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February 28, 2006

Via Federal Express

Roseann B. MacKechnie
Clerk of the Court
Court of Appeals, Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square Room 1803
New York, NY 10007

Re: Civ. No 05-0609-cv, LoPresti c. Citigroup, Inc.; United States District Court for the Eastern District of New York

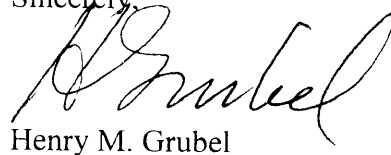
Dear Ms. MacKechnie:

Enclosed for filing in the above referenced matter are the original and four copies of the Appellant's Reply Memo of Law to the Lutheran Medical Center opposition to appellant's motion for leave to serve a 5 page supplemental appendix, plus a certificate of service.

Please file-mark the extra copy and return it to me in the enclosed self-addressed Fed Ex envelope. A copy of the enclosed is being provided to all counsel of record.

Thank you for your assistance in this matter.

Sincerely,



Henry M. Grubel

Cc: All counsel

05-0609 cv

**United States Court Of Appeals
For the Second Circuit**

LoPresti v. Citigroup, Inc.

On Appeal from the United States District Court

For the Eastern District of New York

Reply Memo of Law to the Lutheran Medical Center

Opposition to Appellant's Motion

For Leave to Serve A 5 Page Supplemental Appendix

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Attorney for the Appellant

The Lutheran Medical Center (LMC) and Citigroup appellees oppose the application by the appellant to supplement the record on appeal with a few pages of the LMC Summary Plan Description, (SPD), of its § 403(b) program.

The inclusion of a few relevant pages of the LMC SPD reveals that the eligibility requirements for employee participation in the LMC § 403 (b) plan are not universal, as required by the IRS. This can result in a “plan failure” under IRS guidelines. Appellant cited and set this forth in his second amended complaint, which was dismissed by the District Court.

Appellant came into possession of the SPD as a result of the assistance of the United States Department of Labor. This document was received by appellant in October 2004. It is reasonable to presume that the Citigroup and the LMC appellees were involved in the authoring and distribution of the SPD well before October 2004.

The contents of the SPD are consistent with issues raised in the second amended complaint and are clearly relevant to the proof of appellant’s case.

It is reasonable to question, that if the Citigroup and LMC appellees or the Buck appellees knew of the existence of the SPD, why they did not submit a copy thereof to the District Court when it first became available.

Appellant has no idea when the SPD was written and distributed. It is about seventeen pages in length and recites an effective date of October 1, 2001, which is well before the appellees' motions to dismiss under FRCP 12(b)(6) were brought.

We must also have produced by LMC the Plan Document, which is required by the IRS in this situation.

The Citigroup and LMC appellees are so resistant to having these few pages from the LMC SPD made part of the record, because the SPD provides documentary proof in support of appellant's case and shows that the dismissal was error.

In view of the foregoing, the question arises, as to why the appellees failed to submit the SPD to the District Court early on, so that the Court could have addressed the entire issue of the Court's "same plans" reasoning in its decisions.

In view of the requirement by IRS of universal eligibility under a § 403(b) plan, by definition an employer may not have more than one § 403(b) plan, for the plan to be qualified under the IRS rules and regulations.

THE CASES CITED BY LMC ARE NOT ON POINT

The cases cited by LMC in its opposition to the instant motion arose either after full trials had been had, or after summary judgment had been

granted. Obviously discovery would have been had in all the cases that LMC cited.

It is to be noted that none of the cases cited by LMC in support of its opposition arose after a dismissal under FRCP 12(b)(6), wherein no discovery of any sort has been held, which is the situation in this appeal. Thus it is respectfully submitted that none of the cited cases are relevant to this matter.

COURTS OF APPEAL HAVE INHERENT
EQUITABLE POWER TO SUPPLEMENT
THE RECORD ON APPEAL

“court has equitable power to supplement record” *Mills v. State of N.Y.* 2005 WL 1176103, *1 (S.D.N.Y.) (S.D.N.Y.,2005). Citing *Kennedy*, *infra*

“.....we recognize that a number of our sister circuits have held that the courts of appeals have the inherent equitable power to supplement the record on appeal, where the interests of justice require. *See United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir.2000)

“Under some circumstances, we have an inherent equitable power to supplement the record on appeal. *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir.1986);

“Although a court of appeals will not ordinarily enlarge the record to include material not before the district court, it is clear that the authority to do so exists.” *Gibson v. Blackburn*, 744 F.2d 403, 405 n. 3 (5th Cir.1984);

“[I]n the interest of justice, this court may order the record enlarged.” *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir.1970);

“In special circumstances, however, a court of appeals may permit supplementation of the record to add material not presented to the district court.” 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3956.4, at 349-51 (3d ed. 1999 & Supp.2003);

“In extraordinary situations, the circuit court may consider material not presented to the district court when it believes the interests of justice are at stake.” 20 *Moore's Federal Practice*, § 310.10[5] [f], at 310-19 (3d ed. 2000),

“...this court may supplement the record when necessary.” See *Prather v. Rees*, 822 F.2d 1418, 1420 n. 1 (6th Cir.1987).

“This court has held that when reviewing Rule 12(b) 6) motions, we will consider new factual allegations raised for the first time on appeal provided they are consistent with the complaint. A plaintiff may attempt to survive a Rule 12(b)(6) motion by adding essential new facts in a brief on

appeal *See Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir.1992);

“A plaintiff may present unsubstantiated factual allegations on appeal, “provided [they are] consistent with the complaint, to show that the complaint should not have been dismissed.” “This rule is necessary to give plaintiffs the benefit of the broad standard for surviving a Rule 12(b)(6) motion…” *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir.1992) as cited by *Highsmith v. Chrysler Credit Corp* 18 F.3d 434 (1994), *439-440 (C.A.7 (ILL), 1994).

“A plaintiff is “free on … appeal to give us an unsubstantiated version of the events,” provided it is consistent with the complaint, to show that the complaint should not have been dismissed. *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 915 (7th Cir.1985); accord *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir.1992). This rule is necessary to give plaintiffs the benefit of the broad standard for surviving a Rule 12(b)(6) motion as articulated in *Hishon*, 467 U.S. at 73, 104 S.Ct. at 2232, and *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).” As cited in *Dawson v. General Motors Corp.* 977 F.2d 369 (1992), *372 -373 (C.A.7 (Ill.),1992)

THE COMPLAINT'S FACTUAL ALLEGATIONS
ARE TAKEN AS TRUE

“The suit having been dismissed by the District Court for failure to state a claim, the complaint's factual allegations are taken as true.”

Leatherman v. Tarrant County Narcotics Intelligence and Coordination

Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161, 122 L.Ed.2d 517 (1993).

O'Hare Truck Service, Inc. v. City of Northlake 518 U.S. 712, *715, 116 S.Ct. 2353, **2355 (U.S.Ill.,1996)

“We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.”

See *United States v. Gaubert*, 499 U.S. 315, 327, 111 S.Ct. 1267, 1276, 113 L.Ed.2d 335 (1991).

ISSUES FIRST RAISED IN A REPLY BRIEF ARE
NOT WAIVED IN THE SETTING OF THE APPEAL
OF AN FRCP 12(B)(6) DISMISSAL

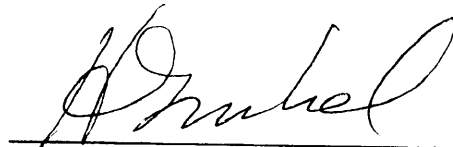
“In most circumstances a litigant who fails to raise an argument until his reply brief will be deemed to have waived that argument. *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir.1990). This case is before us, however, on a motion for dismissal pursuant to Rule 12(b)(6). The inquiry we are faced with is whether the plaintiff can prove any set of facts to support his allegation.” *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2

L.Ed.2d 80 (1957). As cited by *Highsmith v. Chrysler Credit Corp* 18 F.3d 434 (1994), *439-440 (C.A.7 (ILL), 1994).

For the reasons hereinabove and heretofore stated it is respectfully requested that appellant's motion to supplement the record on appeal be granted.

Dated: February 28, 2006
Freeport, New York

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
CARMINE A. LoPRESTI,

Appellant,

05-0609-cv

-against-

CERTIFICATE OF SERVICE

CITIGROUP, INC., et. al.

Appellees.

-----X

On February 28, 2006, counsel for the appellant, served the Reply Memo of Law to the Lutheran Medical Center Opposition to Appellant's Motion For Leave to Serve a 5 Page Supplemental Appendix, upon counsel for the appellees who have appeared in this action as follows. All were served two copies by Fed Ex standard overnight service:

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Attorneys for Buck Consultants; and Buck Consultants, Inc.

Dated: February 28, 2003
Freeport, New York



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