

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

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

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

*-against-*

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

*Defendants-Appellees,*

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

*Defendants.*

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

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**PETITION FOR REHEARING**

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

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
CARMINE A. LoPRESTI,

Appellant,

**05-0609-cv**

-against-

PETITION FOR REHEARING

CITIGROUP, INC., et. al.,

Appellees.

-----X

This petition for a rehearing, is respectfully brought by the Appellant above named, pursuant to F.R.A.P. 40, to convince this Court that it erred in affirming the dismissal of Appellant's case, under F.R.C.P. 12(b)(6) a mere two days after the case was submitted. Appellant respectfully petitions this Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represents to the Court as follows:

a. Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses other procedural aspects of the decision, wherein it is believed the Court may be convinced its result is based upon the application of procedures prejudicial to the appellant, and the erroneous resolution of questions of fact and legal principles applicable thereto.

b. Appellant was denied an adjournment of oral argument despite his counsel's sudden, unexpected illness, in lieu thereof the Court ordered that the appeal was to be submitted by all sides, thus oral argument was denied as to any party;

c. In its apparent haste to deliver its decision herein, the Court left undecided a motion that appellant made in this Court to enlarge his record on appeal by the addition of five (5) pages of the appellee LUTHERAN MEDICAL CENTER'S Summary Plan Description of its 403(b) annuity program. It supported Appellant's argument on this appeal. As far as appellant knew his motion to enlarge the record was undecided as of the day his appeal was taken on submission by the Court.

d. Honorable Judge Pierre Leval, a member of the panel, should have disqualified himself from being involved in the appeal.

e. That Honorable Judge Barrington Parker might have required disqualification from being involved in this appeal.

f. Appellant feels that he has been victimized by the same sort of bias and prejudice exhibited by the Honorable Magistrate Judge Viktor V. Pohorelsky in the District Court. Whether this is due to the Appellant's Italian-American heritage or his given name, is unknown at this time.

As to Honorable Judge Pierre Leval, his financial disclosure form for calendar year 2003, received on May 17, 2005 by the Financial Disclosure Office, reveals that he received the sum of \$3,000 from Columbia University for his efforts in delivering the Horace S. Manges lecture at Columbia on or about April 1, 2003.

The Horace S. Manges lecture was endowed by the law firm of Weil, Gotshal and Manges, LLC, in memory of their deceased name partner Horace S. Manges, Esq.

Weil Gotshal and Manges, LLC represents the defendants appellees Citigroup and State Street, in this action in the District Court and in this Court.

Judge Leval also delivered another Horace S. Manges lecture at New York University law school a few years ago.

Judge Leval lists his wife as receiving a pension from “State St. Inst. Pension Plan”. State Street is a named party in this appeal. What relationship, if any, this pension plan has to the defendant herein is unknown to the appellant at this time.

Judge Leval’s financial statement reveals that he received dividends on his investment in the “Smith Barney Liquid Res Fund”. If this is the firm that is now known as Salomon Smith Barney, Inc., it is also a named defendant-appellee in this action.

In view of the foregoing, Judge Leval should have disqualified himself from serving on the panel pursuant to 28 U.S.C.S. § 455.

Judge Parker states in the papers that he filed prior to being approved as a Judge on the Second Circuit Court of Appeals, that he owned stock in the defendant-appellee herein, Citigroup, Inc.

Judge Parker’s financial filings refer to his having accounts at some brokerage firms. If any of those firms are a defendant-appellee herein he should have disqualified himself from serving on the panel pursuant to 28 U.S.C. 455.

## Oral Argument

Pursuant to 28 U.S.C.A. 34 (a)(2) “oral argument must be allowed in every case....” with the exception of issues that are not relevant hereto, in that oral argument had already been scheduled on this appeal by the Court.

Local Rule 34 serves to deny applications for the postponement of oral argument except in the event of an emergency such as the “...unforeseen illness of counsel...”

Appellant’s application for a postponement of argument to a date after April 15, 2006 from the scheduled date of argument of March 20, 2006 was denied by the Court, notwithstanding the fact that Appellant’s counsel, a sole practitioner had suffered a sudden acute cardiac event, which required his admission to the hospital from the emergency room on January 24, 2006.

After being discharged from the hospital on February 7, 2006, where counsel underwent a triple coronary artery bypass graft surgery on January 30, 2006, Appellant filed a motion with this Court to adjourn oral argument of the appeal from March 20, 2006, to any date after April 15, 2006. The motion to adjourn the oral argument was duly filed with this Court on February 17, 2006. There was no opposition to the motion.

On February 28, 2006, the Court denied Appellant’s motion to adjourn oral argument, without stating any reasons for its denial of the motion. The Court also precluded oral argument by any party as part of its decision.

Adjourning the oral argument of this appeal to another date may have changed the composition of the panel of judges hearing this appeal.

Appellant was prejudiced by being denied his statutory right to present oral argument to the Court, as is set forth in 28 U.S.C. 34.

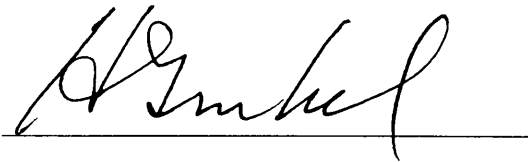
The Court's decision failed to address the issues surrounding the existence of the defendant CITISTREET. CITISTREET defaulted in appearing in the action. Weil Gotshal and Manges, LLC, the attorneys for the CITIGROUP, Inc. defendants averred both to the District Court and to this Court that CITISTREET was a nonexistent entity and thus free to default in the action.

Contrary to the foregoing it is a known and public fact that CITISTREET is a \$215 Billion 50/50 Joint Venture between the defendant-appellees CITIGROUP, Inc and STATE STREET CORPORATION. See the CITISTREET website at CITISTREETONLINE.COM. Thousands of employees in the public and private sector use CITISTREET for their retirement benefits.

For the foregoing reasons this petition for a rehearing, before a different panel of Judges, should be granted.

Dated: Freeport, New York  
April 6, 2006

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "H. Grubel", is written above a horizontal line.

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

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

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

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

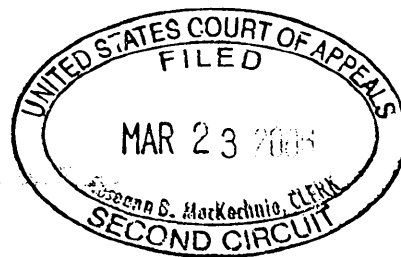
PRESENT:

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

*Circuit Judges,*

HON. WILLIAM K. SESSIONS III,\*

*Chief District Judge,*



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

*Plaintiff-Appellant,*

**SUMMARY ORDER  
No. 05-0609-cv**

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

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

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

4 *Defendants-Appellees,*

5 Citistreet, Copeland Associates, Inc.,

6 *Defendants.*  
7

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8  
9 For Plaintiff-Appellant: Henry M. Grubel, Freeport, NY.

10  
11 For Defendants-Appellees Citigroup and State Street: David J. Lender (Peter S. Hageman,  
12 Gregory S. Coleman, Edward C. Dawson, *on the brief*); Weil Gotshal & Manges LLP, New  
13 York, NY.

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

17  
18 For Defendants-Appellees Lutheran Medical Center, Wendy Z. Goldstein, Miles H. Kucker,  
19 William D. Myhre, Allen Schechter, and Howard Smith: Michael H. Ference; Sichenzia Ross  
20 Friedman Ference LLP, New York, NY.  
21

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22  
23 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND  
24 DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

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

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

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

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

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

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

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

commerce" *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 100 (2d Cir. 1990). For essentially the reasons discussed by the district court, we find that Appellant also failed to state a claim under RICO upon which relief can be granted

Finally, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state law claims once it had dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c). See *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998); *Castellano v. Bd. of Trs.*, 937 F.2d 752, 758 (2d Cir. 1991).

We have considered petitioner's remaining contentions and find them to be without merit. Accordingly, the judgment of the District Court is hereby affirmed.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By:  Miller Carr

**AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS OVERNIGHT**

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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

05-0609cv

**COPY**

-against-

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William D. Myhre, Don Goldstein, State Street Corp., Citistreet Inc., Citistreet Associates,  
LLC, Citistreet Equities, LLC, Citistreet Financial Services, LLC, Travelers Insurance  
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Defendants-Appellees,

Citistreet, Copeland Associates, Inc.,  
Defendants.

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

THE UNDERSIGNED, GAYLE APPLE, BEING DULY SWORN, DEPOSES AND SAYS:  
DEPONENT IS NOT A PARTY TO THE ACTION, IS OVER 18 YEARS OF AGE  
AND RESIDES IN LONG BEACH, NEW YORK.  
THAT ON THIS 27TH DAY OF JANUARY 2006, I SERVED 2 COPIES OF THE  
ATTACHED PETITION FOR REHEARING  
UPON:

David Covey, Esq.  
Sedgwick, Detert, Moran & Arnold, LLP  
125 Broad Street, 39th Floor  
New York, New York 10004-2400

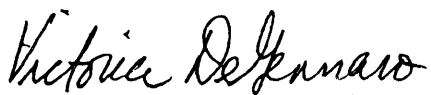
Michael H. Ference, ESQ.  
Sichenzia Ross Friedman Ference LLP  
1065 Avenue of the Americas, 21st Floor  
New York, New York 10018

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

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

  
GAYLE APPLE

STATE OF NEW YORK: COUNTY OF NASSAU  
SWORN TO BEFORE ME THIS:  
6 DAY OF April 2006

  
VICTORIA DeGENNARO  
Notary Public, State Of New York  
No. 01DE6087047  
Qualified In Nassau County  
Commission Expires February 10, 2007