05-0609 cv

United States Court of Appeals

For the Second Circuit

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,

v.

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.

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

BRIEF OF DEFENDANTS-APPELLEES BUCK CONSULTANTS AND BUCK CONSULTANTS, INC.

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PRELIMINARY STATEMENT

This is an appeal by the plaintiff-appellant Carmine A. LoPresti ("LoPresti") from a Judgment dated January 28, 2005, entered in the United States District Court for the Southern District of New York (A-85), based upon a Memorandum and Order dated January 18, 2005 (Johnson, J.) (A67-A83), granting defendants-appellees Buck Consultants, Inc. d/b/a Buck Consultants' ("Buck" or "Buck Consultants") motion to dismiss the Second Amended Complaint (the "Complaint") pursuant to Rule 12(b)(1) and Rule 12(b)(6), FED. R. CIV. P.

This brief is respectfully submitted on behalf of defendant-appellee Buck Consultants, in support of its opposition to the brief for plaintiff-appellant.

STATEMENT OF THE ISSUES

The issues before this Court are as follows:

1. Whether the District Court properly granted defendant-appellee Buck Consultant's motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) where plaintiff-appellant LoPresti failed to state any claim upon which relief can be granted against Buck? Buck submits that the District Court's Order was proper and should be affirmed.

2. Whether the District Court below acted within its discretion in declining to exercise supplemental jurisdiction over Lopresti's remaining state law claims after all federal causes of action were dismissed? Buck submits that the District Court acted within its discretion and its Order should be affirmed.

3. Whether the District Court acted within its discretion when it declined to permit LoPresti to amend the Second Amended Complaint? Buck submits that the District Court acted within its discretion in denying LoPresti's application, especially where he had previously been permitted to amend the original Complaint two times.

STATEMENT OF FACTS

According to the Complaint, the plaintiff, Carmine LoPresti, an insurance salesman, has been engaged in selling and servicing Internal Revenue Code (IRC) §403(b) annuity plans to Lutheran Medical Center ("LMC") employees since approximately 1976. (A-117). These were and are voluntary plans funded entirely by the employee. LMC plays no roll in administering these plans, providing only salary reduction services at the election of the employee. (A-120). The plaintiff was one of six "approved" vendors of such plans for which LMC provided salary reduction services. (A-117). None of the other vendors are involved in this action.

In mid-2001, LMC changed the retirement benefits offered to its employees, adopting the use of an IRC §401(k) plan. (A-121). As part of the overall change in retirement benefits, LMC, as of October 1, 2001, declined to provide salary reduction services for IRC §403(b) plans as offered by the plaintiff and others for new employees. (A-122,123). Subsequently, LMC declined to permit vendors of IRC §403(b) plans, including the plaintiff, onto its premises for the purposes of soliciting business. (A-122).

The only factual allegation contained in the Complaint as to Buck Consultants, Inc., is that Buck Consultants authored and/or co-authored certain documents that were provided by LMC to its employees describing the change in benefits being offered. (A-113,121,128). The Complaint contained no allegation that Buck

Consultants had any decision-making authority with regard to the benefits to be offered or the information to be distributed to LMC employees. The documents attached and incorporated into the Complaint that were allegedly drafted by Buck Consultants all appear over the signature or on the letterhead of LMC and do not provide any substantive analysis or discussion of the plaintiff's §403(b) plans. None of these documents sought to sell or offer variable annuities or other investment products on behalf of Buck Consultants.[1] None of these documents are addressed to the plaintiff. (A-121,213-228)

Based on these alleged facts, LoPresti alleged numerous causes of action against Buck Consultants and the other defendants: ERISA violations; Sherman and Clayton Act violations; RICO violations; New York General Business Law violations; New York Insurance Law violations; and various common law claims. The Complaint, however, failed to allege specific conduct by Buck Consultants to support any of the claimed causes of action. Accordingly, all claims against Buck Consultants were dismissed by the District Court.

[1] Although the Complaint asserted that Buck Consultants is in the business of selling insurance, investment, and retirement products (A-121), it did not assert that Buck Consultants engaged in the sale of any such products to LMC employees at any relevant time.

STANDARD OF REVIEW

A district court's dismissal for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6) is reviewed *de novo*. *Broder v. Cablevision Sys. Corp.*, No. 04-4932-CV, 2005 WL 1910275, at *5 (2d Cir. Aug 11, 2005); *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000).

A dismissal pursuant to FED. R. CIV. P. 12(b)(6) is appropriate where, even accepting the allegations contained in the complaint as true, it appears beyond a doubt that the plaintiff cannot prove facts in support of his complaint that would entitle him to relief. *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999); *see also Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997); *Lehman v. Kornblau*, 134 F. Supp.2d 281, 287 (E.D.N.Y. 2001) (citing *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999)(the court noted it "must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff."). The court must limit its consideration "to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Lehman*, 134 F. Supp. 2d at 287, quoting *Leonard F. v. Israel Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999); *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999).

SUMMARY OF ARGUMENT

The District Court properly dismissed the Complaint against Buck Consultants on the ground that it failed to state a claim upon which relief can be granted. There is no basis in law or fact for the ERISA, antitrust and RICO claims against Buck. LoPresti's brief amounts to nothing more than a recitation of principles of law combined with conclusory statements that he adequately pled the required elements of his claims.

Despite alleging fifteen (15) counts pursuant to which it seeks recovery, the Complaint failed to allege a single viable cause of action against Buck Consultants. Despite its self-serving characterization of the events surrounding LMC's change in retirement benefits, the Complaint entirely failed to assert that Buck Consultants played an active role in the alleged plot against the plaintiff so as to subject itself to liability. Buck Consultants was retained by LMC to provide consulting services with respect to the evaluation of its existing retirement benefits plan and with respect to potential plans to be offered to its employees in the future. At no relevant time did Buck Consultants have decision-making authority with respect to the retirement benefits to be offered by LMC to its employees. At no relevant time did Buck Consultants directly communicate on its own behalf with LMC employees. At no relevant time did Buck Consultants seek to sell investment, retirement or investment

products to either LMC or its employees. Thus, the Complaint failed to properly plead a single viable cause of action as to Buck Consultants.

POINT I

BUCK CONSULTANTS' MOTION TO DISMISS WAS PROPERLY GRANTED

A. The Standard For A Motion To Dismiss Pursuant To FRCP 12(b)(6)

A motion to dismiss under Rule 12(b)(6) should be granted where it appears beyond doubt that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). While a court should draw all reasonable inferences in favor of the plaintiff and should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief (*Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999)), "conclusions of law or unwarranted deductions of fact are not admitted" (*First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994), cert. denied, 513 U.S. 1079 (1995)).

In the instant matter, the Complaint failed to allege a single viable cause of action against Buck Consultants. In addition, LoPresti failed to demonstrate that any material fact was overlooked by the Court below in reviewing the instant matter. The District Court carefully and clearly recited the facts and law underlying its decision, which was amply supported by the record below. LoPresti has failed to raise any specific issue of fact sufficient to warrant reversal.

B. The District Court Properly Dismissed LoPresti's ERISA Claim

1. The Complaint Failed To Allege That Buck Consultants Was A "Co-Fiduciary" Of The Same Plan As Plaintiff

The District Court properly found that LoPresti failed to specify whether Buck was alleged to be a co-fiduciary of the same plan as LoPresti. Specifically, the Complaint alleged that Buck Consultants, as one of the defendants, has subjected the plaintiff to liability pursuant to 29 U.S.C. § 1105(a) as a co-fiduciary by breaching its responsibilities as an ERISA fiduciary with respect to the retirement benefits being offered to LMC employees. (A-137,138). For such an action to be viable, both the plaintiff and Buck Consultants must be co-fiduciaries of the same plan in which the violations are alleged to occur. *Modern Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000 (D. Conn. 1982). Specifically, and as the District Court pointed out, 29 U.S.C. § 1105(a) provides that:

> ... [A] fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104 (a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a) (emphasis added).

Thus, even taken as true, the Complaint alleges only that the plaintiff is an ERISA fiduciary with respect to the §403(b) plans sold by the plaintiff. (A-137). The Complaint contains no allegation that Buck Consultants is or was at any time a fiduciary with respect to that plan. Thus, the District Court properly found that LoPresti's vague allegation in the Complaint that "certain" defendants are co-fiduciaries was insufficient to support a specific claim against Buck Consultants, given that LoPresti failed to plead any facts to support the notion that Buck was a co-fiduciary of the same plan. Moreover, there is no allegation that Buck Consultants ever accepted any fiduciary responsibility with respect to any retirement plan mentioned in the Complaint. Accordingly, because the Complaint failed to allege facts sufficient to establish a necessary element of this cause of action as to Buck, the District Court properly dismissed this cause of action.

2. The District Court Correctly Found As A Matter Of Law That LoPresti's §403(B) Plan And The Citigroup Defendants' 403(B) And §401(K) Plans Are Not The Same Plans As Required By 29 U.S.C. §1105(A)

The District Court correctly found that LoPresti's §403(b) plan and the Citigroup defendants' §403(b) and §401(k) plans are not the same plans as required by 29 U.S.C. §1105(a). Therefore, LoPresti's ERISA claim was dismissed as he failed to state a cause of action upon which relief can be granted. In this regard, the District

Court pointed out that the plans at issue in the Complaint are LoPresti's plan, which is described as an ERISA §403(b) plan, and the Citigroup defendants' §403(b) and §401(k) plans. Importantly, the District Court noted that these plans cannot be the same plans because the primary concern expressed in the Complaint is that the Citigroup defendants' plans were different than LoPresti's plan. (A-78-79,119-120).

For instance, LoPresti alleges that "the sales materials ... distributed by the defendants to plaintiff's customers, failed to properly disclose and explain to plaintiff's customers the drawbacks of enrolling in, and participating in the defendants' §403(b) and §401(k) plans, as opposed to the plaintiff's§ 403(b) fixed annuity plan ... ." (A-121). LoPresti further alleges that "the defendants embarked on a campaign ... to misappropriate and co-opt plaintiff's §403(b) annuity business, by having his customers transfer their accumulated annuity account values ... into the defendants' § 401(k) and § 403(b) plans ..." and that "[t]he LMC DEFENDANTS have given the non-existent CITISTREET the exclusive right to personally market their new §403(b) products to the LMC employees." (A-122,124). In addition, LoPresti alleges that "the defendants ... are involved illegally [in selling] the annuities offered under the LMC §401(k) plan, the former §403(b) plan, or the new ERISA §403(b) plan at LMC," and that the "defendants are fraudulently misleading plaintiff's customers by telling them that the defendants' fixed §403(b) and/or §401(k)

plan annuities are the same as the fixed annuities written by the plaintiff, when it is not true." (A-127-128,130).

3. The Complaint Failed To Allege That Buck Assumed Fiduciary Responsibilities To Any Plan

The District Court correctly found that the Complaint failed to allege that Buck assumed fiduciary responsibilities as to any plan. While the Complaint alleged that certain defendants' breach of fiduciary duties occurred in part by distributing misleading literature, the literature Buck was allegedly consulted upon, by no means does this establish Buck as a fiduciary.

Merely authoring documents or providing advice on tax and benefits issues does not suffice to establish status as a fiduciary if the entity performing these tasks has no decision-making authority. *Bona v. Barasch*, 01 CV 2289, 2003 WL 1395932, *21 (S.D.N.Y. Mar. 20, 2003), citing *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1353 (11th Cir. 1998).

ERISA defines a fiduciary of an employee benefit plan as follows:

> A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

The Complaint failed to allege that Buck had any such discretionary or decision-making authority or control, and therefore failed to state a claim upon which relief may be granted. The dismissal was appropriate.

4. The Thrust Of LoPresti's Argument On Appeal, Which Is Simply That He Is A Fiduciary Of The LMC §403(B) Plan And That He May Be Liable Under ERISA As Such, Holds No Weight With Regard To Why The Complaint Was Dismissed

LoPresti dedicates a substantial part of his appellate brief towards attempting to convince the Court that a) he is a fiduciary of his LMC §403(b) plan, and b) that he is subject to liability under ERISA as a fiduciary (Appellants' brief, pp. 19-29). However, LoPresti incorrectly argues on appeal that the District Court erred in finding that LoPresti's §403(b) plan was not an ERISA plan, and that LoPresti was not a fiduciary of that plan. To the contrary, however, in the Memorandum and Order granting Buck's motion to dismiss, at footnote "3" therein, in no uncertain terms the Court stated as follows:

> The Court finds that it is not necessary to rule at the present moment on the question of whether Plaintiff's plans were, in fact, ERISA plans or whether Plaintiff was an ERISA fiduciary (Def.'s Repl. Mem. Supp. Mot. Dismiss at 2), because even granting these assumptions in favor of Plaintiff the point that is relevant here is that Defendant Buck is not alleged to be a co-fiduciary of the same ERISA plan.

(A-71).

In view of this, LoPresti's argument that the motion to dismiss should have been denied because there are questions of fact as to whether LoPresti's § 403(b) plan was an ERISA plan, and whether LoPresti was a fiduciary of that plan, is irrelevant. The District Court correctly found that these issues were not necessary to their determination that LoPresti failed to state a cause of action.

As the District Court correctly determined, even granting these issues in LoPresti's favor, no cause of action can be maintained because the Complaint still failed to allege that Buck is a co-fiduciary of the same plan. Moreover, as discussed in greater detail above, LoPresti's §403(b) plan and the Citigroup defendants' §403(b) and §401(k) plans are not the same plans as required by 29 U.S.C. §1105(a).

C. The District Court Properly Dismissed The Antitrust Claims Because, Even If Taken As True, The Complaint Failed To Allege Facts Sufficient To State A Cause Of Action

The District Court correctly dismissed the antitrust claims contained in Counts Two and Three of the Complaint because Buck was not competing with Lopresti or any other parties to the underlying action, and "[t]here can be no antitrust violation without a competitor ... ." *In Re European Rail Pass Antitrust Litigation*, 166 F. Supp. 2d 836, (S.D.N.Y. 2001).

Specifically, the Complaint failed to allege that Buck was in competition with Lopresti. Indeed, the Complaint alleged that Buck was not properly licensed to sell annuities by the NASD, SEC or NYSID. (A-113,128).

On appeal, LoPresti argues that he did allege that Buck Consultants was in competition with Lopresti by way of Buck's "counseling" and "meeting" with LoPresti's LMC clients, and that District Court Judge Johnson conceded this point. To the contrary, Judge Johnson stated correctly that "the Complaint at no point clearly states that Buck Consultants is counseling and meeting with Plaintiff's clients; in fact, it says specifically that Buck Consultants merely authored documents that other defendants utilized." (A-81). Only for the first time in opposition to Buck's motion to dismiss did LoPresti allege that Buck was "counseling" and "meeting" with LoPresti's LMC clients, and was therefore a competitor of LoPresti.

Moreover, the Complaint entirely failed to assert, as it must, an antitrust injury. *See, e.g.*, *S. O. Textiles Co., Inc. v. A& E Pros. Group*, 18 F. Supp.2d 232, 242 (E.D.N.Y. 1998). As Buck Consultants was not a competitor of any of the other parties to this action, and as LoPresti failed to allege an antitrust injury, the District Court correctly found that antitrust liability cannot lie.

D. <u>**The District Court Properly Dismissed The RICO Claim Because The Complaint Failed To Allege That Buck Consultants Committed Any Predicate Acts Through Participation In An Enterprise That Established A Pattern Of Racketeering**</u>

To properly state a RICO claim for damages under 18 U.S.C. § 1962(c), a plaintiff must establish "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7)

the activities of which affect interstate commerce or foreign commerce." *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 100 (2d Cir. 1990), cert. denied, *Syverson v. Summit Women's Center West, Inc.*, 510 U.S. 865 (1993); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). The District Court correctly found that LoPresti did not plead any facts regarding Buck Consultants' alleged involvement sufficient to constitute a pattern of racketeering activity involving two or more acts, since the only specific allegation as to Buck was that Buck authored certain documents issued on one occasion. For that reason, and the reasons that follow, the District Court's Order should be affirmed.

1. The Complaint Failed To Properly Allege A Pattern of Racketeering Activity

A "pattern of racketeering activity" requires proof: (1) that each defendant committed at least two predicate acts of racketeering activity within a ten-year period, 18 U.S.C. § 1961(5); (2) "that these racketeering predicates are interrelated; and (3) that they reveal continued, or the threat of continued, racketeering activity." *United States v. Diaz*, 176 F.3d 52, 93 (2d Cir. 1999) (citing *H.J., Inc.*, 492 U.S. at 236-39); *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 520 (2d Cir. 1994). The Complaint failed to state a cause of action as to Buck Consultants because it failed to allege that Buck committed any specific predicate acts. The Complaint further failed to allege a continued pattern or a threat of a continued pattern of racketeering activity.

2. The Complaint Failed to Allege Specific Predicate Acts Committed by Buck Consultants

The RICO allegations in the Second Amended Complaint consist solely of conclusory statements as to the "defendants." No specific predicate acts are asserted to have been committed by Buck Consultants individually. To the extent that LoPresti seeks to rely on the conclusory assertion that Buck drafted certain communications for LMC, the Complaint completely failed to assert that Buck Consultants knowingly or intentionally attempted to defraud anyone, least of all the plaintiff, using interstate mails or transmission facilities. Accordingly, the Complaint failed to properly plead this element of a RICO violation as to Buck Consultants. *See, e.g., Pinnacle Consultants, Ltd. v. Leucadia Nat. Corp.*, 101 F.3d 900 (2d Cir. 1996).

3. The Complaint Failed To Allege A Continuing Pattern Of Racketeering Activity By Buck Consultants

Although two predicate acts may, in some circumstances, be sufficient to establish a pattern of racketeering activity, "the requirements of relatedness and continuity prevent the application of RICO to isolated and sporadic criminal acts." *Diaz*, 176 F.3d at 93. As a result, a plaintiff must show that the racketeering predicates are "related" and amount to or pose a threat of "continuous" criminal activity. See *H.J., Inc.*, 492 U.S. at 239-40; *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 465-66 (2d Cir.1995), cert. denied, 518 U.S. 1017 (1996). The requirement of "continuity" may be either "closed-ended" or "open-

ended," referring either to "a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc.*, 492 U.S. at 241-42; *Diaz*, 176 F.3d at 93; *Feirstein v. Nanbar Realty Corp.*, 963 F. Supp. 254-59 (S.D.N.Y.1997). In the instant case, the Complaint asserted that the alleged racketeering activities "date from early to mid 2001" and threaten to continue into the future – thus attempting to assert "open-ended continuity." (A-150).

To establish open-ended continuity, a plaintiff must allege past criminal conduct coupled with a threat of future criminal conduct. *GICC Capital Corp.*, 67 F.3d at 466. To show that open-ended continuity exists, a plaintiff must allege that "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future" or "that the predicates are a regular way of conducting defendant's ongoing legitimate business." *Pier Connection, Inc. v. Lakhani*, 907 F. Supp. 72, 75-76 (S.D.N.Y. 1995)(quoting *H.J., Inc.*, 492 U.S. at 242-43); *Giannacopolous v. Credit Suisse*, 965 F. Supp. 549, 552 (S.D.N.Y. 1997); *Rini v. Zwirn*, 886 F. Supp. 270, 300 (S.D.N.Y. 1995). In addition, where the alleged scheme has a limited goal and is "inherently terminable," there is no open-ended continuity because no threat of continued racketeering activity exists. *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229 (2d Cir. 1999); *China Trust Bank of New York v. Standard Chartered Bank, PLC*, 981 F. Supp. 282, 287 (S.D.N.Y.1997); *Giannacopolous*, 965 F. Supp. at 552.

In the instant matter, the "scheme" alleged in the Complaint is on its face self-limiting and "inherently terminable." The only activity asserted in the Complaint is the activity comprised of LMC changing the retirement benefits package to be offered to its employees. This activity was accomplished during a single year and does not continue to the future. Even accepting the claims as true, it is only the effect of the "scheme" on the plaintiff that continues to the future, not the activity of the defendants. Thus, the Complaint failed to properly plead a threat of continued racketeering activity. *See Casio Computer Co., Ltd. v. Sayo*, 98 CV 3772, 2000 WL 1877516 (S.D.N.Y. 2000).

4. <u>The Complaint Failed To Properly Plead The Existence Of An "Enterprise"</u>

The United States Supreme Court has held that an "enterprise" is a "group of persons associated together for a common purpose or engaging in a common course of conduct . . . proved by evidence of an ongoing organization, formal or informal, and by any evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). "The enterprise is not the 'pattern of racketeering;' it is an entity separate and apart from the pattern of activity in which it engages." *Id.* at 583; *see also Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 348 (S.D.N.Y. 1998); *Moll v. U.S. Life Title Ins. Co. of N.Y.*, 654 F. Supp. 1012, 1031-32 (S.D.N.Y. 1987). Thus, a complaint must allege sufficient facts to demonstrate an enterprise which exists as a continuous structure separate and distinct from the

commission of the predicate acts alleged. *Casio Computer Co., Ltd. v. Sayo*, 98 CV 3772, 2000 WL 1877516 (S.D.N.Y. 2000); *Schmidt*, 16 F. Supp.2d at 350.

In the instant case, there are insufficient factual allegations to demonstrate an organized group with a chain of command directing the enterprise's actions on a continuing basis beyond the alleged fraudulent scheme or that the alleged enterprise would still exist if the alleged "predicate acts" were removed from the equation. *See Casio Computer Co., Ltd. v. Sayo*, 98 CV 3772, 2000 WL 1877516 (S.D.N.Y. 2000); *Ray v. Gen. Motors Acceptance Corp.*, 1995 WL 151852, at *3 (S.D.N.Y. 1995). Therefore, LoPresti failed to properly plead the existence of a RICO enterprise among the defendants.

5. The Complaint Failed To Properly Plead That Buck Consultants Participated In The Alleged Enterprise

The United State Supreme Court has stated that to "participate, directly or indirectly," in an alleged racketeering enterprise, one must have played a part in directing the affairs of that enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). As a result, a party is not liable under 18 U.S.C. § 1962(c) unless such party participated "in the operation or management of the enterprise itself." *Id.* at 185. Courts have found that the 'operation and management' test of *Reves* "is a very difficult test to satisfy." *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1090 (S.D.N.Y. 1996). Thus, the ruling in *Reves* spares from RICO liability those who are true "outsiders" of an alleged enterprise. *See Dep't of Econ.*

Dev. v. Arthur Andersen & Co., 924 F. Supp. 449, 465 (S.D.N.Y. 1996); *Amalgamated Bank of New York v. Marsh*, 823 F. Supp. 209, 219-20 (S.D.N.Y. 1993); *Morin v. Trupin*, 832 F. Supp. 93, 98 (S.D.N.Y. 1993); *Biofeedtrac Inc., v. Kolinor Optical Enter. & Consultants, S.R.L.*, 832 F. Supp. 585, 591 (E.D.N.Y. 1993).

There are no factual allegations in the Complaint that Buck Consultants either was in charge of decision-making for the alleged enterprise or was directing the affairs of the enterprise. Rather, the Complaint contained only the bald conclusion of law that all defendants were in control of the alleged enterprise. Such a lack of particularity is fatal to a plaintiff's complaint. In this Circuit, the "simple taking of directions and performance of tasks that are 'necessary and helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994). There is a great difference between having actual control over an enterprise and associating with an enterprise in ways that do not involve control. The former would result in liability under Section 1962(c); the latter would not. *Dep't of Econ. Dev.*, 924 F. Supp. at 466 ("providing important services to a racketeering enterprise is not the same as directing the affairs of an enterprise."); *Biofeedtrac, Inc. v. Kolinor Optical Enterprises & Consultants, S.R.L.*, 832 F. Supp. 585, 591 (E.D.N.Y. 1993) (dismissing RICO claim against an attorney whose role was limited to providing legal advice and services and whose substantial involvement did not constitute "operation and management"). Thus,

"[s]imply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result." *LaSalle Nat'l Bank*, 951 F. Supp. at 1090 (quoting *University of Md. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993).

Indeed, the United States District Court for the Southern District of New York dismissed RICO claims against consultants ("professional defendants") in a case similar to the case at bar where the complaint alleged only "that the professional defendants 'knowingly, intentionally or recklessly' assisted in effecting the Transactions, in rendering advice on the Transactions, and/or in preparing disclosures regarding the Transactions or the disclosures regarding Keene's asbestos liability." *Lippe v. Bairnco Corp.*, 96 CV 7600 218 B.R. 294 (S.D.N.Y. 1993). As in *Lippe*, the Complaint in the instant case failed to allege sufficient facts on which this Court could find that Buck Consultants had a part in directing the affairs of the alleged RICO enterprise. Thus, the RICO claim as to Buck Consultants was appropriately dismissed.

E. The District Court Correctly Declined To Construe Lopresti's Claims Against The Other Defendants Implicitly Against Buck

While LoPresti submits no argument or reasoning in support, he merely poses the question of whether the District Court correctly declined to construe his claims against the other defendants implicitly against Buck. It is respectfully submitted that the District Court was correct in its decision not to do so.

First, the Complaint failed to allege an agency theory of liability against Buck, and therefore, the allegations posed against the other defendants do not apply as against Buck. Likewise, the Complaint did not set forth any facts needed to prove the existence of an agent-principal relationship between Buck and any of the other defendants. The District Court correctly found that the result of finding an agency-principle relationship would be the imposition of liability upon the principal for acts of the agent, and not the imposition of liability upon the agent for acts of the principal.

In addition, the District Court correctly found that in cases involving claims of fraud, the Complaint may not rely upon blanket references to acts or omissions by all of the defendants, for each defendant named in the Complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged. *In Re Blech Securities Litigation*, 928 F. Supp. 1279, 1292-1293 (S.D.N.Y. 1996). Furthermore, the District Court appropriately pointed out that it would be illogical to construe every mention of the word "defendants" to include Buck because most of the allegations have nothing to do with Buck, and to do so would render much of the Complaint meaningless.

POINT II

THE DISTRICT COURT WAS WELL WITHIN ITS DISCRETION IN DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION OVER LOPRESTI'S REMAINING STATE LAW CLAIMS AFTER ALL FEDERAL CAUSES OF ACTION WERE DISMISSED

Supplemental jurisdiction over state court causes of action is left to the sound discretion of the district courts. *See Ametex Fabrics, Inc. v. Just In Materials, Inc.*, 140 F.3d 101, 105 (2d Cir. 1998) (citing *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994)). A district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). A district court will weigh and balance certain factors, including considerations of judicial convenience, economy and fairness to the litigants. *See Ametex Fabrics, Inc.*, 140 F.3d at 105 (citing *Purgess*, 33 F.3d at 138). Where the federal law claims are dismissed before trial, the balance of factors tilts in favor of declining supplemental jurisdiction over the remaining state law claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). The instant matter presented no reason to depart from the general rule, and the District Court herein was well within its discretion in declining to exercise supplemental jurisdiction over LoPresti's remaining state law claims. The case was in its infancy and the parties had conducted no discovery.[2]

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[2] Incidentally, the New York State Supreme Court previously addressed several of Mr. LoPresti's analogous state law claims in a separate litigation against another hospital,

POINT III

THE DISTRICT COURT PROPERLY DECLINED TO PERMIT LOPRESTI TO AMEND THE SECOND AMENDED COMPLAINT

LoPresti was permitted to amend the original complaint two times, initially on January 24, 2003, and then again on February 24, 2003. After Buck and the other defendants filed their motions to dismiss the Second Amended Complaint, and two years after he filed the Second Amended Complaint, LoPresti sought leave to file a Third Amended Complaint. The District Court pointed out that Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint after the first responsive pleading may be granted "when justice so requires," and it was within the Court's discretion to deny LoPresti's application. LoPresti failed to cite a single case or any authority to indicate that there is precedent for granting leave to amend under these circumstances. In addition, as the District Court discussed in its Order denying LoPresti's motion to amend the Second Complaint, "the proposed amendments do not significantly alter the substance of Plaintiff's accusations … ." (A-57).

On appeal, LoPresti quoted the following from Wright and Miller FPP §1357, "[a] wise judicial practice (and one that is commonly followed) would be to allow at

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at which time the Court dismissed Mr. LoPresti's causes of action for violation of General Business Law § 340 (the Donnelly Act), violation of Insurance Law § 2123 (b), tortious interference with contract, tortious interference with prospective contractual relations and/or economic advantage, and unfair competition and misappropriation of business. *See Lopresti v. Mass. Mut. Life Ins. Co.*, 798 N.Y.S.2d 710 (Sup.Ct. 2004).

least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the appellant actually can state a claim for relief." (Appellants' brief, p. 36). Here, LoPresti was allowed to amend the intial Complaint two times, and the District Court was well within its discretion to deny a third request, especially where the substance of the allegations contained therein were substantially the same.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the judgment appealed from be affirmed in all respects.

Dated: New York, New York
December 15, 2005

Respectfully Submitted,

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