

# 05-0609<sub>cv</sub>

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**United States Court of Appeals**  
for the  
**Second Circuit**

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**CARMINE A. LOPRESTI, Individually, and in his fiduciary capacity  
under the Employee Retirement Income Security Act of 1974, under  
the Lutheran Medical Center § 403(b) Tax Sheltered Annuity Plan,**  
*Plaintiff-Appellant,*

*-against-*

**Citigroup Inc., Wendy Z. Goldstein, Miles H. Kucker, Allen Schechter,  
Howard Smith, William D. Myhre, Don Goldstein, State Street Corp.,  
Citistreet Associates, LLC, Citistreet Equities, LLC, Citistreet Financial  
Services, LLC, Travelers Insurance Company, Buck Consultants, Buck  
Consultants, Inc. Lutheran Medical Center, Mayda Casado, Jean Desjardins,  
Jim Wilson, Smith Barney Corporate Trust Company, Individually, and in  
their fiduciary capacities under the Employee Retirement Income Security  
Act of 1974, David A. Spina, Sanford I. Weill, Salomon Smith Barney, Inc.,  
Citistreet, LLC.,**

*Defendants-Appellees,*

**CITISTREET, COPELAND ASSOCIATES, INC.,**

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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**REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR PLAINTIFF-  
APPELLANT TO THE OPPOSITION BY CITIGROUP INC. AND  
LUTHERAN MEDICAL CENTER DEFENDANTS-APPELLEES**

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## **1. Preliminary Statement**

Plaintiff-appellant hereafter “LoPresti” hereby submits his reply brief to the briefs in opposition of the Citigroup, Inc. and State Street Corp. appellees, hereafter “Citigroup” and to the brief in opposition by the Lutheran Medical Center appellees, hereafter “LMC”. We will begin with LoPresti’s reply to the Citigroup brief in opposition.

## **2. The Nature Of The LMC § 403(B) Annuity Deposits**

At the outset it is to be noted that the funds being dealt with in this matter are all LMC employees’ elective deferrals, made by way of voluntary deductions from their pay. There are no hospital contributions made into the elective deferrals of the employees’ § 403(b) deposits that are at issue in this litigation. LMC is not dealing with its own money. LMC never once demonstrates how the diversion of its employee elective deferrals benefit anyone but LMC.

## **3. The Citigroup Preliminary Statement is Unavailing**

The Citigroup preliminary statement asserts that LMC was making a “business decision” when it changed the service provider and mandated diversion of the LMC employees’ elective deferrals to Citistreet Associates, Inc. It is interesting that Citigroup makes this statement on LMC’s behalf, in that LMC is represented by its own separate counsel and states that it was Citistreet and not Citistreet Associates, LMC. Citigroup by extension is thus stating that LMC made this decision for its own profit.

The entire thrust of ERISA is to protect the covered employee from the actions of the employer that harm the employees.

#### **4. The “Ordinary Business Decision” Argument Fails**

In the second sentence of their preliminary statement Citigroup states that this “business decision was clearly permitted by law (as even appellant Lopresti admitted, *see* A.264)”. LoPresti alleged injuries to the LMC employees in his complaint.

If this “business decision” harmed the LMC employees in the § 403 (b) plan, the defendant violated ERISA. This is a matter of proof. Citigroup also failed to qualify the statement by LoPresti at A-264 when he said immediately thereafter “However with these rights come the burden of exercising them according to law.” LoPresti’s complaint details the appellees departure from the law

The words “ordinary business” decision bring to mind the “business decisions” that involved Citigroup in the Enron debacle, Citigroup’s expulsion from doing business in certain foreign countries, and other defalcations by Citigroup.

In ¶ 2 of page 1 Citigroup again refers to the “ordinary business decision” being converted into a federal case by LoPresti. It goes on to say that the complaint “completely failed” to state a claim under any of the state or federal laws he invoked. Contrary thereto, the complaint contains many allegations to support LoPresti’s status as an actual or deemed fiduciary.

Under ERISA legislation, the employer may do nothing that would harm the employee.

LoPresti had set forth in his complaint many areas where the defendants are causing harm to the LMC employees.

### **5. The Existence of Citistreet**

Citigroup in its preliminary statement also speaks about LMC changing “the service provider of its “defined contribution” employee retirement savings plan to Citistreet Associates LLC, a subsidiary of Citistreet LLC....” LMC in its brief however states that it dealt with Citistreet and not these Limited Liability Companies. The Citigroup mention of the two Citistreet entities involved are not borne out by the exhibits attached to the complaint which in general refer to the vendor as being Citistreet, as does LMC in its brief at page ~~12~~. 9

### **6. A “Defined Contribution Plan” is not Involved in this Case**

The § 403(b) plan involved in this litigation is not a defined contribution employee retirement plan as Citigroup states. A defined contribution plan is more in the nature of a pension, profit sharing, or stock bonus plan which is not the province of a § 403(b) plan. A defined contribution plan comes generally under § 401 of the Internal Revenue Code.

### **7. The Existence of Citistreet**

Citistreet is a 50/50 joint venture between Citigroup Inc. and State Street Corp. Citistreet defaulted in appearing in this action and the Citigroup

defendants have gone to great lengths to deny Citistreet's existence despite all of the public evidence of its existence to the contrary. See [www.citistreet.com](http://www.citistreet.com) online. Even appellee LMC agrees with this in its brief. *Page 9*

## **8. Fraud**

Citigroup states that virtually all of LoPresti's claims rest on his allegations of fraud. However F.R.C.P. 9(b) is not applicable hereto in the context of this complaint.

LoPresti has adequately pleaded the causes of action in ERISA, Antitrust, RICO, and the pendent State Law claims.

## **9. The Proposed Amended Complaint**

As to the third proposed amended complaint that was submitted by LoPresti, that proposed amended complaint, as Citigroup well knows, dealt solely and exclusively with the identification of the 50/50 joint venture between Citigroup and State Street known as Citistreet. Said proposed third amended complaint did not deal in any way whatsoever with the issues involved in the FRCP 12 (b)(6) motions to dismiss. The proposed third amended complaint was submitted on motion before the district court dismissed plaintiffs' action, and the District Court knew it had nothing to do with amending the complaint for 12(b)(6) purposes.

## **10. The Alleged Hearing Regarding Citistreet**

The statement of issues regarding the granting of a default judgment is deceptively framed by Citigroup. LoPresti was precluded from presenting his evidence, and denied the right to discovery. He was denied the right of subpoena and denied the right to call witness. The sole purpose, as stated by Honorable Magistrate Judge Viktor V. Pohorelsky for holding the hearing was so that in his words he could assess the credibility of Citistreet's president. While not part of the record herein it is to be noted that within some 30-60 days after the hearing, the Citistreet President/CEO and the Citistreet Chairman of the Board were both ousted from their positions.

### **11. The Fraud Issue**

In the Citigroup brief in opposition, in its argument on page 12 of their opposition Citigroup cites two cases that are distinguishable from the instant case. First Nationwide Bank and De Jesus have no relevancy to LoPresti's case. Both cases involved dismissals under F.R.C.P. 12(b)(6) of cases wherein the stricter pleading requirements of F.R.C.P. 9 were required because both cases sounded in fraud.

This case sounds in ERISA and citing First Nation Wide and the De Jesus are out of context. Most of the subsequent cases regarding ERISA are distinguishable in that they involve owners as not being covered ERISA.

### **13. LoPresti's Statement on ERISA Claim**

On page 13 of the Citigroup brief they argued that "LoPresti failed to state an ERISA claim". Contrary thereto LoPresti alleged facts that would establish him as an ERISA fiduciary. Citigroup failed to recognize, that ¶¶

48-50, 52, 126, 127, 128, 130 (A-118 – A-137) taken together with the facts set forth in LoPresti's complaint clearly establish that he is an ERISA fiduciary.

#### **14. The "Same Plan" Issue**

The argument about the issue of what is the "same plan" in this case begs the question of the existence of more than one § 403(b) plan at LMC. Attached hereto in the supplement appendix is the LMC § 403(b) ERISA summary plan description. LMC has denied universal eligibility to its employees to participate in the § 403(b) plan. The failure of LMC to provide for universal eligibility of all its employees to participate in the § 403(b) plan may render the Citigroup § 403(b) plan to be non qualified, under IRC 403 (b)(12), and thus the Citigroup § 403 (b) plan can not be superimposed over the existing § 403(b) plan. Whether an ERISA and non ERISA § 403(b) plan can properly so coexist was not dealt with by the District Court.

The LMC § 403(b) Summary Plan Description (which is attached hereto in appellants Supplemental Appendix), which LoPresti only saw years after this litigation began, excludes many employees from being eligible to participate in the plan. Only unionized nurses, members of Union 1199, and certain security employees are eligible to enroll in the LMC §403(b) plan.

Under § 403(b) (12) of the Internal Revenue Code, lack of universal eligibility results in a plan failure. If a § 403(b) plan fails, there is no plan. The argument about the "same plan" made by Citigroup and the finding of the court below in its decision about the "same plan" presumes making

findings of fact which are improper as a basis for dismissal under F.R.C.P. 12(b)(6).

### **15. LoPresti's Fiduciary Status**

LoPresti clearly stated that he was a fiduciary in his complaint contrary to what Citigroup says, see ¶ 60 at A-118. Citigroup states that LoPresti did not assert fiduciary status of the LMC "new plan". Subject to proof, the existence of a "new plan" assumes that it is qualified as a "new plan". A reading of the eligibility restrictions of the "new plan" reveal that it may not be a qualified § 403(b) plan. If so, this results in a plan failure. All is subject to proof at trial of its existence. This involves a question of law that can only be resolved after findings of fact are made.

### **16. The § 401(k) and § 403(b) Plan**

Citigroup misstates LoPresti's argument by saying the LoPresti's fiduciary status with respect to the § 403(b) annuities he sold became an ERISA plan because of LMC's implementation of a § 401(k) plan, which converted the § 403(b) annuities into a plan governed by ERISA. Citigroup cites ¶¶ 48, 50, and 128 of the complaint for the proposition that LoPresti states that implementation of the § 401(k) plan converted the § 403(b) plan to an ERISA plan. However, LoPresti did not implicate the § 401(k) plan in these cited paragraphs.

Contrary to the foregoing statements made by Citigroup, LoPresti did not cite the implementation of the § 401(k) plan as causing the § 403(b) plan to become an ERISA plan.

In ¶ 48 of the complaint, LoPresti clearly stated that the LMC plan no longer met the requirements of ERISA Regulation § 2510.3-2 (f) and that by its actions the LMC § 403(b) non ERISA plan became an ERISA plan. It had absolutely had nothing to do with the establishment of a § 401(k) plan. See also ¶ 69 (A-123) LoPresti clearly sets forth the anti-discrimination rules of employee eligibility to participate in a § 403(b) plan which will result in a plan failure.

Contrary to the statement on page 14 that LoPresti did not allege that the Citigroup appellees had any involvement with the § 403(b) annuities that he sold, LoPresti clearly set forth throughout his complaint that the Citigroup appellees interfered with the annuities that he sold. Further, LMC's conduct in converting the non ERISA plan to an ERISA plan was as set forth in the complaint aided and abetted by all of the co-defendants.

### **17. The New Plan**

The conclusory statement that there is a "new plan" at LMC is arbitrarily stated by Citigroup to be a "new plan" but it does not resolve the issue of whether it a legal separate § 403(b) plan. Whether it is a legal plan and who the fiduciaries thereof are, are all questions of material facts that must be decided by the trier of the facts before the question of law with regard thereto can be resolved.

LoPresti certainly alleged the fact that LMC failed to comply with 29 C.F.R § 2510.3-2. In Citigroup's 4<sup>th</sup> point they cite two cases for the proposition that a program not previously governed by ERISA is not converted into an ERISA plan because the employer offers a new plan. *LaVenture v. Prudential* involved a corporate owner who had a disability

insurance policy that was not subject to ERISA. This is completely distinguishable from the issues involved in this matter.

**18. The Issues of the Questions of Fact Were Not Addressed by the Appellees**

All the foregoing issues involve resolutions of questions of material fact before the questions of law can be decided by a court. This was the thrust of LoPresti's appeal of the dismissal of his action under FRCP 12(b)(6).

Footnote 7 on page 16 is the only time that Citigroup addresses the issue of the substance of this appeal, with a broad brush statement, to the effect that LoPresti is wrong to contend that the District Court made findings of fact.

The foregoing failure by Citigroup made in two sentences in a footnote which cited no case law or any portion of the record, one can argue that Citigroup waived its challenge to the primary position taken by LoPresti on this appeal.

So as much as Citigroup argues about LoPresti's challenge to the dismissal of LoPresti's antitrust claim in ¶ B at page 16, LoPresti adopts this position against Citigroup for their failure to set forth their contentions and the reasons for them with citations to the authorities and parts of the record on which the appellee relies.

**19. LMC Agrees with LoPresti Regarding the Existence of Citistreet**

The LMC brief fully supports LoPresti's position on the existence of the defaulted defendant Citistreet.

## 20. Conclusion

For the reasons set forth herein and in LoPresti's brief, the decisions of the District Court should be reversed and the Complaint be reinstated so that this case can be decided on merits.

Dated: January , 2006  
Freeport, New York

Respectfully Submitted,



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## **SUPPLEMENTAL APPENDIX**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
Carmine A. Lopresti, Individually, and in his fiduciary capacity  
under the Employee Retirement Income Security Act of 1974,  
under the Lutheran Medical Center § 403(b) Tax Sheltered  
Annuity Plan,

Plaintiff-Appellant,

-against-

Citigroup Inc., Wendy Z. Goldstein, Miles H. Kucker, Allen  
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State Street Corp., Citistreet Associates, LLC, Citistreet Equities,  
LLC, Citistreet Financial Services, LLC, Travelers Insurance  
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Income Security Act of 1974, David A. Spina, Sanford I. Weill,  
Salomon Smith Barney, Inc., Citistreet, LLC.,

Defendants-Appellees,

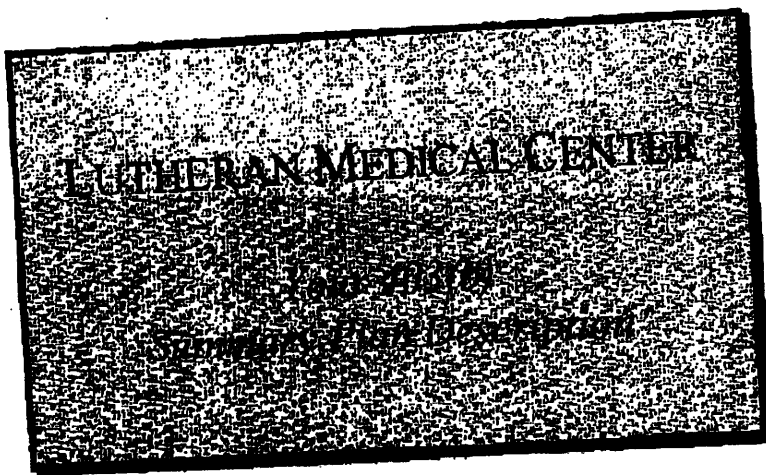
Citistreet, Copeland Associates, Inc.,  
Defendants.

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**LUTHERAN MEDICAL CENTER 403(b) RETIREMENT PLAN**

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***WHY WE HAVE THIS PLAN***

Retirement can be a special time, when lifelong hopes and dreams are realized. But to ensure that your retirement will be all that you want it to be, you need to begin planning for it now.

To live comfortably during your retirement years, it's important that you build a sound financial future. The Lutheran Medical Center 403(b) Retirement Plan (the "Retirement Plan" or the "Plan") is designed to help you, when combined with other savings, to have the funds you'll need for your retirement.

Saving for the future - especially for retirement - is something we know we should do, but often find difficult to get started. Finding any money to save can be a serious challenge.

Lutheran Medical Center and many of its related not-for-profit entities such as Lutheran Augustana Center for Extended Care and Rehabilitation, Health Plus, Shore Hill Housing, Shore Road Housing, Harbor Hill Housing, and Family Health Centers (collectively referred to as "LMC", "us" or "the Employer") provides this Plan as a means to help you save for your retirement.

This Plan is one way of our showing you that we value the important work that you do which helps us to meet our goals. We hope that this 403(b) Retirement Plan will be helpful to you in providing for your future.

***ABOUT CITISTREET***

We have retained CitiStreet Associates LLC, one of the nation's premiere personal retirement planning specialists, to provide administrative and investment services with respect to the Plan. CitiStreet Account Executives specialize in providing the retirement planning information you will need to understand how this Plan can help you. They will also help you decide which investments are more likely to secure a bright financial future for you.

This 403(b) Retirement Plan has many special tax and legal rules that you may sometimes find hard to understand. Sometimes, you may have a practical question about what you need to do to exercise your rights under the Plan. We want you to know that your CitiStreet Account Executive is ready to help answer your questions about the Plan. However, CitiStreet is *not* authorized to make any statement on behalf of LMC which retains legal responsibility for administering the Plan.

**LUTHERAN MEDICAL CENTER 403(b) RETIREMENT PLAN**

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Under current law, the money put into your Account will not be taxed until withdrawn, usually when you retire or, at your option, when you change employment. Distributions from the Plan will be fully taxable unless rolled over to a qualified plan of your new employer or an IRA.

***AM I ELIGIBLE TO PARTICIPATE IN THE PLAN?***

*Are all employees eligible to participate in the Plan?*

All Employees represented by the Federation of Nurses/UFT, or 1199 S.E.I.U. are eligible to participate in the Plan. Employees represented by the Special and Superior Officer Benevolent Association are not eligible unless grandfathered. No other Employees are eligible.

If you are eligible, you can begin making your own contributions immediately by meeting with the CitiStreet Account Executive to complete the required forms. He or she can be contacted at 718-630-7244.

*What if I'm not sure whether I'm eligible to participate?*

If you feel you may be eligible, and you want to enroll in the Plan, you should contact LMC's Benefits Manager who can assist you in determining your eligibility.

***HOW TO ENROLL IN THE PLAN***

*How do I sign up for the Plan?*

In order to make Salary Deferral Contributions you must meet with the CitiStreet Account Executive to complete the required forms. He or she can be contacted at 718-630-7244.

***PLAN CONTRIBUTIONS***

*Who contributes to this Plan?*

Contributions to the Plan can be made by you. We encourage you to make Salary Deferral Contributions so that your retirement savings are the most they can be. Your employer makes no contribution to the Plan.

*How much should I contribute?*

While it is generally wise to save for retirement and there is a tax incentive to contribute to a tax-deferred plan, this is a *personal decision*, and you will have to decide how much, if any, you should save.

**LUTHERAN MEDICAL CENTER 403(b) RETIREMENT PLAN****IDENTIFYING INFORMATION**

Here's some identifying information you may need to know about the Plan.

Name of Plan:	Lutheran Medical Center 403(b) Retirement Plan
Plan Identification Number (PIN):	002
Employer Identification Number (EIN):	11-3589771
Effective Date:	October 1, 2001
Name and address of Plan Sponsor and Plan Administrator:	Lutheran Health Care Retirement Plan Committee Lutheran Medical Center 150 55 <sup>th</sup> Street Brooklyn, New York 11220-2508 (718) 630-7280

Requests for information and legal claims of any kind (including service of legal process or a court order) are properly made when addressed to the Plan Administrator at the address shown above.

You may obtain a complete list of all Employers sponsoring the Plan by making a written request to the Plan Administrator. You also may examine this list at the office of the Plan Administrator.

The Plan Year is the calendar year.

**AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS PRIORITY OVERNIGHT**

**UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT**

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Carmine A. Lopresti, Individually, and in his fiduciary capacity under  
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Sanford I. Weill, Salomon Smith Barney, Inc., Citistreet, LLC.,  
Defendants-Appellees,

Citistreet, Copeland Associates, Inc.,  
Defendants.

-----X  
STATE OF NEW YORK: COUNTY OF NASSAU

THE UNDERSIGNED, GAYLE APPLE, BEING DULY SWORN, DEPOSES AND SAYS:  
DEPONENT IS NOT A PARTY TO THE ACTION, IS OVER 18 YEARS OF AGE  
AND RESIDES IN LONG BEACH, NEW YORK.

THAT ON THIS \_\_\_\_ DAY OF JANUARY 2006, I SERVED 2 COPIES OF THE  
ATTACHED REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR PLAINTIFF-APPELLANT  
TO THE CITY GROUP & LUTHERAN MEDICAL OPPOSITION UPON:

DAVID COVEY, ESQ.  
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David J. Lender, ESQ.  
Weil, Gotshal & Manges  
767 Fifth Avenue,  
New York, New York 10153

THE ADDRESS DESIGNATED BY SAID ATTORNEYS FOR THAT PURPOSE BY  
DEPOSITING A TRUE COPY OF SAME ENCLOSED IN A FED EX OVERNIGHT  
ENVELOPE INTO A FEDERAL EXPRESS PICKUP BOX BEFORE 5:30 PM

\_\_\_\_\_  
Gayle Apple

STATE OF NEW YORK: COUNTY OF NASSAU  
SWORN TO BEFORE ME THIS:

\_\_\_\_ DAY OF \_\_\_\_\_ 2006