



2. On October 16, 2007, Fish & Richardson filed its Counterclaim Against ICR and Third-Party Complaint Against Scott C. Harris. Fish & Richardson alleged that Mr. Harris's misconduct breached his contract with the Firm (Count I) and the fiduciary duties he owed to the Firm and its clients (Count II). Fish & Richardson also asserted that it had an ownership interest in certain patents associated with Mr. Harris, and therefore sought declaratory relief (Count III) and a constructive trust (Count IV) against Mr. Harris and ICR with respect to the '252 patent and any other U.S. or foreign patents or patent applications that Mr. Harris prosecuted and obtained through the misuse of Fish & Richardson resources and in breach of his contractual and fiduciary duties (the "Disputed Patents").

3. On October 31, 2007, Mr. Harris filed his Counterclaim Against Fish & Richardson, asserting claims for defamation, tortious interference and violation of the California Labor Code.

4. On December 3, 2007, the Court set March 31, 2008 as a deadline for amending pleadings and set a fact discovery cutoff of September 30, 2008.

5. In December 2007, ICR and Mr. Harris on the one hand, and Fish & Richardson on the other, produced to each other documents responsive to each of their respective expedited requests. Fish & Richardson is continuing to confer with counsel for ICR and Mr. Harris about the adequacy of ICR's and Mr. Harris's limited expedited production. And, with the exception of the parties' limited expedited production of documents, very little discovery has taken place.

6. Fish & Richardson has learned through, among other things, expedited discovery that there are other entities, which purport to have an ownership interest in the Disputed Patents. In order to insure that all necessary parties regarding ownership are before the Court, Fish & Richardson seeks leave at this time to add six additional identified entities, as well as unnamed

Doe entities, each of which appears to be closely connected to and represented by the same law firm representing Mr. Harris and ICR, namely Niro, Scavone, Haller & Niro (the “Niro firm”).<sup>2</sup>

7. The Court should permit Fish & Richardson to amend its Counterclaim and Third-Party Complaint. Courts should freely give leave to amend when justice so requires. FED. R. CIV. P. 15(a)(2). In the Seventh Circuit, “leave to file a second amended complaint should be granted liberally.” *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792 (7th Cir. 2004). It is well-settled that courts should apply a liberal policy respecting amendments to pleadings so that cases may be decided on the merits. *Sitrick v. Freehand Sys.*, 2004 WL 725306, at \*2 (N.D. Ill. Mar. 31, 2004). “[I]n the absence of delay, undue prejudice to the party opposing the motion, or futility of the amendment, leave should be freely given.” *Eastern Natural Gas Corp. v. Aluminum Co. of Am.*, 126 F.3d 996, 999 (7th Cir. 1997).

8. ICR and Mr. Harris cannot meet their heavy burden to demonstrate that special circumstances exist to deny Fish & Richardson leave to amend. Fish & Richardson has filed its motion more than six weeks *before* the Court’s deadline to amend complaints and add new

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<sup>2</sup> In moving to amend its Counterclaim and Third-Party Complaint, Fish & Richardson is obligated to advise the Court that this may not be the last proposed amendment to add parties that Fish & Richardson will file. Fish & Richardson currently believes that it has an adequate factual and legal basis to add the Niro firm as a party defendant to this lawsuit, based upon claims of aiding and abetting breaches of fiduciary and contractual duty. Many of the facts upon which those claims may be based are set forth in the proposed Amended Counterclaim and Third-Party Amended Complaint. Recognizing the consequences and gravity of naming a professional law firm as a party to a lawsuit, however, particularly in a case in which they are counsel of record, at this time Fish & Richardson has not added the Niro firm as a party in its proposed Amended Counterclaim and Third-Party Complaint. Instead, before Fish & Richardson would ask for leave to do so, it would seek to complete at least the expedited discovery it requested of Mr. Harris in November 2007, and which remains outstanding, and to depose Mr. Harris and conduct a Rule 30(b)(6) deposition on issues relating to the Niro firm’s activities. Given the time that will be required to complete that discovery and other outstanding issues, Fish & Richardson may later request the Court to extend the deadline for adding parties from March 31, 2008, to a date that allows the completion of at least the outstanding expedited discovery and the depositions identified above.

parties. Fish & Richardson's amendment also is based upon facts which are already at issue – how Mr. Harris developed the patents and what he did with them. Moreover, the claims against these additional parties are substantially similar to Fish & Richardson's claims against Mr. Harris and ICR, claims Mr. Harris and ICR did not move to dismiss. In addition, Fish & Richardson gave notice that it would seek to add these parties at earlier points in the litigation. Almost no discovery has occurred yet and discovery is not set to close for many months. And, even if Fish & Richardson were not permitted to add these additional related parties, to pursue its claims against ICR and Mr. Harris fully, Fish & Richardson would need third-party discovery of each shell entity to whom Mr. Harris purportedly "assigned" patents. Under these facts, ICR and Mr. Harris have no reasonable argument against Fish & Richardson's motion to amend.

WHEREFORE, Fish & Richardson respectfully requests that the Court grant Fish & Richardson's motion and permit Fish & Richardson to file its Amended Counterclaim and Third-Party Complaint.

February 12, 2008

Respectfully submitted,

FISH & RICHARDSON P.C.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed with the Court by means of the Court's CM/ECF system, which will send notification of such filing to the following counsel at their email address on file with the Court:

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