

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

CARMINE A. LoPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

NOTICE OF MOTION TO  
DISQUALIFY  
MAGISTRATE JUDGE  
POHORELSKY

CITIGROUP, INC., et al.,

Defendants.

-----X

To: Attorneys for the defendants:

David Lender, Esq.  
Weil Gotshal and Manges, LLP  
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New York, NY 10153

Michael H. Ference, Esq.  
Sichenzia, Ross, Friedman & Ference LLP  
1065 Avenue of the Americas  
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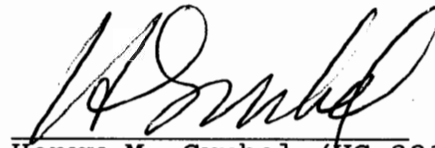
David Covey, Esq.  
Sedgwick, Detert, Moran & Arnold  
125 Broad Street, 39<sup>th</sup> Floor  
New York, N.Y. 10004

**PLEASE TAKE NOTICE** that upon the attached affidavit of the plaintiff and the Memorandum of Law, the plaintiff will move the Court on July 16, 2004, at 10:30 a.m., or as soon thereafter as counsel can be heard, before Magistrate Judge Viktor V. Pohorelsky, in the United States District Court, Eastern District of N.Y., at 225 Cadman Plaza East, Brooklyn, N.Y. 11201 to have Magistrate Judge Viktor V. Pohorelsky disqualify himself from presiding as the assigned Magistrate Judge in this action and to have another Magistrate Judge be assigned to hear this case all pursuant to 28 USCS §§ 144 and 455(b)(1).

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**PLEASE TAKE FURTHER NOTICE**, that pursuant to Local Rule 6.1(b) of the Eastern District of New York, answering papers, if any, shall be served within ten (10) business days after service of the papers herein. This notice is given without plaintiff conceding that any answering papers are appropriate herein.

Dated: Freeport, New York  
June 14, 2004



Henry M. Grubel (HG-3211)  
Henry M. Grubel, P.C.  
Attorney for Plaintiff  
37 Prospect Street  
Freeport, New York 11520  
516-623-4130

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

CARMINE A. LOPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

MOTION TO DISQUALIFY  
MAGISTRATE JUDGE  
POHORELSKY

CITIGROUP, INC., et al.,

Defendants.

-----X

Plaintiff moves the Court for an order pursuant to 28 U.S.C.S. §§ 144 and/or 455 to disqualify Magistrate Judge Viktor V. Pohorelsky and have him recuse himself as the Magistrate in this case, so as to have another Magistrate appointed in his place and stead.

This motion is made on the grounds, *inter alia*, that Magistrate Judge Viktor V. Pohorelsky has a personal bias and/or prejudice against plaintiff, and that his prior relationships with counsel for the defendants herein have an appearance of impropriety, all as more fully set forth in the attached affidavit of bias and prejudice of the plaintiff Carmine A. LoPresti, and plaintiff's attached Memorandum of Law.

Dated: Freeport, New York  
June 14, 2004



Henry M. Grubel (HG-3211)  
Henry M. Grubel, P.C.  
Attorney for Plaintiff  
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516-623-4130

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

CARMINE A. LOPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

AFFIDAVIT OF BIAS OR  
PREJUDICE AND CERIFICATE  
OF COUNSEL 28 USC §§ 144,  
and 455.

CITIGROUP, INC., et al.,

Defendants.

-----X

State of New Jersey)

ss.:

County of Monmouth)

CARMINE A. LOPRESTI, being duly sworn, deposes and states:

1. My name is Carmine A. Lopresti. I am over 18 years of age. I reside at 42 Stoney Brook Road in Holmdel, New Jersey. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts stated in this affidavit are true and correct, and my opinions are based upon the facts as stated herein.

2. I am the plaintiff in this matter. I make this affidavit in support of my motion to disqualify Magistrate Judge Viktor V. Pohorelsky from this case, on the basis of his personal bias and/or his prejudice against me; for his active advocacy on behalf of the defendants who have defaulted herein, before having held a hearing; and for his relationships with attorneys in each defense firm, including Judge Pohorelsky's former boss Otto G. Obermaier, Esq., who is now a member of the firm of Weil, Gotshal

and Manges LLP., attorneys for the defaulted defendants Citistreet and Copeland Associates, Inc.

3. This action lies in ERISA, RICO, Antitrust and various common law and statutory New York State claims.

4. Two of the defendants herein, CITISTREET, which is the target defendant herein, and COPELAND ASSOCIATES, Inc. defaulted in appearing.

5. On April 21, 2003 my lawyer served by overnight delivery, a motion with supporting papers for a default judgment against CITISTREET and COPELAND ASSOCIATES, Inc. It was received by counsel for the defendants on April 22, 2003.

6. On April 23, 2003 Judge Pohorelsky became the Magistrate Judge on my case. Prior to that time there had been three other Magistrates assigned to the case. According to the docket the first two assigned Magistrate Judges recused themselves.

7. There was no reason given on the docket as to why Judge Pohorelsky replaced the then assigned Magistrate Judge Pollack. The docket as of June 7, 2004 is annexed hereto and made a part hereof, (as are all the exhibits), as Exhibit 'A'. It shows that there have never been any conferences or discovery in this case.

8. The only defense firm that opposed my motion for a default judgment against Citistreet and Copeland, was the law firm of Weil, Gotshal and Manges LLP.

9. The opposition mounted by Weil, Gotshal and Manges LLP to my motion for a default judgment was based on their allegations that Citistreet and Copeland were non-existent, non-cognizable legal entities, not subject to the jurisdiction of this court.

10. In support of my motion for a default judgment, my attorney Henry Grubel, alleged that Citistreet was a joint venture and that Copeland was a de facto corporation, both being legal entities subject to the jurisdiction of this court.

11. On May 28, 2003, Judge Pohorelsky ordered that he would hold a hearing on July 7, 2003 at 10:30 a.m., on my motion for a default judgment, because my motion had been referred to him for a report and recommendation. The order provided that only my attorney and counsel for the parties opposing the motion attend. See Exhibit 'B'.

12. My lawyer issued numerous subpoenas and made extensive preparations for the hearing. However, they proved to be an exercise in futility. The hearing that Judge Pohorelsky had ordered never took place. The ordered 'hearing' was nothing more than a thirty minute proceeding wherein Judge Pohorelsky excoriated and belittled my motion for a default judgment.

13. A transcript of the July 7, 2003 proceeding is annexed hereto as Exhibit 'C'.

14. Judge Pohorelsky's bias and prejudice against me, and his advocating on behalf of Weil, Gotshal and Manges LLP, and the

defaulting defendants is clearly reflected on a reading of the transcript of the proceeding. Some of Judge Pohorelsky's statements taken therefrom follow:

*'I've reviewed your papers and, Mr. Grubel, I don't understand what it is you think you're going to accomplish by this motion. The defendants, it seems to me, have made a pretty convincing factual showing that CITISTREET' --- there is no CITISTREET regardless of what the advertisements may say.'* 2/16

*'---There seems to be a clear line of facts showing that Copeland Associates Inc.----- doesn't exist. So I don't understand why you're going through this rigmarole.'* 2/24

*'-----there is no Copeland Associates, Inc.'* 3/24

*'I don't know. I have the distinct impression that you're just playing games, Mr. Grubel.'* 5/14.

*'There is no company named CITISTREET'.* 7/23

*'That's not what the law really allows, to play games with names like this in order to go after somebody else.'* 8/9

*'... You're just trying to - you're just fooling around with words. You're just playing games is what you're doing.'* 8/23

15. It is clear from reading the transcript that the judge was not conducting a hearing on the issues presented. The transcript shows that Judge Pohorelsky had pre-judged the issues. The Judge's mind was already made up in opposition to me from the very start. In addition he actively advocated that Citistreet and Copeland were non existent. Judge Pohorelsky took no evidence on the issue of their existence. The Judge's tone of voice was

consistent with his advocating more than once that my lawyer was just playing games, and that "there is no company named Citistreet" and "there is no Copeland Associates, Inc."

16. The Judge did not hold the hearing he himself had ordered, and he did not advise my lawyer about this in advance. Judge Pohorelsky would not hear or accept any of the evidence from my attorney showing that Citistreet is a joint venture, and that Copeland was a de facto corporation.

17. As seen in the transcript, what was supposed to have been a hearing on my motion for a default judgment, became a forum wherein Judge Pohorelsky advocated, and performed the heavy lifting on behalf of the defaulted defendants, and their attorneys Weil, Gotshal and Manges LLP, in opposition to my motion for default judgments against Citistreet and Copeland.

18. I learned early on in this case that Judge Pohorelsky knew Ping Moy, Esq. Both Judge Pohorelsky and Ping Moy, Esq. served together as Assistant United States Attorneys in the Southern District of New York at the same time.

19. Mr. Moy is now employed as the V.P. and General Counsel for the co-defendant Lutheran Medical Center. Judge Pohorelsky denied my informal letter request dated May 5, 2003, to recuse himself on account of his prior relationship with Ping Moy, Esq. in a decision dated May 16, 2003. See Exhibit 'D'.

20. I just recently learned, about Judge Pohorelsky's

previous relationships with two of the attorneys in the two other defense firms in this case.

21. Maria Orecchio, Esq., served as a judicial intern for Judge Pohorelsky. She is currently employed as an associate in the law office of Sedgwick, Detert, Moran, and Arnold LLP, which is the firm representing the co-defendants, Buck Consultants.

22. As previously stated however, neither the Lutheran Medical Center defendants nor Buck Consultants opposed my motion for a default judgment against Citistreet and Copeland. To the contrary, counsel for Lutheran Medical Center, Sichenzia, Ross, Friedman and Ference LLP, has agreed with me on the record herein, in its motion papers under Rule 12(b)(6), that Citistreet is indeed a joint venture.

23. I also just learned that Otto G. Obermaier, Esq., is a member of the firm of Weil, Gotshal and Manges LLP. Judge Pohorelsky served from 1984 until 1991 as an Assistant United States Attorney in the Southern District of New York. He became Mr. Obermaier's Deputy Chief of the Criminal Division in 1989, when Mr. Obermaier became the United States Attorney for the Southern District of New York.

24. Judge Pohorelsky allowed Weil, Gotshal and Manges LLP, to appear on behalf of the defendants who are in default. It was inferred by the Judge and Weil, Gotshal and Manges LLP, that the defaulted defendants would be the beneficiaries of a dismissal,

should the court grant the pending motions by the co-defendants made under F.R.C.P. 12(b)(6), thus making their defaults moot.

25. On April 16, 2003, (see Exhibit 'E') my application to the Clerk of the Court to have him note the defaults of Citistreet and Copeland on the court's docket has not even been docketed on the Court docket. My application therefore was referred to Magistrate Judge Mann by Judge Sterling Johnson, Jr., the District Court Judge assigned to this matter. See docket entry number 47 of Exhibit 'A'. We have never heard from Judge Mann. The Weil firm addressed its objections to the entry of the default on the docket to Judge Pohorelsky, even though the issue had been referred to Judge Mann.

26. It is my understanding that a default judgment may not be obtained unless the Clerk of the Court has noted the default on the docket. Robert C. Heinemann, the Clerk of this Court has refused to note the defaults. See Exhibit 'F'. I do not know if Judge Pohorelsky had anything to do with the Clerk's refusal to note the defaults of the defendants Citistreet and Copeland Associates, Inc., however the Clerk's actions are consistent with what Judge Pohorelsky said at the July 7, 2003 proceeding.

27. Based upon the above stated facts it is my opinion that:

a. An impartial hearing, on the merits, was not and/or will not be held on the issues raised by my motion for a default judgment if Judge Pohorelsky presides;

b. Judge Pohorelsky has shown no impartiality or objectivity herein.

c. Judge Pohorelsky is hopelessly biased and prejudiced against me and in favor of Citistreet and Copeland Associates, Inc.

d. I will not get a fair and impartial disposition of my case if Judge Pohorelsky remains as the assigned Magistrate Judge on this case.

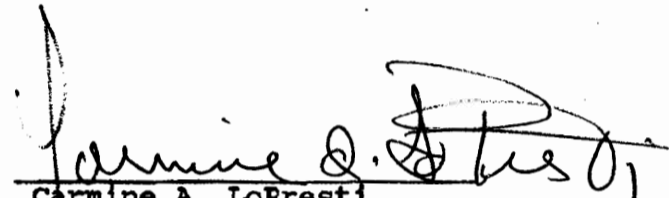
e. The actions of Clerk's office have prejudiced my ability to obtain a default judgment.

f. The co-defendants' pending motions under F.R.C.P. 12(b)(6), will be granted, in order to protect Citistreet and Copeland from the consequences of their defaults herein.

g. Due to the timing of his assignment and Judge Pohorelsky's prior and/or present relationship with Weil, Gotshal and Manges LLC, I believe that the Judge has expressed his bias and prejudice against me and in favor of the defendants in default herein.

28. I respectfully submit that under the circumstances herein Judge Pohorelsky should properly recuse himself from being the Magistrate Judge in this matter.

Subscribed and sworn to  
this 14 day of June 2004.

  
Carmine A. LoPresti

SUBSCRIBED and SWORN TO BEFORE ME

THIS 14<sup>th</sup> DAY OF JUNE 2004



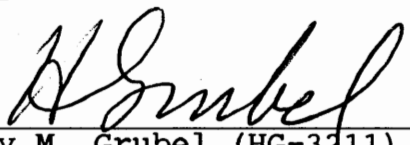
JENNIFER H. JOHNSON-HENRY  
Notary Public - New Jersey  
Monmouth County  
My Commission Expires May 13, 2008

CERTIFICATE OF COUNSEL

As required by the provisions of Section 144 of Title 28 of the United States Code, I, as counsel of record for Carmine A. LoPresti, certify that this affidavit of prejudice is submitted in good faith and not for purposes of delay.

Dated: June 15, 2004  
Freeport, New York

Henry M. Grubel, P.C.

By:   
Henry M. Grubel (HG-3211)  
Attorney for plaintiff

**EXHIBIT 'A'**

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"Be among the first to know" of any new developments in this case.  
Automatically **TRACK** the docket shown below.

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## Online Docket Sheet

CourtLink obtained this docket from the court on 7/18/2003.  
If you need an updated version click [Update](#). (\$4.00 charge applies)

Documents for this case may be available online.  
By updating the case, we will be able to determine if documents are available.

### US District Court Civil Docket

US District Court for the Eastern District of New York  
(Brooklyn)

1:02cv6492

Lopresti v. Citigroup, Inc et al

This case was retrieved from the court on Friday, July 18, 2003

Date Filed: 12/11/2002	Class Code: ECF
Assigned To: Judge Sterling Johnson Jr	Closed: No
Referred To: Magistrate Judge Viktor V Pohorelsky	Statute: 29:1132
Nature of suit: ERISA (791)	Jury Demand: Plaintiff
Cause: E.R.I.S.A.-Employee Benefits	Demand
Lead Docket: None	Amount: \$100,000,000
Other Docket: None	
Jurisdiction: Federal Question	

#### Litigants

Carmine A Lopresti, Individually, and in His  
Fiduciary Capacity Under the Employee  
Retirement Income Security ACT of 1974,  
Under the Lutheran Medical Center S 403(B)  
Tax Sheltered Annuity Plan  
PLAINTIFF

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v.

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Copeland Associates, Inc, Individually, and in  
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Date	#	Proceeding Text
12/11/2002	 <u>1</u>	COMPLAINT against Buck Consultants, Buck Consultants, Inc., Mayda Casado, Citigroup, Inc., Citistreet, Citistreet Associates, LLC, Citistreet Equities, LLC, Citistreet Financial Services, LLC, Citistreet Incorporated, Copeland Associates, Inc., Jean Desjardins, Don Goldstein, Wendy Z. Goldstein, Miles H. Kucker, Lutheran Medical Center,, William D. Myhre, Allen Schechter, Howard Smith, Smith Barney Corporate Trust Company, State Street Corporation, Travelers Insurance Company, Jim Wilson ( Filing fee receipt number 8131.) , filed by Carmine A. LoPresti. (Attachments: # 1 Civil Cover Sheet)(Bowens, Priscilla) (Entered: 12/12/2002)
12/23/2002	<u>2</u>	Letter from Henry M. Grubel, Esq. to Judge Johnson dated 12/17/02 enclosing printouts of the statutes, and regulations cited in the complaint. Also enclosed is a hard copy of the complaint and extra copy of the exhibits. (enclosures attached). (Fernandez, Erica) (Entered: 12/23/2002)
12/30/2002	<u>4</u>	Consent to Electronic Case Filing, by counsel for the plaintiff. (Sica, Michele) (Entered: 01/24/2003)
01/06/2003	 <u>3</u>	COMPLAINT against all defendants ( Filing fee receipt number 008131.) Summons Issued, filed by Carmine A. LoPresti.(Grubel, Henry) (Entered: 01/06/2003)
01/24/2003	<u>5</u>	AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR DAMAGES against Buck Consultants, Buck Consultants, Inc., Mayda Casado, Citigroup, Inc., Citistreet, Citistreet Associates, LLC, Citistreet Equities, LLC, Citistreet Financial Services, LLC, Citistreet Incorporated, Copeland Associates, Inc., Jean Desjardins, Don Goldstein, Wendy Z. Goldstein, Miles H. Kucker, Lutheran Medical Center,, William D. Myhre, Allen Schechter, Howard Smith, Smith Barney Corporate Trust Company, State Street Corporation, Travelers Insurance Company, Jim Wilson , filed by Carmine A. LoPresti.(Fernandez, Erica) (Entered: 02/03/2003)
01/24/2003	<u>6</u>	WAIVER OF SERVICE Returned Executed by Citistreet Associates, LLC. waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/05/2003)
01/24/2003	<u>7</u>	WAIVER OF SERVICE Returned Executed by Travelers Insurance Company. Waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/06/2003)
01/24/2003	<u>8</u>	WAIVER OF SERVICE Returned Executed by Miles H. Kucker. Waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/06/2003)
01/24/2003	<u>9</u>	WAIVER OF SERVICE Returned Executed by Don Goldstein. Waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/06/2003)

- 01/24/2003 10 WAIVER OF SERVICE Returned Executed by Mayda Casado. Waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/06/2003)
- 01/24/2003 11 WAIVER OF SERVICE Returned Executed by Jean Desjardins. Waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/06/2003)
- 01/24/2003 12 WAIVER OF SERVICE Returned Executed by Buck Consultants, Inc.. Waiver sent on 12/16/2002, answer due 2/14/2003. (Fernandez, Erica) (Entered: 02/06/2003)
- 01/24/2003 13 WAIVER OF SERVICE Returned Executed by State Street Corporation. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 14 WAIVER OF SERVICE Returned Executed by Buck Consultants. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 15 WAIVER OF SERVICE Returned Executed by Howard Smith. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 16 WAIVER OF SERVICE Returned Executed by Lutheran Medical Center,. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 17 WAIVER OF SERVICE Returned Executed by Wendy Z. Goldstein. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 18 WAIVER OF SERVICE Returned Executed by Allen Schechter. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 19 WAIVER OF SERVICE Returned Executed by William D. Myhre. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 20 WAIVER OF SERVICE Returned Executed by Citigroup, Inc.. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 21 WAIVER OF SERVICE Returned Executed by Smith Barney Corporate Trust Company. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 22 WAIVER OF SERVICE Returned Executed by Jim Wilson. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 23 WAIVER OF SERVICE Returned Executed by Citistreet Equities, LLC. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 24 WAIVER OF SERVICE Returned Executed by Citistreet Financial Services, LLC. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 01/24/2003 25 WAIVER OF SERVICE Returned Executed by Citistreet. Waiver sent on 12/16/2002, answer due 2/14/2003. (Sica, Michele) (Entered: 02/06/2003)
- 02/12/2003  26 Interoffice Memorandum dated Feb. 12, 2003 from M.J. Levy recusing himself from this case. (Vaughn, Terry) (Entered: 02/12/2003)
- 02/13/2003 -- Mag. Judge Roanne L. Mann added. Mag. Judge Robert M. Levy no longer assigned to case. Chambers advised by e'mail. (Vaughn, Terry) (Entered: 02/13/2003)
- 02/18/2003  -- Mag. Judge Roanne L. Mann has recused herself and is no longer assigned to case. Mag. Judge Cheryl L. Pollak added. Chambers notified by e'mail. (Vaughn, Terry) (Entered: 02/18/2003)
- 02/20/2003 29 AFFIDAVIT of Service for Summons and Amended Complaint served on CitiStreet on 02/05/03, filed by Carmine A. LoPresti. (Sica, Michele) (Entered: 02/25/2003)

- 02/20/2003 30 AFFIDAVIT of Service for Summons and Complaint served on Copeland Assoc. N/K/A CitiStreet on 02/07/03. filed by Carmine A. LoPresti. (Sica, Michele) (Entered: 02/25/2003)
- 02/21/2003 27 STIPULATION AND ORDER directing that Defts shall have until 3/14/03 to answer or otherwise plead in response to Pltf's Amended Complaint, filed and served on all counsel on 1/24/03; It is further stipulated and agreed that the undersigned defts and their attorneys will not contest the service of Pltf's complaint and amended complaint. Signed by counsel for parties and so ordered by Judge Sterling Johnson Jr. on 2/5/03. (Fernandez, Erica) (Entered: 02/21/2003)
- 02/24/2003  28 AMENDED COMPLAINT 2nd Amended Complaint against all defendants, filed by Carmine A. LoPresti.(Grubel, Henry) (Entered: 02/24/2003)
- 03/11/2003 31 AFFIDAVIT of Service for Second AMended Summons & Complaint served on Citistreet as a Corporation on 02/24/03, filed by Carmine A. LoPresti. (Sica, Michele) (Entered: 03/13/2003)
- 03/11/2003 32 AFFIDAVIT of Service for 2nd Amended Summons & Complaint served on David Spina on 02/24/03, filed by Carmine A. LoPresti. (Sica, Michele) (Entered: 03/13/2003)
- 03/11/2003 33 AFFIDAVIT of Service for Summons & Complaint served on Copeland Associates n/k/a Citi Street on 02/25/03, filed by Carmine A. LoPresti. (Sica, Michele) (Entered: 03/13/2003)
- 03/11/2003 34 AFFIDAVIT of Service for Summons & Complaint served on Sanford I. Weill on 02/24/03, filed by Carmine A. LoPresti. (Sica, Michele) (Entered: 03/14/2003)
- 04/18/2003 36 Letter dtd 04/10/03 from David Lender to August Marzilliano, writing to provide an explanation as to the reasons for the numerous joint stipulations filed by the parties agreeing to extend the date on which the defendants are required to answer or otherwise move against the plaintiffs' complaint (Sica, Michele) (Entered: 04/22/2003)
- 04/21/2003 35 ENDORSED ORDER, The request for a 5 page extention on Judge Johnson's twenty page limitation is GRANTED . Signed by Judge Sterling Johnson Jr. on 04/03/03. (Sica, Michele) (Entered: 04/21/2003)
- 04/22/2003 38 STIPULATION AND ORDER by and among the attorneys for Defendants and Plaintiff, the Defendant shall have until 03/28/03 to answer or otherwise plead in response to Plaintiff's second amended complaint, filed and served on all counsel on 02/21/03.. Signed by Judge Sterling Johnson Jr. on 03/11/03. (Sica, Michele) (Entered: 04/29/2003)
- 04/23/2003 -- Case reassigned to Judge Viktor V. Pohorelsky. Judge Cheryl L. Pollak no longer assigned to the case. Parties notified. (Bowens, Priscilla) (Entered: 04/28/2003)
- 04/24/2003 37 Letter dated 4/21/03 from Henry M. Grubel to Counsel enclosing a motion for an order for entry of a final judgment against the dft Citistreet, and referral of this matter to a jury for the sole purpose of assessing damages, and for a default judgment as against the dft Copeland Associates, Inc. (Noh, Kenneth) (Entered: 04/24/2003)
- 04/29/2003 39 STIPULATION by and among the attorneys for defendants and attorneys for Plaintiffs, that defendant shall have until 04/11/03 to answer or otherwise plead in response to plaintiff's second amended complaint, filed and served on all counsel on 02/21/03 filed by Citigroup, Inc., State Street Corporation. (Sica, Michele) (Entered: 04/29/2003)
- 04/29/2003 50 MOTION to Dismiss all claims against Buck Consultants, Inc. d/b/a Buck Consultants (supporting papers attached) by Buck Consultants, Buck Consultants, Inc.. (Fernandez, Erica) (Entered: 05/19/2003)
- 04/30/2003 40 Letter dated 4/22/03 from Henry M. Grubel to David Lender, Michael Ference and David Covey enclosing the electronic form of the motion for a final

- judgment against the defendant Citistreet and a default judgment against Copeland Associates, Inc. (Black, Amanda) (Entered: 04/30/2003)
- 05/01/2003 41 STANDARD REFERRAL ORDER: The civil case here in above set forth is referred to Mag. Pohorelsky for the following pretrial purpose: Motion for default judgment as to defts. Signed by Judge Sterling Johnson Jr. on 4/23/03. (Fernandez, Erica) (Entered: 05/01/2003)
- 05/01/2003 43 Letter from Henry M. Grubel to Counselors dated 4/22/03 enclosing the electronic form of the motion for a final judgment against deft Citistreet and a default judgment against Copeland Associates. (enclosures not attached) (Fernandez, Erica) (Entered: 05/02/2003)
- 05/02/2003 42 Letter dated 4/28/2003 from Michael H. Ference to Counsel enclosing a copy of LMC defts' Notice of Motion and Memorandum of law in Support of their Motion to Dismiss the Second Amended Complaint. (w/o encl.)(Barrett, Charryse) (Entered: 05/02/2003)
- 05/05/2003 44 STIPULATION AND ORDER by and among attorney's for defendant's, the defendant's shall have until 04/28/03 to answer or otherwise plead or move to respond to plaintiff's second amended complaint, filed and served on all counsel on 02/21/03. Signed by Judge Sterling Johnson Jr. on 04/10/03. (Sica, Michele) (Entered: 05/05/2003)
- 05/06/2003 45 Letter dtd 04/30/03 from Michael H. Ference to Counsel. enclosing a copy of the LMC defendants' Rule 7.1 statement. (enclosure not attached). (Sica, Michele) (Entered: 05/06/2003)
- 05/06/2003 46 Letter from Henry M. Grubel to Counselors. enclosing Plaintiff's notice of motion for an order under FRCP 54 for an order of entry of final judgment. (enclosure not attached). (Sica, Michele) (Entered: 05/06/2003)
- 05/07/2003 47 STANDARD REFERRAL ORDER (rec'd for docketing 5/7/03) referring to Mag Mann the request to enter default as against Citistreet and Copeland. Signed by Judge Sterling Johnson Jr. on 4/16/03. (Fernandez, Erica) (Entered: 05/07/2003)
- 05/13/2003 48 Letter from David Lender to Judge Johnson Regarding Judge Johnson's rules, the submission of this cover letter and are concurrently serving upon Plaintiff and our Co-defendant, Defendant's Memorandum of Law in Support of Opposition to plaintiff's Motion for Default Judgment Against "Copeland Associates" and citistreet. (Sica, Michele) (Entered: 05/13/2003)
- 05/14/2003 49 Letter from David Lender to Judge Johnson Regarding the submission of Defendant's Memo of Law in Support of Opposition to Plaintiff's Motion for default. as per Judge Johnson's rules. (Sica, Michele) (Entered: 05/14/2003)
- 05/19/2003 51 Letter dtd 05/05/03 from Henry M. Grubel to Judge Pohorelsky. requesting the Magistrate Pohorelsky recuse himself as the Magistrate in this case. (Sica, Michele) (Entered: 05/19/2003)
- 05/21/2003  52 ORDER: Decision By letter dtd 05/05/03, the plaintiff's counsel has informally requested a recusal in this action to avoid an appearance of bias or impartiality. . Signed by Judge Viktor V. Pohorelsky on 05/16/03. (Sica, Michele) (Entered: 05/21/2003)
- 05/22/2003  53 MOTION for Default Judgment as to Citistreet & Copeland Assoc by Carmine A. LoPresti. (Attachments: # 1 mot for def judgmt# 2 P's aff in support# 3 p's memo of law# 4 trans ltr to defs# 5 tran ltr to judge johnson# 6 P's reply affid# 7 cert of service of reply# 8 p's supplemental reply# 9 proposed order# 10 P's ltr to Judge re supp reply)(Grubel, Henry) (Entered: 05/22/2003)
- 05/22/2003  54 MOTION for Default Judgment as to Citistreet & Copeland Assoc. by Carmine A. LoPresti. (Attachments: # 1 Dughi aff in opposition# 2 memo of law in opposition# 3 wgm trans ltr to judge# 4 wgm trans ltr to mag)(Grubel, Henry) (Entered: 05/22/2003)
- 05/23/2003  55 MOTION for Default Judgment as to Citistreet & Copeland Assoc. Inc. by Carmine A. LoPresti. (Attachments: # 1 Part-2 P's Exhibits to Mot for default

- judgment# 2 Part -3 P's Exhibits to Motion for Default Judgment# 3 Part-4 P's Exhibits to mot for default judgment# 4 Part-1 Exhibits to P's reply papers# 5 Part-2 Exhibits to P's reply papers# 6 Part-3 Exhibits to P's Reply papers# 7 P's exhibits to supplemental reply)(Grubel, Henry) (Entered: 05/23/2003)
- 05/27/2003 [56](#) Letter dtd 04/02/03 from Kimberly S. Penner to August Marzilliano. Buck Consulatan, hereby joins in our co-defendants' request, by letter dtd 04/01/03, of a five page extention on Judge Johnson's twenty (20) page limitation on Memorandum of Law. (Sica, Michele) (Entered: 05/27/2003)
- 05/27/2003 [57](#) Letter dtd 04/29/03 from Kimberly S. Penner to Judge Johnson & Magistrate Pollak. Notifying the court that on 04/28/03 a Notice of motion and supporting documents were served on the Plaintiff's and Co-Defendant's. Enclosures not attached. (Sica, Michele) (Entered: 05/27/2003)
- 05/30/2003 [58](#) ORDER: The pltf's motion for a default judgment against Citistreet and Copeland Associates, Inc. has been referred to Mag for a report and recommendation. A hearing on the motion will be held on 7/7/03 at 10:30 AM. Counsel are directed to report to Room 571 at EDNY. Signed by Judge Viktor V. Pohorelsky on 5/28/03. c/m by chambers(Fernandez, Erica) (Entered: 05/30/2003)
- 06/26/2003 [59](#) STIPULATION AND ORDER, by the parties that Sichenzia RossFriedman Ference LLP should be substituted as counsel of record for the parties in place of Duval & Stachenfeld LLP. Signed by Judge Sterling Johnson Jr. on 03/15/03. (Sica, Michele) (Entered: 06/26/2003)
- 07/07/2003 [60](#) Minute Entry for proceedings held before Viktor V. Pohorelsky : for a Civil Conference held on 7/7/2003. Purpose of Conference: Hearing on Default Motion. Counsel for all sides present. The next conference is adjourned sine die. Argument held; rulings reserved. (Sica, Michele) (Entered: 07/10/2003)
- 07/14/2003 [61](#) Letter from Henry M. Grubel, Esq. to Mag Pohorelsky requesting a copy of the recording of the proceeding held at 10:30 AM on 7/7/03 in Courtroom 521. (Fernandez, Erica) (Entered: 07/14/2003)

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**EXHIBIT 'B'**

---

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LOPRESTI, et al.,

Plaintiffs,

- v -

CITIGROUP, INC., et al.,

Defendants.  
-----X

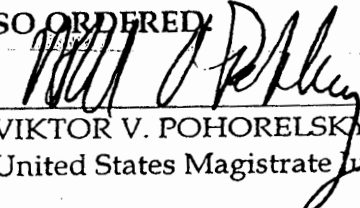
**ORDER**

CV-02-6492 (SJ)(VVP)

The plaintiffs' motion for a default judgment against Citistreet and Copeland Associates, Inc. has been referred to me for a report and recommendation. A hearing on the motion will be held on **Monday, July 7, 2003 at 10:30 a.m.** Counsel are directed to report to Room 521 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York for the hearing.

Counsel for the movant is directed to serve a copy of this order on all counsel. Only counsel for the movant and for the parties opposing the motion are required to attend.

SO ORDERED:

  
VIKTOR V. POHORELSKY  
United States Magistrate Judge

Dated: Brooklyn, New York  
May 28, 2003

**EXHIBIT 'C'**

---

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----X  
4 LOPRESTI, :  
5 Plaintiff, : CV-02-6492 (SJ)  
6 v. : July 7, 2003  
7 CITIGROUP, INC., et al., : Brooklyn, New York  
8 Defendants. :  
9 -----X

10 TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
11 BEFORE THE HONORABLE VIKTOR V. POHORELSKY  
12 UNITED STATES MAGISTRATE JUDGE

13 APPEARANCES:

14 For the Plaintiff: HENRY GRUBEL, ESQ.

15  
16 For the Defendant: DAVID LENDER, ESQ.  
PETER HAGIMAN, ESQ.

17  
18 Audio Operator:

19  
20 Court Transcriber: ELIZABETH BARRON  
21 328 President Street, #3  
22 Brooklyn, New York 11231  
23 (718) 596-3802  
24

25 Proceedings recorded by electronic sound recording,  
transcript produced by transcription service

1 THE COURT: This is civil action 02-6492, LoPresti  
2 versus Citigroup, et al.

3 Would counsel please state their appearances for  
4 the record?

5 MR. GRUBEL: Henry Grubel, 37 Prospect Street,  
6 Freeport, New York, 11520, for the plaintiff LoPresti, who  
7 is on my left. Is it okay, your Honor, if he sits here with  
8 me?

9 THE COURT: Yes, no problem.

10 MR. LENDER: Good morning, your Honor. David  
11 Lender (ph) from the law firm of Weil, Gottschall & Manges  
12 (ph). I have with me my colleague Peter Hagiman (ph) and we  
13 represent the Citigroup and State Street Defendants.

14 THE COURT: Please be seated. Judge Johnson  
15 referred to me this motion for a default judgment against  
16 Citistreet and Copeland Associates, Inc. I've reviewed the  
17 papers and, Mr. Grubel, I don't understand what it is you  
18 think you're going to accomplish by this motion. The  
19 defendants, it seems to me, have made a pretty convincing  
20 factual showing that Citistreet -- there is no Citistreet,  
21 regardless of what the advertisements may say. At the very  
22 least, it is a factual dispute to be resolved which you  
23 would need to have discovery on.

24 Then Copeland Associates, Inc. -- there seems to  
25 be a clear line of facts showing that Copeland Associates,

1 Inc. was merged into another company and it doesn't exist.  
2 So I don't understand why you're going through this  
3 rigmarole. You can answer.

4 MR. GRUBEL: Thank you. The primary reason is  
5 that the facts as presented that your Honor just recited, we  
6 rebut them all and we have what we consider --

7 THE COURT: Let's take Copeland Associates, Inc.  
8 What evidence do you have that Copeland Associates, Inc. has  
9 not been merged out of existence.

10 MR. GRUBEL: They claim that they were merged out  
11 of existence in the year 2000 and everything else being  
12 equal -- I'll cut to the chase on this -- they've still  
13 existed up until March 24th, 2003.

14 THE COURT: How is that?

15 MR. GRUBEL: By the secretary of state in Ohio.  
16 They were filed in 30 or 40 states but they did not  
17 surrender their license in Ohio, which listed 2 Battery  
18 March Place as being their home office until well after this  
19 lawsuit began.

20 THE COURT: But if Copeland Associates, Inc.  
21 itself doesn't exist, even though there is some filing in  
22 the secretary of state's office somewhere that says they are  
23 licensed to do business in the State of Ohio, you still have  
24 no assets to pursue because there is no Copeland Associates,  
25 Inc. So your judgment against Copeland Associates, Inc. is

1 a nonjudgment.

2 MR. GRUBEL: May I respond to that?

3 THE COURT: Sure.

4 MR. GRUBEL: We have checks from bank accounts  
5 that they wrote checks on in six figures, Copeland  
6 Associates, Inc., TNC Bank, and that was well after the year  
7 2000. That's attached to -- two of those checks are  
8 attached to the complaint and I believe all three of them  
9 are attached to the motion.

10 THE COURT: So at a minimum then, I'd have to hold  
11 some kind of a factual hearing; right?

12 MR. GRUBEL: And towards that end, if your Honor  
13 please, I had subpoenaed TNC's bank records on Copeland and  
14 I subpoenaed records from Citigroup and State Street as to  
15 Citistreet and whatever they were doing, and from an  
16 insurance company as to the checks and the letters that they  
17 got from Citistreet. They've all said that they object to  
18 it and that will have to be probably the subject of another  
19 motion.

20 THE COURT: You mean the subpoenas.

21 MR. GRUBEL: Yes.

22 THE COURT: Okay. Do you want to tell me why you  
23 think that just because you have some advertisements that  
24 have the word Citistreet on it, that Citistreet is a suable  
25 entity?

1 MR. GRUBEL: If I take a look at the 10-Ks that  
2 were filed by State Street, they list Citistreet all over  
3 the place. And in their own documentation, they always that  
4 Citistreet is a joint venture between Citigroup and State  
5 Street.

6 THE COURT: All right, but Citistreet is a name.  
7 Regardless of whether -- do you think that there are assets  
8 out there in the name of Citistreet that are not controlled  
9 by Citigroup, Inc. or Citistreet LLP?

10 MR. GRUBEL: According to their web site, they  
11 have eight hundred million under management and they employ  
12 3,000 people and they have offices all over the U.S., and  
13 they are the largest --

14 THE COURT: I don't know. I have the distinct  
15 impression that you're just playing games, Mr. Grubel. It  
16 just doesn't make sense to me that you're spending this kind  
17 of effort going after -- you have Citistreet LLP. That's  
18 the company; right?

19 MR. GRUBEL: That's one of the companies but a  
20 company in our state is not allowed to present itself as  
21 being a joint venture and operate as a corporation. It's  
22 not allowed.

23 THE COURT: A joint venture -- I don't know what  
24 you mean by that? What does that have to do with the  
25 present --

1 MR. GRUBEL: If you have a joint venture, as they  
2 advertise and say that they are and admit that they are --  
3 in fact, Lutheran admits it in its papers on the 12(b)(6)  
4 motion, if you have that.

5 THE COURT: I don't have that.

6 MR. GRUBEL: I have a copy of it if you want to  
7 see it.

8 THE COURT: I'll take your word for it.

9 MR. GRUBEL: Have you filed the papers yet on  
10 the --

11 MR. LENDER: Your Honor, under Judge Johnson's  
12 rules, the papers don't get filed until it's fully briefed.

13 THE COURT: That's right, until it's fully  
14 briefed.

15 MR. LENDER: We just received his opposition, we  
16 have to write our reply and then we'll file it.

17 THE COURT: So none of those are served.

18 MR. GRUBEL: We've opposed them and we've sent  
19 them --

20 THE COURT: I'll take you at your word that they  
21 say they're a joint venture.

22 MR. GRUBEL: May I approach?

23 THE COURT: I believe you.

24 MR. GRUBEL: If you want to say that a joint  
25 venture is not liable for its acts, I have nothing further

1 to say except that under New York State law, the owners of  
2 the joint venture are liable for the acts of the joint  
3 venture, just like in a partnership.

4 THE COURT: That depends on what the joint venture  
5 is, doesn't it? If it's a partnership, yes. I don't know  
6 exactly what your argument is. You're saying that  
7 Citistreet, the name Citistreet --

8 MR. GRUBEL: No, I'm saying the company  
9 Citistreet.

10 THE COURT: Is a joint venture.

11 MR. GRUBEL: Absolutely. I'm not saying it, they  
12 do.

13 THE COURT: I think their argument is that  
14 Citistreet is a trade name, if you want to call it that, or  
15 it's a name under which they do business. The actual name  
16 of the company is Citistreet LLC or Citistreet whatever.

17 MR. GRUBEL: They're not filed. They haven't  
18 filed a d/b/a, they haven't done anything. They should have  
19 filed a d/b/a that says ABC doing business as Citistreet.  
20 They have not done it.

21 THE COURT: So what are you going to do if you get  
22 a judgment that says Citistreet? What are you going to do?  
23 Are you going to go find a company named Citistreet? There  
24 is no company named Citistreet.

25 MR. GRUBEL: I disagree with that.

1 THE COURT: And then what are you going to do?  
2 Are you going to execute against Citistreet? Are you going  
3 to try to?

4 MR. GRUBEL: Sure. And then if that returns  
5 unsatisfied, then against Citistreet and State Street.

6 THE COURT: On what basis?

7 MR. GRUBEL: On the basis that they are the owners  
8 of this joint venture.

9 THE COURT: That's not what the law really allows,  
10 to play games with names like this in order to go after  
11 somebody else. In other words, you want a judgment that you  
12 can then execute against the parties that have answered the  
13 complaint. Is that right?

14 MR. GRUBEL: I want a judgment against the parties  
15 who are responsible for the allegations in the complaint.

16 THE COURT: That's right, and you have answering  
17 parties who are saying, we're ready to step up and we're not  
18 going to say that Citistreet, not Citistreet LLC is  
19 responsible for this. They're not going to say Copeland  
20 Associates, Inc. is responsible for this, not us. They're  
21 saying there is no such company really with any assets. The  
22 company with assets is us and we're prepared to step up and  
23 answer the claims. You're just trying to -- you're just  
24 fooling around with words. You're just playing games is  
25 what you're doing.

1 I don't see any other way to explain it because  
2 what you just told me is what you're going to do with this  
3 judgment, if you get it, this default judgment, is you're  
4 going to go after the assets of Citigroup LLC and Citigroup,  
5 Inc., and they're here. They're not fighting this. They're  
6 fighting it but they're saying we're here, we're going to  
7 answer the complaint, and we're not going to hide behind the  
8 notion that Citistreet and not us or Copeland Associates,  
9 Inc. and not us is responsible for this. Am I right?

10 MR. GRUBEL: I haven't heard that yet. I haven't  
11 seen any answer. I do not know that as a fact, your Honor.  
12 I really don't. They could turn around and say to us you've  
13 got to go against Citistreet and Citistreet has no assets.  
14 If that is their point of view --

15 THE COURT: I'll tell you what. Can we put this  
16 motion on hold until we see how they answer? Then if they  
17 answer that way, then we can decide it.

18 MR. LENDER: Your Honor, we filed a motion to  
19 dismiss on behalf of the Citistreet and State Street  
20 defendants and you'll see when it's bundled and submitted,  
21 there is no defense that says aha, we got you, you've got  
22 the wrong Citistreet. We filed a sworn affidavit --

23 THE COURT: Okay, but answer my question. Does it  
24 matter that the motion remains undecided for the next 30,  
25 60, 90 days?

1 MR. LENDER: Not from our perspective, your Honor.

2 THE COURT: But then if the motion to dismiss is  
3 decided in your favor, then I guess I'll have to decide the  
4 Citistreet motion, whether there's a Citistreet that's  
5 suable and a Copeland Associates, Inc. that's suable, and we  
6 can have some factual inquiry into that. How about that?

7 MR. LENDER: That's fine, your Honor. The only  
8 other element I should just add is that in the motion to  
9 dismiss, we essentially moved to dismiss against Citistreet  
10 and Copeland on the exact same grounds that we have here.

11 THE COURT: On the exact same grounds that you  
12 have here.

13 MR. LENDER: That Citistreet doesn't exist, the  
14 right entity is LLC, which is the entity that's owned by  
15 Citigroup and State Street, and that Copeland doesn't exist  
16 because it merged into a different entity, which is another  
17 named defendant, so that he has the right parties. But we  
18 can wait until the motion to dismiss --

19 THE COURT: The thing is that in order for me to  
20 decide these default motions, it seems to me, I'm going to  
21 have to have a factual hearing. I have to permit discovery.  
22 Mr. Grubel is going to want to go scurrying around through  
23 papers to subpoena Citigroup or Citistreet, I suppose, for  
24 things; right? I think I'd have to permit him to do that  
25 and I don't see why I should let you -- why you both should

1 go through all of that if it turns out that you're going to  
2 get -- we can sort of postpone that.

3 MR. LENDER: I think that's a good decision, your  
4 Honor, and we're fine with that.

5 MR. GRUBEL: Just for the record, I'd like to  
6 state that I don't think that they have standing to make a  
7 motion against a party that they don't represent or that  
8 they claim doesn't exist in the manner that they did in the  
9 12(b)(6) motion.

10 THE COURT: I think that they do have the  
11 obligation to let the Court know that you're going to get a  
12 judgment, if you prevail, that's of no consequence and that  
13 is basically a -- you could make up some company and sue it;  
14 right, and then get a judgment and then use that judgment --  
15 I'm just positing a hypothetical situation. You're saying  
16 there is an entity called Citistreet. You want to use this  
17 judgment for some purpose; right?

18 They're saying there is no such company and if I  
19 say they don't have standing to raise that, then I'm going  
20 to give you a judgment with which you could do mischief.  
21 It's not up to the Court, it seems to me, to give out  
22 judgments to people just because somebody doesn't answer,  
23 when there is at least some posited reason for that. I  
24 think the Court has some obligation to explore whether the  
25 judgment is one that ought to be entered and that is against

1 the person that's suable or that's a suable entity.

2 MR. GRUBEL: We have a question of fact here; do  
3 or do they not exist?

4 THE COURT: Right.

5 MR. GRUBEL: To that extent, I'd like to offer my  
6 proof and towards that end, I will need help with the  
7 subpoenas, and then the Court makes a decision.

8 THE COURT: Right. It seems to me that if the  
9 motion to dismiss is denied, then we're going to get into  
10 all sorts of discovery, and this just might be one other  
11 aspect of discovery which we can deal with in the normal  
12 course. If it's not, then I guess I'll have to start making  
13 some decisions about what extent of discovery is going to be  
14 necessary to resolve this factual issue.

15 MR. GRUBEL: Should I make a motion on the  
16 subpoenas or leave it alone?

17 THE COURT: You don't need to. I'll just hold  
18 this default motion -- I was just going to hold the default  
19 motion. Have you served the subpoenas?

20 MR. GRUBEL: They have been served.

21 THE COURT: And they've been objected to?

22 MR. GRUBEL: Yes. They want to modify them.

23 THE COURT: You can still work on modifying them  
24 if you want to. You can make a motion to me, although if  
25 it's just for purposes of the default, I'm just going to

1 table it as well.

2 MR. GRUBEL: I'll hold off on that.

3 THE COURT: Anything else? I was going to set a  
4 schedule for discovery but since we have motions to dismiss  
5 pending, we'll wait and see what happens with that. If  
6 there's nothing else, then we're adjourned.

7 MR. LENDER: Thank you, your Honor.

8 MR. GRUBEL: Thank you, your Honor.

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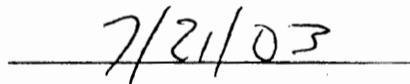
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I certify that the foregoing is a correct transcript  
from the electronic sound recording of the proceedings in  
the above-entitled matter.



Elizabeth Barron



Date

**EXHIBIT 'D'**

---

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
CARMINE LOPRESTI, etc.,

Plaintiff,

- v -

CITIGROUP, INC., et al.,

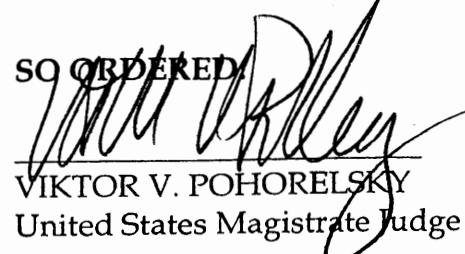
Defendants.  
-----x

**DECISION**

CV-02-6492 (SJ)(VVP)

By letter dated May 5, 2003, the plaintiff's counsel has informally requested my recusal in this action to avoid an appearance of bias or impartiality. See 28 U.S.C. § 455(a). The factual basis for the request is that my former employment as an Assistant United States Attorney in the Southern District of New York, which ended in January 1991, overlapped with that of Ping Moy, who now apparently is employed as Vice President and General Counsel of one of the defendants in this action, Lutheran Medical Center. (Mr. Moy has not filed a notice of appearance on behalf of Lutheran Medical Center, which, according to the docket, is represented in this action by Michael H. Ference of the law firm of Sichenzia Ross Friedman Ference LLP.) As the court had little contact with Mr. Moy while employed as an Assistant United States Attorney, and cannot remember the last contact of any kind with Mr. Moy, the circumstances known to the court raise no reasonable appearance of bias or lack of impartiality. See *In re Aguinda*, 241 F.3d 194, 201 (2<sup>nd</sup> Cir. 2001) ("[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.") The request is accordingly denied.

SO ORDERED

  
VIKTOR V. POHORELSKY  
United States Magistrate Judge

Dated: Brooklyn, New York  
May 16, 2003

**EXHIBIT 'E'**

---

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

Civil Action, File Number: CV-02-6492 (SJM)  
U.S. DISTRICT COURT, E.D.N.Y.  
(RLM) IN CLERK'S OFFICE  
LONG ISLAND COURTHOUSE

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, )

-against- )

CITIGROUP, INC., WENDY Z. GOLDSTEIN, )  
MILES H. KUCKER, ALLEN SCHECHTER, )  
HOWARD SMITH, WILLIAM D. MYHRE, )  
DON GOLDSTEIN, STATE STREET CORPORATION, )  
CITISTREET, CITISTREET, LLC, )  
CITISTREET ASSOCIATES, LLC, )  
CITISTREET EQUITIES, LLC, )  
CITISTREET FINANCIAL SERVICES, LLC, )  
TRAVELERS INSURANCE COMPANY., )  
LUTHERAN MEDICAL CENTER, )  
BUCK CONSULTANTS, BUCK CONSULTANTS, INC. )  
MAYDA CASADO, JEAN DESJARDINS, )  
JIM WILSON, SMITH BARNEY CORPORATE )  
TRUST COMPANY, SALOMON SMITH BARNEY, )  
INC., COPELAND ASSOCIATES, INC., )  
Each and every defendant individually, )  
And in their fiduciary capacities, )  
under EMPLOYEE RETIREMENT INCOME )  
SECURITY ACT of 1974, under the )  
Lutheran Medical Center § 403(b) Tax )  
Sheltered Annuity Plan )  
SANFORD I. WEILL, and DAVID A. SPINA )

Defendants. )

★ MAR 13 2003 ★

ENTERED

★ \_\_\_\_\_ ★

REQUEST TO CLERK TO  
ENTER DEFAULT AS TO  
THE DEFENDANTS  
CITISTREET AND  
COPELAND ASSOCIATES,  
INC.

REQUEST TO CLERK TO ENTER DEFAULT

To: The Clerk of the United States District Court, Eastern  
District of New York

The defendant CITISTREET having failed to answer or otherwise  
appear in the above entitled action and the time for appearance  
having expired, you are requested to enter said defendant's

Exhibit A

Exhibit B

Exhibit C

Exhibit D


Exhibit E

Exhibit F

default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

The defendant COPELAND ASSOCIATES INC., having failed to answer or otherwise appear in the above entitled action and the time for appearance having expired, you are requested to enter said defendant's default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

Dated: Freeport, New York  
March 12, 2003



---

HENRY M. GRUBEL (HG-3211)  
HENRY M. GRUBEL, P.C.  
Attorney for Plaintiff  
CARMINE A. LOPRESTI  
37 Prospect Street  
P.O. Box 628  
Freeport, New York 11520  
516-623-4130

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK  
Civil Action, File Number: CV-02-6492 (SJ)  
(RLM)

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, )

-against- )

CITIGROUP, INC., WENDY Z. GOLDSTEIN, )  
MILES H. KUCKER, ALLEN SCHECHTER, )  
HOWARD SMITH, WILLIAM D. MYHRE, )  
DON GOLDSTEIN, STATE STREET CORPORATION, )  
CITISTREET, CITISTREET, LLC, )  
CITISTREET ASSOCIATES, LLC, )  
CITISTREET EQUITIES, LLC, )  
CITISTREET FINANCIAL SERVICES, LLC, )  
TRAVELERS INSURANCE COMPANY., )  
LUTHERAN MEDICAL CENTER, )  
BUCK CONSULTANTS, BUCK CONSULTANTS, INC. )  
MAYDA CASADO, JEAN DESJARDINS, )  
JIM WILSON, SMITH BARNEY CORPORATE )  
TRUST COMPANY, SALOMON SMITH BARNEY, )  
INC., COPELAND ASSOCIATES, INC., )  
Each and every defendant individually, )  
And in their fiduciary capacities, )  
under EMPLOYEE RETIREMENT INCOME )  
SECURITY ACT of 1974, under the )  
Lutheran Medical Center § 403(b) Tax )  
Sheltered Annuity Plan )  
SANFORD I. WEILL, and DAVID A. SPINA )

Defendants. )

AFFIDAVIT IN SUPPORT  
OF REQUEST OF CLERK  
TO ENTER A DEFAULT  
UNDER FRCP 55(a) AS  
AGAINST THE DEFENDANTS  
CITISTREET & COPELAND  
ASSOCIATES, INC.

State of New York )

County of Nassau ).ss:

HENRY M. GRUBEL, being duly sworn deposes and says:

1. I am the attorney for the plaintiff in the above action  
and submit this affidavit in support of plaintiff's application to

have the Clerk of this Court enter a default against two of the defendants herein, CITISTREET and COPELAND ASSOCIATES, INC., under FRCP 55(a), for their failure to timely answer, plead, move, or otherwise appear in this action in response to the complaints that were served upon them.

2. On December 16, 2002, your affiant mailed a notice of lawsuit and request for waiver of service of summons to the defendant CITISTREET. (See Exhibit "A")

3. On January 8, 2003, Robert C. Dughi returned the waiver of service of summons that was sent to CITISTREET. Mr. Dughi signed the waiver in his capacity as President of CITISTREET, LLC, a different defendant herein. (See Exhibit "B")

4. A copy of the face sheet of the original complaint is annexed hereto. (See Exhibit "C")

5. The capacity in which Mr. Dughi signed the waiver of service of summons as the president of a co-defendant herein and not as an officer of CITISTREET made the waiver of service of summons as to CITISTREET defective, and of no relevance.

6. Thereafter an Amended Summons and Complaint was served on the defendant CITISTREET on February 5, 2003. (See Exhibit "F1&2")

7. Then a Second Amended Summons and Complaint was served on the defendant CITISTREET on February 24, 2003. (See Exhibit "F3")

8. On December 16, 2002, your affiant mailed a notice of lawsuit and request for waiver of service of summons to the defendant COPELAND ASSOCIATES, INC. (See Exhibit "D")

9. No signed waiver of service of summons was ever received back from COPELAND ASSOCIATES, INC. (See Exhibit "E" the blank waiver)

10. Thereafter an Amended Summons and Complaint was served on the defendant COPELAND ASSOCIATES INC., on February 7, 2003. (See Exhibit "F4")

11. Then a Second Amended Summons and Complaint was served on the defendant COPELAND ASSOCIATES INC., on February 25, 2003. (See Exhibit "F5")

12. The returns of service of the Amended Summons and Complaint and Second Amended Summons and Complaint are on file in this action as to the defendants CITISTREET and COPELAND ASSOCIATES INC. (See Exhibit "F1-5")

13. The defendant CITISTREET, has not answered or otherwise appeared in this action and the time within which said defendant may appear has expired.

14. The defendant COPELAND ASSOCIATES, INC., has not answered or otherwise appeared in this action and the time within which said defendant may appear has expired.


15. A letter from Weil, Gotshal & Manges dated February 4, 2003 stated that the defendants CITISTREET and COPELAND ASSOCIATES, INC. were non-existent entities and requested that plaintiff delete them from the caption. (See Exhibit "G")

16. The foregoing letter is not in the nature of an answer or an appearance.

17. Plaintiff vigorously contests that these defendants do not exist, the letter from Weil, Gotshal, & Manges, to the contrary notwithstanding.

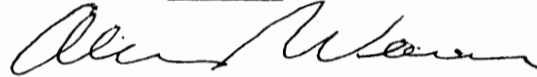
WHEREFORE, it is respectfully requested that the Clerk of this Court enter defaults as to the defendants CITISTREET and COPELAND ASSOCIATES, INC.

Dated: Freeport, New York  
March 12, 2003



HENRY M. GRUBEL (HG-3211)  
HENRY M. GRUBEL, P.C.  
Attorney for Plaintiff  
CARMINE A. LOPRESTI  
37 Prospect Street  
P.O. Box 628  
Freeport, New York 11520  
516-623-4130

Subscribed and sworn to before me  
on March 12, 2003



ALLAN WEINER  
Notary Public, State of New York  
No. 01WE9578906  
Qualified in Nassau County  
Term Expires March 30, 2006

**EXHIBIT 'F'**

---

UNITED STATES DISTRICT COURT

ROBERT C. HEINEMANN  
CLERK  
JAMES GIOKAS  
CHIEF DEPUTY

EASTERN DISTRICT OF NEW YORK

PLEASE REPLY TO:  
 BROOKLYN OFFICE  
U.S. COURTHOUSE  
225 CADMAN PLAZA EAST  
BROOKLYN, NEW YORK 11201  
 LONG ISLAND OFFICE  
UNITED STATES DISTRICT COURT  
100 FEDERAL PLAZA  
CENTRAL ISLIP, NEW YORK  
11722-4438

May 7, 2004

Henry M. Grubel, Esq.  
Law Office of Henry M. Grubel, P.C.  
37 Prospect Street  
Freeport, NY 11520

Re: 02-CV-6496 (SJ) (VVP)  
Lo Presti v. Citigroup, Inc., et al.

Dear Mr. Grubel:

I have received your letter of May 5, 2004, and understand your renewed request.

I am aware of the distinction between a notation of default, as opposed to the entry of a default judgment. However, even a ministerial act is not taken in a vacuum, separate from a factual dispute between counsel in the underlying action. Under all of the circumstances here, as explained in your letter and as previously indicated on the record, I do not agree that the entry of a Rule 55(a) notation of default against Citistreet and Copeland Associates, Inc. by the Clerk's Office is required at this time.

A copy of this reply will be docketed.

Sincerely yours,



Robert C. Heinemann  
Clerk of Court

cc: Hon. Sterling Johnson, Jr., United States District Judge  
Hon. Viktor V. Pohorelsky, United States Magistrate Judge  
David Lender, Esq.  
Michael Ference, Esq.  
David Covey, Esq.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

CARMINE A. LoPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO  
DISQUALIFY MAGISTRATE

JUDGE POHORELSKY

CITIGROUP, INC., et al.,

Defendants.

-----X

**I. INTRODUCTION**

Plaintiff, Carmine A. LoPresti has moved this court to disqualify Magistrate Judge Pohorelsky from this case pursuant to 28 USC §§ 144, and 455, due to his bias and/or prejudice against plaintiff, and his bent in favor of the defendants Citistreet and Copeland Associates, Inc.

This memorandum of law is respectfully submitted in support of plaintiff's motion to disqualify Magistrate Judge Pohorelsky.

**II. HISTORY OF CASE**

**A. FACTUAL BACKGROUND:**

Plaintiff filed this action asserting ERISA, RICO, Antitrust violations plus statutory and common law, New York State claims.

The law firm of Weil, Gotshal and Manges LLP appeared on behalf of the co-defendants CITIGROUP, Inc., STATE STREET CORP., their subsidiaries and employees. No one appeared on behalf of CITISTREET and COPELAND ASSOCIATES, Inc. Both defendants deliberately defaulted.

Although the Weil firm did not appear on behalf of Citistreet and Copeland, over plaintiff's objection, Weil formally opposed both the Clerk's docketing of the default, and plaintiff's motion for a default judgment, on the alleged ground that neither defaulting party was a cognizable legal entity.

Plaintiff asserts that Citistreet, the target defendant, is a joint venture and that Copeland is a de facto corporation.

None of the co-defendants have opposed plaintiff's motion for a default judgment. The co-defendant Lutheran Medical Center has averred to this Court, in a prior unrelated filing, that Citistreet, is indeed a joint venture.

**B. PROCEDURAL BACKGROUND:**

Plaintiff's complaint was filed with the Court on February 20, 2003. All of the defendants were duly served therewith. All defendants appeared by counsel, except for the target defendant Citistreet and the co-defendant Copeland. They chose to default.

On April 21, 2003 plaintiff noticed a motion for a default judgment under Rule 55 of the F.R.C.P. against Citistreet and Copeland. Plaintiff also requested that the Clerk of the Court note the defaults of Citistreet and Copeland on the Court's docket pursuant to F.R.C.P. Rule 55(a). The Weil law firm opposed having default judgments entered against Citistreet and Copeland on the alleged grounds that they do not exist.

A hearing was ordered to be held on July 7, 2003 on plaintiff's motion. The hearing became merely an on the record

proceeding in that no evidence or testimony was taken before Magistrate Judge Pohorelsky. Only counsel from the Weil firm and for plaintiff were present, because the order for the hearing required that only defense counsel opposing plaintiff's motion needed to appear.

The decision on plaintiff's motion for a default judgment is still pending. The Clerk of the Court has refused to note the defaults of the defendants Citistreet and Copeland on the Court's docket.

All of the defendants that appeared made motions to dismiss under F.R.C.P. 12(b)(6). Plaintiff opposed all of said motions. Decisions thereon are currently pending.

### **III. ARGUMENTS AND AUTHORITIES**

#### **A. STATUTORY BASIS FOR DISQUALIFICATION**

28 USCS § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The purpose of the law is to avoid the appearance as well as the actual existence of bias or prejudice on the part of the judge, the facts as stated in the affidavit as the basis for the belief that bias or prejudice exists, must be accepted as true by the judge even though he or she knows the statements to be false. Berger v. United States, 255 U.S. 22,; Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966);

As stated by the United States Court of Appeals for the Second Circuit in Apple v. Jewish Hospital 89 F.2D 326 (1987)

Section 144 provides that a judge should recuse himself when a party has filed a "timely and sufficient affidavit" showing that the judge has "a personal bias or prejudice" against the party or in favor of an adverse party. Section 455(a) provides that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Additionally, § 455(b)(1) prescribes recusal where a judge has "a personal bias or prejudice concerning a party."

Plaintiff has stated facts in his affidavit that constitute legally sufficient grounds for recusal.

To be sufficient the affidavit must set forth facts, including the time, place, persons and circumstances, Berger v. United States supra at 34;

Applying these standards to the present case, the affidavit in support of the plaintiff's motion for recusal is plainly sufficient on its face. The affidavit in support of the motion to disqualify Judge Pohorelsky is legally sufficient under 28 USCS § 144.

The facts are stated in the affidavit with particularity. They would convince a reasonable person that the Judge's bias or bent in favor of the defaulted defendants and his bias or bent against plaintiff exists. The facts also show that the bias is personal as opposed to judicial. Parrish v Board of Comm'rs (1975, CA5 Ala) 524 F2d 98,

The affidavit gives fair support to the charge of a bent of mind of the Magistrate that may impede or prevent impartiality of judgment. Berger v. United States, supra.

Plaintiff's affidavit of bias and prejudice in support of Judge Pohorelsky's disqualification meets the requirement of showing that the Judge's prejudice exists against affiant and in favor of the defendants, so as to preclude impartial judgment by Judge Pohorelsky. In re Lisman (1937, CA2 NY) 89 F2d 898.

The reasons and facts stated in plaintiff's affidavit, regardless of their truth or falsity, fairly support the charge of the Judge's bent of mind. Such bent of mind may prevent or impede impartiality of his judgment. Therefore, it is the Judge's duty to allow the affidavit submitted by the plaintiff and withdraw. Simmons v United States (1962, CA3 NJ) 302 F2d 71.

The affidavit is legally sufficient to require recusal. The affidavit shows the objectionable inclination and disposition of the Judge in defendants' favor and prejudice against plaintiff. It gives fair support to the charge of the Judge's bent of mind that may prevent or impede impartiality of judgment. United States v Pastor (1975, SD NY) 419 F Supp 1318.

According to Apple v Jewish Hosp Supra, the Court stated that 28 USCS §§ 455(a) and 144 are read in the same manner and that:

When deciding if a § 455(a) motion is timely, we apply a four-factor test which asks whether:

(1) the movant has participated in a substantial manner in trial or pre-trial proceedings;

(2) granting the motion would represent a waste of judicial resources;

(3) the motion was made after the entry of judgment; and

(4) the movant can demonstrate good cause for delay.

Applying the above four factors, (1) the movant has not participated in any trial or pre-trial proceedings other than the July 7, 2003 proceeding, (2) Granting the motion will not represent a waste of judicial resources; (3) the motion was not made after the entry of judgment; and (4) Plaintiff only recently became aware of the relationship the Magistrate had with his former boss, Otto Obermaier, Esq., a member of the firm of Weil, Gotshal and Manges LLP, and that a former judicial intern of the Magistrate is now employed at Sedgwick, Detert, Arnold and Moran LLP.

The standard under 28 USCS § 144 is whether assuming truth of the facts alleged, a reasonable person would conclude that Judge Pohorelsky is biased or prejudiced against the plaintiff.

Personal bias is an attitude of extrajudicial origin. Ferrari v United States (1948, CA9 Cal) 169 F2d 353. The relationships with

attorneys in each firm representing the defense is extrajudicial.

The opinions stated by the Judge displayed a deep-seated favoritism of the defaulted defendants and antagonism toward the plaintiff. They show that it would make fair judgment on his part impossible. The opinions appear to be derived from his prior relationships with the defense attorneys.

In any event the bias and prejudice could not have been acquired as part of the judicial process, because the bias was demonstrated before any judicial process or proceeding began. The Judge's bias and prejudice reveals such a high degree of favoritism or antagonism as to make fair judgment in this case impossible. Liteky v United States (1994) 510 US 540, Even general hostility and frustration towards the plaintiff requires recusal under the due process clause of the United States Constitution only in the most extreme cases, which this case is.

As stated in Ward v. Village of Monroeville, 409 U.S. 57, 60-62 the plaintiff is entitled to a neutral and detached judge.

The purpose of 28 U.S.C.S. § 455(a) is to promote public confidence in integrity of judicial process. It was held in United States v. Brinkworth, 68 F.3d 633, 637 (2d Cir. 1995) that recusal of the judge, based on his appearance of partiality is as much for protection of citizenry as of the complainant plaintiff herein since the integrity of the judiciary is paramount concern.

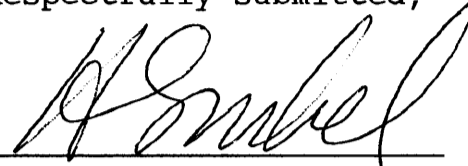
In United States v. Jordan, 49 F.3d 152, 155 (5th Cir. 1995) it was held that the judge's friendship with the attorney who defendant had accused of criminal action required the judge's

recusal.

As stated in Liteky v. United States, 510 U.S. 540, "what matters is not the reality of bias or prejudice but its appearance". Judge Pohorelsky's bias or prejudice is very apparent, and justifies his recusal or disqualification as the Magistrate in this matter.

Dated: Freeport, New York  
June 15, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Grubel", written over a horizontal line.

Henry M. Grubel (HG-3211)  
Henry M. Grubel, P.C.  
Attorney for plaintiff  
37 Prospect Street  
Freeport, New York 11520  
516-623-4100

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LOPRESTI,

Plaintiff,

CV-02-6492 (SJ) (VVP)

-against-

CERTIFICATE OF SERVICE

CITIGROUP, INC., et. al.

Defendants.  
-----X


I, Henry M. Grubel, the attorney of record for the plaintiff in this action, certify that on June 15, 2004, prior to the last pick-up, at the FedEx drop box in Freeport N.Y. I personally served the Motion, Notice of Motion, affidavit in support, and memo of law for recusal of Magistrate Judge Pohorelsky by sending copies thereof via FedEx next day delivery, upon the attorneys for the defendants who have appeared in this action addressed as follows:

David J. Lender, Esq.  
Weil, Gotshal & Manges, LLP  
767 Fifth Avenue  
New York, NY 10153  
Phone: 212-310-8000

Michael H. Ference, Esq.  
Sichenzia, Ross, Friedman Ference, LLP  
1065 Avenue of the Americas  
New York, NY 10018  
Phone: 212-930-9700

David Covey, Esq.  
Sedgwick, Detert, Moran & Arnold  
125 Broad Street, 39<sup>th</sup> Floor  
New York, NY 10004  
Phone: 212-422-0202

Dated: June 15, 2004  
Freeport, N.Y.

  
HENRY M. GRUBEL (HG-3211)  
HENRY M. GRUBEL, P.C.  
Attorney for Plaintiff  
37 Prospect Street  
Freeport, New York 11520  
516-623-4130

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
CARMINE A. LOPRESTI, et al.,

Plaintiffs,

- v -

CITIGROUP, INC., et al.,

Defendants.  
-----x

**ORDER**

CV-02-6492 (SJ)(VVP)

The plaintiffs have moved, pursuant to 28 U.S.C. §§ 144 and 455(b)(1) to disqualify the undersigned magistrate judge from presiding over further proceedings in this action. Any party wishing to submit papers in support of, or in opposition to, the motion shall serve and file such papers by July 6, 2004. A hearing on the motion will be held on **Friday, July 16, 2004 at 2:30 p.m.** in Room 518 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York. Only counsel who wish to be heard orally are required to attend the hearing.

SO ORDERED:

  
VIKTOR V. POHORELSKY  
United States Magistrate Judge

Dated: Brooklyn, New York  
June 17, 2004

(84)

Law Office of  
HENRY M. GRUBEL, P.C.  
37 Prospect Street  
Freeport, N. Y. 11520  
Phone - (516) 623-4130

RECEIVED  
U.S. DISTRICT COURT, E.D.N.Y.  
IN CLERK'S OFFICE  
LONG ISLAND COURTHOUSE

★ JUN 22 2004 ★  
ENTERED  
★ ————— ★

June 22, 2004

Hon. Viktor V. Pohorelsky  
United States Magistrate Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: CV-02-6492, LoPresti v. Citigroup, Inc, et al.

Dear Judge Pohorelsky:

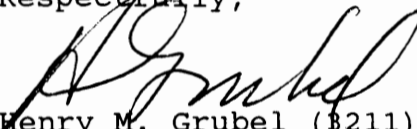
Plaintiff respectfully requests clarification of your order dated June 17, 2004 to hold a hearing on July 16, 2004, on plaintiff's motion pursuant to 28 U.S.C. §§ 144 and 455 to disqualify you as Magistrate Judge in this matter.

Briefly stated, it is my understanding of the law that your sole function at this juncture is to pass on the legal sufficiency of plaintiff's Affidavit of Bias and Prejudice that was submitted in support of his motion to disqualify you herein.

This is a question of law for you to rule upon. It is my further understanding that once you have ruled on the legal sufficiency of plaintiff's affidavit, another judge, other than yourself, must rule on plaintiff's motion. Further, for purposes of the motion, plaintiff's allegations as set forth in his affidavit of bias must be accepted by the Court as being true.

Accordingly, I do not understand what issues will be left to address at the hearing you ordered. As such, I can not properly prepare for the hearing unless you advise all parties with some specificity, about its focus, purpose, etc., in a timely manner.

Respectfully,

  
Henry M. Grubel (3211)  
Attorney for plaintiff

CC: All Counsel (see annexed)  
Judge Sterling Johnson, Jr.  
Chief Judge Edward R. Korman  
Chief Magistrate Judge Michael L. Orenstein

David Lender, Esq.  
Weil Gotshal and Manges, LLP  
767 Fifth Avenue  
New York, NY 10153

Michael H. Ference, Esq.  
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New York, N.Y. 10018

David Covey, Esq.  
Sedgwick, Detert, Moran & Arnold  
125 Broad Street, 39<sup>th</sup> Floor  
New York, N.Y. 10004

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LOPRESTI,

Plaintiff,

CV-02-6492 (SJ) (VVP)

-against-

CERTIFICATE OF SERVICE

CITIGROUP, INC., et al.,

Defendants.

-----X

I, Henry M. Grubel, the attorney of record for the plaintiff in this action, certify that on June 22, 2004, I personally sent my letter to Magistrate Judge Pohorelsky requesting clarification of his order dated June 17, 2004, by delivering the original thereof to the clerk's office in the East Islip Court house, and by sending copies thereof that same day, by first class U.S. Mail to the attorneys for the defendants who have appeared in this action addressed as follows:

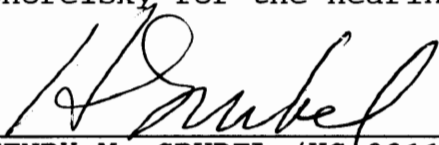
David J. Lender, Esq.  
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New York, NY 10004

I also mailed copies of the letter to Judges Johnson, Korman, Orenstein and Pohorelsky, addressed to them at the court house in Brooklyn. Enclosed in each mailing to everyone was a copy of the order signed by Judge Pohorelsky for the hearing to be held on July 16, 2004.

Dated: June 22, 2004  
Freeport, N.Y.

  
HENRY M. GRUBEL (HG-3211)  
HENRY M. GRUBEL, P.C.  
Attorney for Plaintiff  
37 Prospect Street  
Freeport, New York 11520  
516-623-4130

Law Office of  
HENRY M. GRUBEL, P.C.  
37 Prospect Street  
Freeport, N. Y. 11520  
Phone - (516) 623-4130

June 15, 2004

To: David Lender, Esq.;  
Weil Gotshal and Manges, LLP  
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New York, N.Y. 10004

RECEIVED  
IN CHAMBERS OF  
HON. STERLING JOHNSON, JR.  
JUN 16 2004  
TIME A.M. \_\_\_\_\_  
P.M. \_\_\_\_\_

Gentlemen:

Re: LoPresti v Citigroup Inc. et al.  
E.D.N.Y. CV-02-6492 (SJ) (VVP)

Enclosed herewith, please find plaintiff's motion, notice of motion, plaintiff's affidavit in support, and the memorandum of law, in support of plaintiff's motion to disqualify Magistrate Judge Pohorelsky from this case.

This motion will be filed with the Court today. I am also sending courtesy copies of these motion papers to Judge Sterling Johnson, Jr. and Magistrate Judge Viktor V. Pohorelsky.

The Court will not accept this motion because: (1) it was not submitted as a fully briefed motion, per ~~the~~ Judge Johnson's individual rules, (2) it was not electronically filed and (3) the Court did not receive a courtesy copy of your memorandum in support of your motion. The motion may be submitted according to the Judge's individual rules when it is fully briefed.

Via Fedex next day service to all counsel and the Court  
Via Hand delivery to the Court

June 24, 2004

*[Signature]*  
Henry M. Grubel  
*[Signature]*  
Sterling Johnson Jr.  
Clerk