

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 SUMMARY ORDER
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6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS
8 OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS
9 OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A
10 RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL
11 OR RES JUDICATA.

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13 At a stated term of the United States Court of Appeals for the Second Circuit, held at the United
14 States Courthouse, Foley Square, in the City of New York, on the 23rd day of March, two
15 thousand and six.

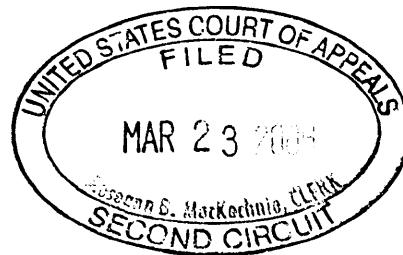
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17 PRESENT:

18 HON. PIERRE N. LEVAL,
19 HON. BARRINGTON D. PARKER,

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21 *Circuit Judges,*

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23 HON. WILLIAM K. SESSIONS III,*

24
25 *Chief District Judge,*
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28 Carmine A. LoPresti, Individually, and in his fiduciary capacity under the Employment
29 Retirement Security Act of 1974, under the Lutheran Medical Center § 403(b) Tax Sheltered
30 Annuity Plan,

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32 *Plaintiff-Appellant,*

33
34 SUMMARY ORDER
35 No. 05-0609-cv

36
37 v.

38 Citigroup Inc., Wendy Z. Goldstein, Miles H. Kucker, Allen Schechter, Howard Smith, William
39 D. Myhre, Don Goldstein, State Street Corp., Citistreet Associates, LLC, Citistreet Equities,
40 LLC, Citistreet Financial Services, LLC, Travelers Insurance Company, Buck Consultants, Buck
Consultants, Inc., Lutheran Medical Center, Mayda Casado, Jean Desjardins, Jim Wilson, Smith

* The Honorable William K. Sessions III, Chief United States District Court Judge for the District of Vermont, sitting by designation

1 Barney Corporate Trust Company, Individually, and in their fiduciary capacities under the
2 Employment Retirement Income Security Act of 1974, David A. Spina, Sanford I. Weill,
3 Salomon Smith Barney, Inc., Citistreet, LLC.,

4 *Defendants-Appellees,*

5 Citistreet, Copeland Associates, Inc.,

6 *Defendants.*
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9 For Plaintiff-Appellant: Henry M. Grubel, Freeport, NY.

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11 For Defendants-Appellees Citigroup and State Street: David J. Lender (Peter S. Hageman,
12 Gregory S. Coleman, Edward C. Dawson, *on the brief*); Weil Gotshal & Manges LLP, New
13 York, NY.

14
15 For Defendants-Appellees Buck Consultants and Buck Consultants, Inc.: David M. Covey;
16 Sedgwick, Detert, Moran & Arnold, LLP, New York, NY,

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18 For Defendants-Appellees Lutheran Medical Center, Wendy Z. Goldstein, Miles H. Kucker,
19 William D. Myhre, Allen Schechter, and Howard Smith: Michael H. Ference; Sichenzia Ross
20 Friedman Ference LLP, New York, NY.
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23 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND
24 DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

25 Plaintiff-Appellant, Carmine A. LoPresti ("LoPresti"), appeals from the January 18, 2005
26 and the April 18, 2005 judgments of the United States District Court for the Eastern District of
27 New York (Sterling Johnson, Jr., District Judge), dismissing LoPresti's claims pursuant to
28 Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). Familiarity with the record below and
29 issues on appeal is presumed.

30 We review a Rule 12(b)(6) dismissal *de novo*. *United States v. City of New York*, 359
31 F.3d 83, 91 (2d Cir. 2004). Dismissal under Rule 12(b)(6) is appropriate if "it appears beyond
32 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him
33 to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss a complaint

1 under Rule 12(b)(6), a court "must accept as true all of the factual allegations set out in plaintiff's
2 complaint, draw inferences from those allegations in the light most favorable to plaintiff, and
3 construe the complaint liberally." *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001).

4 The district court dismissed all of the plaintiff's federal claims under the Employment
5 Retirement Income Security Act ("ERISA") and the Racketeer Influenced and Corrupt
6 Organizations Act ("RICO"), as well as the antitrust claims under the Sherman Antitrust Act and
7 the Clayton Act ("antitrust claims"). The district court then declined to exercise supplemental
8 jurisdiction over the plaintiff's state law claims.

9 To recover on his ERISA claims, Appellant was required to establish that he was a
10 fiduciary of an ERISA plan and that he and the defendants were co-fiduciaries of the same plan
11 in which the violations are alleged to have occurred. *See* 29 U.S.C. § 1105(a); *Modern*
12 *Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000, 1014 (D.Conn. 1982). We agree with the district
13 court that "even if Plaintiff were found to be the fiduciary of some ERISA plan, his plans are not
14 the 'same plan[s]' as Defendants' § 403(b) and § 401(k) plans, as required by 29 U.S.C. §
15 1105(a)." Accordingly, the court below correctly dismissed Plaintiff's ERISA claims.

16 To prevail on his antitrust claims, Appellant would have to show an effect on the market
17 that could constitute an antitrust injury. *Balaklaw v. Lovell*, 14 F.3d 793, 797-98 (2d Cir. 1994).
18 The complaint failed to allege facts that could satisfy this requirement.

19 "To state a claim for damages under RICO, a plaintiff . . . must [allege]: (1) that the
20 defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of
21 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or
22 participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign

