution, to petition the government for redress of grievances, Complaint ¶¶ 36, 40;

2. The right of all citizens, specified in the United States Constitution, to reform the government, Complaint ¶¶ 36, 40;

3. The right of all citizens of the State of Indiana, specified in the Constitution of the State of Indiana, to petition the government for redress of grievances, Complaint ¶¶ 36, 40;

4. The right of all citizens of the State of Indiana, specified in the Constitution of the State of Indiana, to reform the government, Complaint ¶¶ 36, 40;

5. The right to freedom of speech, specified in the First Amendment of the United

States Constitution, Complaint ¶ 37;

6. The right to freedom of speech, specified in the Constitution of the State of Indiana, Complaint ¶ 37;

7. The right and duty to report occupational safety hazards, Complaint ¶¶ 38, 42.

8. The right and duty to report public safety hazards, Complaint ¶ 38;

9. The right and duty to disclose material facts in a government investigation of an occupational safety related incident, Complaint ¶ 38;

10. The right and duty to disclose material facts in a government investigation of a public safety related incident, Complaint ¶ 38;

11. The right and duty under federal and state laws to report potential felonies, Complaint ¶¶ 39, 43;

12. The right and duty under federal and state laws to report potential terrorist activity, Complaint ¶¶ 39, 43;

13. The right and duty as a United States citizen to defend the United States Constitution, Complaint ¶ 41;

14. The right and duty as a citizen of the State of Indiana to defend the Constitution of the State of Indiana, Complaint ¶ 41;

Should more specifics regarding the above referenced statutes and constitutional provisions relied upon by Mr. Ryan be required for the purposes of overcoming Defendant's Motion to Dismiss for Failure to State a Claim, the following additional detail is offered:

1. The right of all citizens, specified in the United States Constitution, to petition the government for redress of grievances, referred to in the Complaint ¶¶ 36, 40 is found in the following language from the United States Constitution:

> Amendment I
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

2. The right of all citizens to reform the government, referred to in the Complaint ¶¶ 36, 40, is found in the Declaration of Independence as well as the following language of the United States Constitution:

> Amendment I
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment IX
> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Amendment X
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The right of all citizens of the State of Indiana, specified in the Constitution of the State of Indiana, to petition the government for redress of grievances, referred to in the Complaint ¶¶ 36, 40 is found in the following language in the State Constitution: Indiana Constitution:

> Article One: Preamble
> PREAMBLE.
> TO THE END, that justice be established, public order maintained, and Liberty perpetuated; WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution.
>
> ARTICLE 1.
> Bill of Rights.
> Section 1. WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government. ...
> Section 9. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible. ...
> Section 31. No law shall restrain any of the inhabitants of the State

> from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.

4. The right of all citizens of the State of Indiana, specified in the Constitution of the State of Indiana, to reform the government, referred to in the Complaint ¶¶ 36, 40 is found in the following language from the State Constitution:

> Article One: Preamble
> PREAMBLE.
> TO THE END, that justice be established, public order maintained, and Liberty perpetuated; WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution.
>
> ARTICLE 1.
> Bill of Rights.
> Section 1. WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government. ...
> Section 9. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible. ...
> Section 31. No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.

5. The right to freedom of speech, specified in the First Amendment of the United States Constitution, referred to in the Complaint ¶ 37 is found in the following language from that Amendment:

> Amendment I
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

6. The right to freedom of speech, specified in the Constitution of the State of Indiana, referred to in the Complaint ¶ 37 is found in the following language of the State Constitution:

> Section 9. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible. ...

7. The right and duty to report occupational safety hazards, referred to in the Complaint ¶¶ 38, 42 is found in the Occupational Safety and Health Act. However, the OSHA duties and rights appear to be limited in application to current and possibly former employees. Because Mr. Ryan was not an employee or former employee of the WTC, he no longer asserts OSHA as a statutory basis of public policy underlying his common law claim. Nonetheless, Mr. Ryan's stated concerns and petitions for redress regarding unanswered questions regarding the reasons for the collapse of the WTC buildings which relate to potential safety defects in design, construction and testing are still protected by federal law including the First Amendment and the Indiana Constitution as noted above. Plaintiff notes that if he were still asserting OSHA as a basis for public policy, that the Defendant was correct in its citation of case law for the proposition that one cannot rely on a statute as a source of public policy to support a common law claim for wrongful discharge if that statute also provides a right of action.

8. The right to report public safety hazards, referred to in the Complaint ¶ 38 is based upon the First Amendment and the Indiana Constitution free speech right and the right to petition for redress noted above.

9. The right and duty to disclose material facts in a government investigation of an occupational safety related incident, referred to in the Complaint ¶ 38 is based upon the First Amendment and the Indiana Constitution free speech right and the right to petition for redress noted above.

10. The right and duty to disclose material facts in a government investigation of a public safety related incident, referred to in the Complaint ¶ 38 is based upon the First Amendment and the Indiana Constitution free speech right and the right to petition for redress noted above.

11. The right and duty under federal and state laws to report potential felonies, referred to in the Complaint ¶¶ 39, 43 is based upon, *inter alia*, the following federal statute:

> TITLE 18--CRIMES AND CRIMINAL PROCEDURE
> PART I--CRIMES
>
> CHAPTER 1--GENERAL PROVISIONS
>
> Sec. 4. Misprision of felony
>
> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

12. The right and duty under federal and state laws to report potential terrorist activity, referred to in the Complaint ¶¶ 39, 43 is based in the recent federal anti-terrorism laws commonly referred to as the Patriot Act, as well as the federal statute quoted below:

> TITLE 18--CRIMES AND CRIMINAL PROCEDURE
> PART I--CRIMES
>
> CHAPTER 1--GENERAL PROVISIONS
>
> Sec. 4. Misprision of felony
>
> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

13. The right and duty as a United States citizen to defend the United States Constitution, referred to in the Complaint ¶ 41, is reflected in the following statutory language relating to aliens and citizenship, which reflects not only the duty imposed on aliens becoming new citizens, but the duty all natural born citizens bear as well:

> TITLE 8--ALIENS AND NATIONALITY
>
> CHAPTER 12--IMMIGRATION AND NATIONALITY

SUBCHAPTER III--NATIONALITY AND NATURALIZATION

Part II--Nationality Through Naturalization

Sec. 1448. Oath of renunciation and allegiance

(a) Public ceremony

A person who has applied for naturalization shall, in order to be and before being admitted to citizenship, take in a public ceremony before the Attorney General or a court with jurisdiction under section 1421(b) of this title an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or ©) to perform work of national importance under civilian direction when required by the law. Any such person shall be required to take an oath containing the substance of clauses (1) to (5) of the preceding sentence ...

14. The right and duty as a citizen of the State of Indiana to defend the Constitution of the State of Indiana, referred to in the Complaint ¶ 41, is found in the following language from the State Constitution:

Article One: Preamble
PREAMBLE.

TO THE END, that justice be established, public order maintained, and Liberty perpetuated; WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution.

ARTICLE 1.
Bill of Rights.

Section 1. WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government. ...

Section 9. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible. ...

Section 31. No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their

> common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.

Defendant UL cites several cases in its Memorandum in an effort to support its assertion that Plaintiff Ryan's Complaint should be dismissed for failure to identify the legal bases for the public policy Plaintiff asserts was violated by his discharge. On a close reading of those cases, however, it is clear that the vast majority of the cases cited by UL are summary judgment decisions, not decisions on motions to dismiss for failure to state a claim, and therefore offer no guidance on what level of detail is required in the complaint allegations to adequately state a claim. *See, e.g.*, *Campbell v. Eli Lilly & Co*., 413 N.E.2d 1054, 1060 (Ind. App. Ct. 1980); *Hostettler v. Pioneer Hi-Bred Int'l, Inc*., 624 F. Supp. 169, 172 (S.D. Ind. 1985). The only exception where UL cites a case that deals with a motion to dismiss and where the court provides specific explanation as to what is and is not required to be in the complaint versus in a response to a motion to dismiss is *Bricker v. Federal-Mogul Corp.*, 29 F.Supp.2d 508 (S.D.Ind. 1998).

As noted *supra*, in *Bricker* the Court, citing several cases noted above, made clear that the Complaint itself need not cite to the legal authorities underlying the asserted claim(s), although such authorities should be identified in response to a motion to dismiss. Given the details already presented in the Complaint noted above, and given the presentation above of the details of the statutory and constitutional sources for the public policies on which Plaintiff Ryan relies, Plaintiff Ryan has more than satisfied the legal requirements for stating his common law claim for wrongful discharge under the public policy exception to the employment at will doctrine. Consequently, Defendant UL's Motion should be denied.

V. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED IN REGARD TO PLAINTIFF'S CLAIM UNDER INDIANA'S PRIVATE EMPLOYER WHISTLEBLOWER STATUTE BECAUSE PLAINTIFF'S COMPLAINT ADEQUATELY STATES SUCH A CLAIM

Defendant asserts that none of the claims that Plaintiff could conceivably have are adequately stated in the Complaint, and Defendant gives the impression that it has addressed every conceivable claim Plaintiff could have in its Memorandum.

> Plaintiff's Complaint is very unclear as to which legal causes of action he is actually asserting. As a result, Defendant in part has been forced to guess at the precise legal causes of action being raised by the Complaint. As set out below, however, none of the claims possibly being asserted by Plaintiff state a claim and the Complaint should be dismissed as a matter of law.

Def. Mem. at 4. Although Defendant in its Memorandum does acknowledge that Plaintiff is or may be asserting a common law claim for wrongful discharge under Indiana's public policy exception to the employment at will doctrine, see Def. Mem. at 8-11, a claim which Plaintiff in fact does assert, and, as noted above, Defendant takes pains to address First Amendment and Section 1983 claims that Plaintiff is clearly not asserting in the Complaint, see Def. Mem. At 4-8, Defendant nonetheless fails to address the most obvious Indiana statutory claim that Plaintiff might be asserting – a claim pursuant to Indiana's private employer whistleblower statute, I.C. 22-5-3-3. *See Coutee v. Lafayette Neighborhood Housing Servs., Inc.*, 792 N.E.2d 907, 911 (Ind. Ct. App. 2003). This statute provides:

> **IC 22-5-3-3**
> **Protection of employees reporting violations of federal, state, or local laws; disciplinary actions; procedures**
> Sec. 3. (a) An employee of a private employer that is under public contract may report in writing the existence of:
> (1) a violation of a federal law or regulation;
> (2) a violation of a state law or rule;
> (3) a violation of an ordinance of a political subdivision (as defined in IC 36-1-2-13); or
> (4) the misuse of public resources;
> concerning the execution of public contract first to the private employer, unless the private employer is the person whom the employee believes is committing the violation or misuse of public resources. In that case, the

> employee may report the violation or misuse of public resources in writing to either the private employer or to any official or agency entitled to receive a report from the state ethics commission under IC 4-2-6-4(b)(2)(G) or IC 4-2-6-4(b)(2)(H). If a good faith effort is not made to correct the problem within a reasonable time, the employee may submit a written report of the incident to any person, agency, or organization.
> (b) For having made a report under subsection (a), an employee may not:
> (1) be dismissed from employment;
> (2) have salary increases or employment related benefits withheld;
> (3) be transferred or reassigned;
> (4) be denied a promotion that the employee otherwise would have received; or
> (5) be demoted.
> c) Notwithstanding subsections (a) through (b), an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information, including suspension or dismissal, as determined by the employer. However, any employee disciplined under this subsection is entitled to process an appeal of the disciplinary action as a civil action in a court of general jurisdiction.
> (d) An employer who violates this section commits a Class A infraction.

The omission by Defendant of any discussion of this potential cause of action is noteworthy, given the pains Defendant went to to give the impression that because of Plaintiff's purportedly vague and ambiguous Complaint, it was being comprehensive in its analysis of every possible claim Plaintiff could be asserting.

Plaintiff Ryan did not specifically reference this whistleblower statute right of action in his complaint, but the facts plead in the Complaint would cover each element of a claim under this statute. There are sufficient allegations in the Complaint for the Court to find that Mr. Ryan through his letter to NIST and his preceding disclosures to UL was asserting either a violation of law or misuse of public resources by a private employer under public contract, or both. The Complaint notes, as UL admits in its motion, that UL has at least one government agency, NIST, with which it contracts to perform services. The Complaint notes, and UL admits, that UL was contracted by NIST to perform fire resistance tests on models and/or components the WTC floor assemblies.

Mr. Ryan's internal reports to UL clearly alleged that there was substantial evidence that the WTC buildings collapsed due to the commission of a crime – the

controlled engineered demolition of the buildings using explosives, which resulted in the tragic death of thousands. Mr. Ryan's letter to NIST was somewhat less explicit than his internal reports to UL but still explicit enough for UL, knowing what it did regarding his preceding internal disclosures to UL, to interpret the letter as an allegation that a crime had been committed. UL's statements regarding Mr. Ryan's "outrageous" "conspiracy theories" makes clear that UL understood Mr. Ryan's letter to NIST as alleging that the WTC building collapses resulted or may have resulted from a criminal conspiracy.

Mr. Ryan's criticism of NIST's investigation of the WTC building collapses as being inadequate, which investigation included the conduct of fire testing of floor assembly models of the WTC by UL, and his reporting that UL had previously tested the steel components of the WTC and certified them as being sufficiently fire resistant that they should have withstood the fires from the jet fuel on 9/11, is sufficient to meet the statutory requirement that there was a misuse of public funds.

Based on the allegations in the complaint, UL fits the statutory requirement of being a private employer under public contract and Plaintiff reported to UL and NIST, with UL knowledge, a crime and misuse of public funds, and was discharged because of these reports. Thus, Plaintiff has stated a claim under this Indiana whistleblower statute.

As noted *supra*, The Seventh Circuit has explained that the complaint is sufficient to state a claim if it alleges the necessary elements of any legal theory on which Plaintiff may be entitled to relief, even if that theory is not the theory intended by the Plaintiff or the theory suggested by the Plaintiff:

> [T]he complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.

Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984) (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE &

PROCEDURE § 1216 at 121-23 (1969)).

VI. IN THE ALTERNATIVE, SHOULD THE COURT FIND THAT PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UNDER THE COMMON LAW PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE AND/OR FAILS TO STATE A CLAIM UNDER INDIANA'S PRIVATE EMPLOYER WHISTLEBLOWER STATUTE, IT WOULD BE APPROPRIATE TO GRANT PLAINTIFF LEAVE TO FILE AN AMENDED COMPLAINT

Should the Court find that Plaintiff has not stated a claim for wrongful discharge under either the common law public policy exception to employment at will or under the Indiana whistleblower statute discussed *supra*, Plaintiff would respectfully request an opportunity to amend his complaint within a reasonable time in an effort to cure any defects in pleading noted by the Court. Under the Fed.R.Civ.P., Rule 15, leave to amend is to be freely given as justice so requires. There are no circumstances here that would suggest that an amendment would be futile.

VII. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Defendant's Motion to Dismiss should be stricken, summarily denied, or denied, and in the alternative, Plaintiff should be granted leave to amend his complaint.

Respectfully submitted,

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Dated: February 5, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Response to Defendant's Motion to Dismiss 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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