

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 the 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.)

SECOND AMENDED
COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF
AND FOR DAMAGES

Jury Trial Demanded

Plaintiff, as and for his second amended complaint, in
accordance with Rules 7(b), 15(a), and 20(a), of the Federal
Rules of Civil Procedure as the case may be, states as follows:

NATURE OF ACTION

1. This action, as hereinafter is more fully set forth, is instituted under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), the Sherman Antitrust Act, the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), certain New York State statutes, and the Common Law, to obtain declaratory and injunctive relief, and to recover damages for injury, and prospective injury, caused by the defendants to the person, business and property of the plaintiff, individually, and in his fiduciary capacity under the ERISA § 403(b) annuity plan at Lutheran Medical Center.

JURISDICTION AND VENUE

2. This action arises under:

- a) The provisions of Title I of ERISA §§ 502(a)(2)&(3), 29 U.S.C. § 1132(a)(2)&(3), as hereinafter more fully appears. Exclusive jurisdiction is conferred on this Court by ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).
- b) The Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, as hereinafter more fully appears. Original jurisdiction is conferred on this Court under 28 U.S.C. §§ 1331 and 1337 and under 15 U.S.C. § 22.
- c) The provisions of the Clayton Act, 15 U.S.C. §§ 12-27, 44, as hereinafter more fully appears. Original jurisdiction is conferred on this Court by 28 U.S.C. § 1337 and 28 U.S.C. § 1331 and 15 U.S.C. § 22.

d) The provisions of RICO, 18 U.S.C. §§ 1961 et seq., as hereinafter more fully appears. Original jurisdiction is conferred on this Court by 18 U.S.C. § 1965(a), and 28 U.S.C. 1331.

3. Plaintiff also seeks damages from the defendants for their violations of certain New York State statutes and the Common Law, all arising out of the same or similar set of facts, so that they form part of the same case or controversy, over which this Court has supplemental jurisdiction under 28 U.S.C. § 1367, as follows:

- a) Violations of Article 22 of the General Business Law of the State of New York §§ 340 et seq., Monopolies (the Donnelly Act);
- b) Violations of Article 22-A of the General Business Law of the State of New York §§ 349 et seq., (Deceptive Acts and Practices).
- c) Violations of § 2123 of the New York State Insurance Law ("NYSIL") (Misrepresentations, Misleading Statements and Incomplete Comparisons) by agents, as implemented by New York State Insurance Department ("NYSID") Regulation 60 (11 NYCRR §§ 51.1 - 51.8) ("REG 60");
- d) Violations of § 4226 of the NYSIL, regarding (Misrepresentations, misleading statements and incomplete comparisons by insurers);
- e) Tortious Interference with Contract;

- f) Tortious Interference with Prospective Economic Advantage;
- g) Conspiracy;
- h) Defamation;
- i) Fraud;
- j) Unfair Competition;
- k) Constructive Fraud.

4. The defendants collectively are wrongfully and fraudulently engaged in sponsoring, marketing, implementing, and administering the sale of retirement products in interstate commerce, with commerce and operations that are engaged in interstate commerce.

5. Each defendant either maintains an office, transacts business, has an agent, or is found in the County of Kings in the State of New York, which is within the jurisdiction of the Eastern District of New York, thus this Court has venue in this litigation pursuant to ERISA § 502(e)(2) & (3), 29 U.S.C. § 1132(e)(2) & (3).

6. Venue is also proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b), in that a substantial part of the events or omissions giving rise to the claims herein, occurred in the Eastern District.

THE PARTIES

7. Plaintiff, CARMINE A. LOPRESTI, ("LOPRESTI") is, and was at all times mentioned, duly licensed by the New York State Insurance Department ("NYSID") to sell and service fixed and variable annuities. Since the mid 1980's plaintiff has been

similarly licensed by the Insurance Department of the State New Jersey. Plaintiff resides at 42 Stoney Brook Road, Holmdel, New Jersey, 07733, and he maintains a mail drop address at 1634 81st Street, Brooklyn, NY, 11214. He is engaged in interstate commerce and is a fiduciary under Title I of ERISA of the LUTHERAN MEDICAL CENTER § 403(b) Tax Sheltered Annuity Plan. The plaintiff's annuity business was wrongfully destroyed by the defendants herein. All of the defendants committed wrongful acts as hereinafter set forth which were all to plaintiff's damage.

8. On information and belief, defendant CITIGROUP, INC., ("CITIGROUP"), is a Delaware corporation, duly authorized to do business in the State of New York, with offices located at 399 Park Ave., New York, N.Y. 10043, and/or at 388 Greenwich Street, New York, NY 10013. It co-owns with the defendant STATE STREET CORPORATION as an apparent joint venture, the fraudulent Enterprise/Company/Organization known as CITISTREET. It is engaged in interstate commerce.

9. On information and belief the defendant SANFORD I. WEILL ("WEILL") is the Chairman and CEO of CITIGROUP. CITIGROUP is the parent company of the non-Lutheran Medical Center defendants, other than the defendants STATE STREET CORPORATION, BUCK and BUCK Inc. WEILL co-structured and co-created the fraudulent Enterprise/ Company/Organization known as CITISTREET, with the defendant SPINA.

10. On information and belief the defendant WENDY Z. GOLDSTEIN ("GOLDSTEIN") is the President and CEO of the defendant LUTHERAN

MEDICAL CENTER ("LMC"). She was instrumental in contracting with, enabling, aiding and abetting the CITIGROUP defendants' unlawful and fraudulent activities at LMC.

11. On information and belief, the defendant MILES H. KUCKER ("KUCKER") was the V.P. of Human Resources of the defendant LMC until in or about October 2002. KUCKER was or still is, a Trustee of the Health Services Retirement Plan ("HSRP"). He was instrumental in contracting with, enabling, aiding and abetting the CITIGROUP defendants' unlawful and fraudulent activities at LMC, as set forth herein.

12. On information and belief, the defendant WILLIAM D. MYHRE ("MYHRE") is the current V.P. of Human Resources at LMC. He was instrumental in enabling, aiding and abetting the CITIGROUP defendants' unlawful and fraudulent activities at LMC, as set forth herein.

13. On information and belief, the defendant ALLEN SCHECHTER ("SCHECHTER") is the Executive V.P. for Finance and Strategic Planning of LMC. He was instrumental in contracting with, enabling, aiding and abetting the CITIGROUP defendants' unlawful and fraudulent activities at LMC, as set forth herein.

14. On information and belief, the defendant HOWARD SMITH ("SMITH") is the Chairman of the Board of Trustees of LMC. He was instrumental in contracting with, enabling, aiding and abetting the CITIGROUP defendants' unlawful and fraudulent activities at LMC, as set forth herein.

15. On information and belief, defendant STATE STREET CORPORATION, ("STATE STREET"), is a Massachusetts corporation. Its principal office is located at 225 Franklin Street, Boston, Mass, 02110. It maintains offices and conducts business in the State of New York at 153 East 53rd Street, 36th Floor, New York, N.Y. and at 61 Broadway, 15th Floor, New York, N.Y.. It is engaged in interstate commerce. It co-owns with the defendant CITIGROUP as an apparent joint venture, the fraudulent Enterprise/Company/Organization known as CITISTREET. It is not authorized to do business in the State of New York.

16. On information and belief the defendant DAVID A. SPINA ("SPINA") is the Chairman and CEO of STATE STREET. He co-structured and co-created with the defendant WEILL the fraudulent Enterprise/Company/Organization known as CITISTREET.

17. On information and belief, defendant CITISTREET, LLC, ("CITISTREET LLC"), is a Delaware, Limited Liability Company, that conducts business in many states and in the State of New York. Its principal office is located at 3 Batterymarch Park, Quincy, MA, 02169. It maintains offices in the State of New York at 90 Merrick Avenue, East Meadow, NY 11554 and in New Jersey at Two Tower Center, East Brunswick, New Jersey 08816. It is engaged in interstate commerce. CITISTREET LLC is not authorized to do business in the State of New York further, CITISTREET LLC was the original company co-founded by the defendants STATE STREET and CITIGROUP. Thereafter the defendant CITIGROUP, either alone or together with STATE STREET co-opted CITISTREET LLC and

turned it into the fraudulent Company/Enterprise/Organization known as CITISTREET.

18. On information and belief, the defendant CITISTREET is an amorphous fraudulent Company/Enterprise/Organization. It is a self styled, self-proclaimed, unlicensed, rump business organization. It is unlicensed and not authorized to do business in the State of New York. Notwithstanding the foregoing it is actively engaged in the retirement benefits, insurance and mutual funds business. It operates in the United States and worldwide. In addition pursuant to the declarations on its website at www.citistreetonline.com, it states that:

- a) CITISTREET is headquartered in Quincy, Mass.
- b) CITISTREET has 3,000 employees.
- c) CITISTREET has 35 field offices.
- d) CITISTREET serves more than 7.5 million retirement plan participants in the United States.
- e) CITISTREET administers \$180 billion in assets in the United States.
- f) CITISTREET serves about 800,000 participants outside the United States.
- g) CITISTREET administers about \$2.5 billion in assets outside the United States.
- h) CITISTREET is a 50/50 joint venture between STATESTREET and CITIGROUP, or their subsidiaries.
- i) CITISTREET has offices located at 90 Merrick Ave., East Meadow, NY 11554; 2 Tower Center, East Brunswick, NJ 08816; at 3 Batterymarch Park, Quincy, MA 02169; and at other locations.

19. All of the foregoing statements set forth in paragraph 18 (See Exhibit "Z-1&2") notwithstanding, and to the contrary,

CITISTREET is a fraud. It is not a legal entity of any sort. (See Exhibit "Z-3,4&5")

20. On information and belief, defendant DON GOLDSTEIN is the Manager of the defendant CITISTREET LLC, and is the Regional Vice President of the defendant CITISTREET. He actively promoted CITISTREET at LMC. DON GOLDSTEIN may be related to the LMC CEO, WENDY GOLDSTEIN.

21. On information and belief, defendant TRAVELERS INSURANCE COMPANY ("TRAVELERS") is a foreign insurance corporation duly licensed and authorized by the New York State Insurance Department ("NYSID") to sell fixed annuities, variable annuities and other life insurance products in the State of New York. It is a part of, or is owned by, the defendant CITIGROUP.

22. On information and belief, TRAVELERS maintains its home office at 1 Tower Square, Hartford, CT 06183, with executive offices at 307 West 7th Street, Suite 400, Fort Worth, Texas 76012. It is engaged in interstate commerce. TRAVELERS is knowingly in league with the fraudulent CITISTREET. It is fully aware of the illicit and unlicensed marketing methods and means being used by CITISTREET, in selling the TRAVELERS variable and fixed annuity contracts at LMC.

23. On information and belief, defendant LUTHERAN MEDICAL CENTER ("LMC") by its officers and trustees, is a duly licensed and authorized, Not-For-Profit, tax payer supported, New York, Hospital corporation, located at 150 55th Street, Brooklyn, New York 11220. It has other properties in Brooklyn where it provides

medical services to the public. It is qualified under Section 501 C-3 of the Internal Revenue Code, ("IRC"), as a non-profit organization. It is engaged in interstate commerce. LMC defendants are complicit with the non-LMC defendants in marketing the CITIGROUP retirement products to the 3,000+ unsuspecting employees being victimized by LMC and the CITIGROUP defendants.

24. On information and belief, defendant BUCK CONSULTANTS ("BUCK") is an entity that sells actuarial, human resources, and related retirement products and services with principal offices located at 500 Plaza Drive, Secaucus, New Jersey 07096. It conducts business in the State of New York. It is engaged in interstate commerce.

25. On information and belief, the defendant BUCK CONSULTANTS, INC ("BUCK INC") is a Delaware Corporation. It sells actuarial, human resources, and related retirement products and services with an office located at 1 Penn Plaza, New York, New York, 10119-4798. It is authorized to do business in the State of New York. It is engaged in interstate commerce.

26. On information and belief, the defendants BUCK and BUCK INC may be one and the same business organization, in that each may be the alter ego of the other. They prepared and circulated misleading pension comparisons to the LMC employees.

27. On information and belief, the defendant MAYDA CASADO ("CASADO") is a sales agent, servant or employee of the defendant CITIGROUP, SMITH BARNEY, and/or CITISTREET. She is carrying out

the wrongful and fraudulent activities of her employer(s). She is engaged in interstate commerce.

28. On information and belief, the defendant JEAN DESJARDINS ("DESJARDINS") is or was a sales agent, servant or employee of CITIGROUP, SMITH BARNEY, and/or CITISTREET. She is or was, carrying out the wrongful and fraudulent activities of her employer(s). She is engaged in interstate commerce.

29. In information and belief, the defendant JIM WILSON ("WILSON") is or was a sales agent, servant or employee of CITIGROUP, SMITH BARNEY, and/or CITISTREET. He is or was carrying out the wrongful and fraudulent activities of his employer(s). He is engaged in interstate commerce.

30. On information and belief, the defendant CITISTREET ASSOCIATES, LLC, ("CSA") is a Delaware Limited Liability Company, duly authorized to do business in the State of New York. Its principle offices are located at 2 Tower Center, East Brunswick, New Jersey, 08816. It is a participating and complicit member of the "Retirement Services Division" of the fraudulent defendant known as CITISTREET, (See Ex G-1). It is engaged in interstate commerce.

31. On information and belief, defendant CITISTREET EQUITIES, LLC, ("CSE") is a New Jersey Limited Liability Company, duly authorized to do business in the State of New York. Its principle offices are located at 2 Tower Center, East Brunswick, New Jersey, 08816. It is a participating and complicit member of the "Retirement Services Division" of the fraudulent defendant known

as CITISTREET, (See Ex G-1). It is engaged in interstate commerce.

32. On information and belief, the defendant CITISTREET FINANCIAL SERVICES, LLC ("CSFS") is a New Jersey Limited Liability Company, duly authorized to do business in the State of New York. Its principle offices are located at 2 Tower Center, East Brunswick, New Jersey, 08816. It is a participating and complicit member of the "Retirement Services Division" of the fraudulent defendant known as CITISTREET, (See Ex G-1). It is engaged in interstate commerce.

33. On information and belief, the defendant SALOMON SMITH BARNEY, INC, ("SMITH BARNEY") is a domestic New York Business Corporation with its principal executive office located at 388 Greenwich Street, New York, New York 10013. It is a part of CITIGROUP and is participating, complicit, and enabling the fraud being perpetrated by the co-defendants herein on the plaintiff and the LMC employees.

34. The plaintiff has been unable to locate the whereabouts of the defendant SMITH BARNEY CORPORATE TRUST COMPANY ("SBCTC"). It is being sued herein as being SMITH BARNEY. On information and belief it is engaged in interstate commerce, and it is participating, complicit, and enabling the fraud being perpetrated by the co-defendants herein on the plaintiff and the LMC employees.

35. On information and belief, the defendant COPELAND ASSOCIATES, INC. ("CAI") is a Delaware business corporation. CAI

has its principal address at 2 Tower Center, East Brunswick, New Jersey 08816. CAI is said to have merged into CITISTREET ASSOCIATES LLC in August 2000 so that it no longer exists. (See Exhibit "Z-3,4&5"). Despite its alleged non-existence, CAI continues to operate and function as CAI. (See Exhibit Z-6&7). It is not authorized to conduct business in the State of New York. It is engaged in interstate commerce. CAI is operating as a de-facto corporation. it is participating, complicit, and enabling the fraud being perpetrated by the co-defendants herein on the plaintiff and the LMC employees.

36. Subject to the proof to be established at trial, certain of the defendants hereinabove named are fiduciaries, as defined in Title I of ERISA, of the § 403(b) Tax Sheltered Annuity ("TSA") plan at LMC.

37. The non-LMC defendants are herein referred to collectively as the CITIGROUP DEFENDANTS.

38. LMC and its officers are herein referred to collectively as the LMC DEFENDANTS.

STATEMENT OF FACTS

39. The LMC defendants deliberately and knowingly contracted with the CITIGROUP defendants, to sell and service § 403-b TSAs and § 401k plans to the LMC employees. In connection therewith the LMC defendants gave the CITIGROUP defendants the exclusive right to engage in such services, and wrongfully denied plaintiff access to the LMC premises. Plaintiff had been selling and servicing TSAs at LMC, for 25 years. Plaintiff was also denied

access to the public LMC lobby and the coffee shop adjacent thereto.

40. The LMC defendants, together with all of the other defendants deliberately failed to reveal to the LMC employees that CITISTREET is not a bona fide, duly licensed and existing company or business entity, although the defendants have cloaked CITISTREET with having all of the indicia of being a bona fide existing and viable business entity or company.

41. The foregoing is a foundation of the defendants' scheme to put at risk and/or plunder the TSA retirement assets of the LMC employees, and to cause plaintiff the economic injuries complained of herein, without anyone having legal recourse against the non-existent defendant known as CITISTREET.

42. Since in or about 1976, at the special instance and request of the defendant LMC, plaintiff has been engaged in the sale and servicing of IRC § 403(b) annuities to the employees of LMC. Plaintiff is a sole proprietor. He was one of six (6) approved vendors of voluntary, salary reduction § 403(b) TSA plans at LMC. (See Exhibit "A"). Plaintiff makes no claims herein on behalf of the other five vendors.

43. Plaintiff has sold, serviced, advised and enrolled about 1,070 LMC employees into his § 403(b) annuities at LMC over the years.

44. The annuities were initially written primarily by the plaintiff through State Mutual Life Insurance Company. From in

or about 1977, and thereafter, they were written primarily by the plaintiff through Royal Globe Life Insurance Company of New York.

45. As the result of various sales and mergers, Royal Globe Life Insurance Company of New York has morphed into the insurance company now known as the North American Company for Life & Health Insurance of New York ("NANY").

46. The annuities sold by the plaintiff were primarily fixed individual § 403(b). Plaintiff did not sell group annuities.

47. The § 403(b) annuities sold by plaintiff and the other § 403(b) annuity vendors were not subject to Title I of ERISA, in that all of the requirements of ERISA Regulation § 2510.3-2(f) were met by LMC, thus exempting the pre-existing §403-b plan from the application of Title I of ERISA.

48. From and after on or about October 2001, the LMC defendants no longer met the requirements of ERISA Regulation § 2510.3-2(f). LMC thereby converted the existing LMC § 403-b non-ERISA Tax Sheltered Annuity (TSA) plan into an ERISA plan, fully subject to the requirements and provisions of Title I of ERISA.

49. Under Title I of ERISA, the LMC § 403-b plan now mandates the existence of plan fiduciaries. Heretofore, the existence of either named or deemed (defacto) plan fiduciaries did not exist when the § 403-b plan was not subject to Title I of ERISA.

50. Plaintiff is now either a deemed, or a defacto, or an actual fiduciary under the LMC § 403(b) plan in that he: provides individualized investment advice to the plan participants; plaintiff provides this advice pursuant to a mutual understanding

between LMC and himself; the advice provided by plaintiff to the LMC plan participants was and is provided on a regular basis; the advice pertains to the value of the property or consisted of recommendations as to the advisability of investing voluntary TSA contributions in certain property, (fixed annuities), as opposed to other sorts of investments; and plaintiff's advice was rendered for a fee derived from the commissions he earns on the sale of the TSA annuity products.

51. Over the past twenty five years plaintiff met regularly, face to face, with the LMC executives and other LMC employees, many of whom relied on his investment advice and followed his recommendations, because of the confidence that the plan participants have in his opinion and advice on these issues.

52. Plaintiff is a fiduciary under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

53. Plaintiff's LMC customer account values in annuities he sold to hundreds of LMC employees, in mid 2001, totaled approximately \$40 million.

54. Plaintiff's customers were contributing voluntarily, by way of salary reductions, approximately \$230,000 per month into their § 403(b) annuities with NANY in 2001.

55. Plaintiff sold, advised on, and serviced the customer friendly, single premium, fixed § 403(b) annuity contracts, which guaranteed a stated rate of interest, for a stated number of years, as well as flexible premium annuities with a fixed rate of interest that contain fixed surrender charges, and advantageous

loan provisions. They also contained a contractual minimum guaranteed rate of interest, to be paid indefinitely thereafter for the life of the annuity contract, together with many other features (See Exhibit "B").

56. The § 403(b) annuity contributions were made via voluntary salary reduction agreements, (known as "elective deferrals"), under Internal Revenue Code § 402(g)(3). These salary reduction agreements were between LMC, the LMC employee, and NANY, as required by § 403(b) of the Internal Revenue Code. (See Exhibit "C")

57. The LMC § 403(b) annuities that plaintiff sold were noncontributory, NON-ERISA. All contributions consisted of the employee's own money. They were all elective deferrals.

58. Plaintiff conducted his LMC annuity sales, service, advisement, and due diligence activities, person-to-person, on the LMC premises about three days a week.

59. In or about March of 2001 the defendant GOLDSTEIN became the President and CEO of LMC. Thereafter, on information and belief, an agreement was made between the LMC DEFENDANTS, and the CITIGROUP defendants, to destroy plaintiff's existing 403(b) business. LMC also contracted with the non-existent company/organization/enterprise known as CITISTREET and eliminated the Health Services Retirement Plan (HSRP) for non-union employees, per a 12/6/02 letter from defendant MYHRE, (See Exhibit "Y"), all in order to promote the new 401(k) plan

administered by the non-existent company known as CITISTREET, and to enrich LMC.

60. Shortly thereafter, in or about July 2001, LMC sent plaintiff's customers an announcement regarding the hospital's adoption of an I.R.C. § 401(k) plan, allegedly as a partial amendment of its § 401(a) defined benefit pension plan known as the Health Services Retirement Plan (HSRP). (See Exhibit "D").

61. On July 24, 2001, the LMC DEFENDANTS caused to be distributed certain misleading Pension Information Packages, authored and/or co-authored by BUCK, or BUCK, INC., and the co-defendants herein to plaintiff's customers. (See Exhibit "E").

62. The package contained a "Dear Fellow Employee" letter dated July 24, 2001 from LMC, which contained deceptive, fraudulent and misleading sales and promotional materials, together with incomplete comparisons between the then existing, and the proposed retirement plans. (See Exhibit "F").

63. The sales materials, referred to in the above four paragraphs, distributed by the defendants to plaintiff's customers, failed to properly disclose and explain to plaintiff's customers the drawbacks of enrolling in, and participating in the defendants' § 403(b) and § 401(k) plans, as opposed to plaintiff's § 403(b) fixed annuity plan, nor did they reveal that the company known as CITISTREET was a non-existent company.

64. Sometime in or after July 2001 the defendants circulated or caused to be circulated to plaintiff's customers certain other

misleading sales materials concerning these matters. (See Ex "G").

65. Thereafter the defendants embarked on a campaign, using wrongful, unlawful, fraudulent, and deceptive means, to misappropriate and co-opt plaintiff's § 403(b) annuity business, by having his customers transfer their accumulated annuity account values and/or redirect their monthly elective deferrals into the defendants' § 401(k) and § 403(b) plans, without complying with the requirements of Regulation 60 of the NYSID.

66. In furtherance of their fraudulent scheme, the LMC DEFENDANTS, in concert, by arrangement, by agreement, and/or contract with the CITIGROUP DEFENDANTS herein barred the plaintiff (and all of the previously authorized IRC § 403(b) annuity vendors) from access to the LMC premises. This prevented plaintiff from competing with the CITIGROUP DEFENDANTS, and put him out of touch with his plan participants.

67. The defendants employed fraudulent and misleading representations, and incomplete comparisons, as defined in §§ 2123 and 4226 of the NYS Ins. Law, in misappropriating plaintiff's customers and business to themselves, all to the plan participant's disadvantage and plaintiff's damage.

68. By letter dated September 25, 2001 from LMC, plaintiff was told that effective October 1, 2001 he could not enroll any LMC employees hired after October 1, 2001 in the LMC § 403(b) plan, in that those employees would all be required to enroll in the new § 401(k) "Citistreet program" and they would not be

allowed to participate in the 403(b) annuity plan. (See Exhibit "H"). This violates IRM 4.72.13.6.1 & IRM 7.7.1] 13.6.1.

69. The LMC DEFENDANTS' actions in denying universal eligibility of all employees to enroll in the § 403(b) salary reduction plan are discriminatory. This will make plaintiff's existing § 403(b) tax sheltered annuity ("TSA") program subject to disqualification by the IRS. (Internal Revenue Manual (IRM) 4.72.13.6.1), which will result in the loss of the § 403(b) tax qualified status of plaintiff's customers' annuities, making plaintiff's customers' elective salary deferrals subject to current income tax. (IRM 4.72.13.6) & (IRM 4.72.13.10) & (IRM 4.72.13.10.2).

70. The LMC DEFENDANTS allowed the CITIGROUP DEFENDANTS to install their retirement products at LMC. Their actions violated the "Prudent Man Standard of Care" set forth in ERISA § 404.

71. The LMC DEFENDANTS failed to conduct a proper due diligence examination of the co-defendants herein. It would have revealed that CITISTREET is not a bona fide existing company, as well as the many regulatory defalcations of the CITIGROUP DEFENDANTS, plus the anti ERISA, antitrust, RICO, or the other prejudicial effects these changes would have on plaintiff and the LMC § 403-b plan participants.

72. LMC has violated ERISA, its Rules & Regulations and thus endangered the viability of the pension and annuity plan assets of the LMC employees.

73. The LMC DEFENDANTS arranged for, personal one-on-one sales meetings between plaintiff's customers and the CITISTREET sales agents. (See Exhibit "I"). Thus their activities, in transferring, rolling over, or redirecting elective monthly deferrals of plaintiff's participant annuity accounts into the defendants' retirement annuity products, were all subject to the full disclosure requirements of Regulation 60, ("REG 60") of the NYS Ins. Dept., 11 NYCRR 51.1 et. seq.

74. The LMC DEFENDANTS have given the non-existent CITISTREET the exclusive right to personally market their new § 403(b) products to the LMC employees. Thereby participating in the fraud and causing plaintiff's 403(b) plan to be converted from a NON-ERISA plan to an ERISA plan, all to the LMC annuity participants' economic peril and disadvantage, and to plaintiff's prejudice in becoming a fiduciary thereunder and in suffering his economic damages.

75. The LMC ERISA § 403(b) plan and their § 401(k) plan (which is by law an ERISA plan), each mandate the existence of a "Summary Plan Description" ("SPD"). ERISA § 102(a)&(b), 29 U.S.C. § 1022(a)&(b).

76. LMC has failed to give the SPD, to every participating employee and beneficiary of the plan, in violation of ERISA § 104(b), 29 U.S.C. § 1024(b)(1).

77. In addition, to the required SPD, a formal "Plan Document" must be in existence, pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The Plan Document must be made available by

LMC to any plan participant or beneficiary to examine, ERISA § 104(b)(2), 29 U.S.C. § 1024(b)(2). Notwithstanding this statutory mandate, the LMC DEFENDANTS have refused to make the existence or contents of LMC Plan Document known or available for inspection and copying by the LMC employees, though duly demanded.

78. Plaintiff sent letters dated October 18, November 7, and November 12, 2001 to his § 403(b) annuity customers, and a November 20, 2001 letter to NANY that he copied to certain LMC DEFENDANTS, in an attempt mitigate his damages, personally and as a fiduciary of the 403(b) plan. (Exhibit "J").

79. In a letter dated December 6, 2001 the LMC DEFENDANTS, issued a gag order to the plaintiff, demanding that he not correspond with his customers. (See Exhibit "K").

80. A December 31, 2001 letter from LMC to NANY stated in pertinent part that "In light of recent events in New York and changes Lutheran Medical Center made to its retirement program.." the plaintiff would no longer be allowed to see his customers on the LMC premises. (See Exhibit "L").

81. On March 11, 2002, LMC by KUCKER sent the plaintiff a letter objecting to some appearances he had made at LMC. It also verified that all of the prior § 403(b) product vendors, similarly situated as the plaintiff, had also been denied access to the LMC premises. (See Exhibit "M"). Said access denials were issued in furtherance of the scheme to defraud plaintiff and his

customers by not revealing that the company known as CITISTREET did not exist.

82. In an effort to mitigate his damages and fiduciary exposure, the plaintiff spoke to a few LMC executives about the situation and sent a letter to Mr. John G. Kapanke, President of the Board of Pensions of the Evangelical Lutheran Church of America, on March 29, 2002. (See Exhibit "N").

83. By letter dated May 24, 2002 Mr. Kapanke advised the plaintiff that they had no control over LMC. (See Exhibit "O").

84. In furtherance of their fraud and deceit, and the dissemination of misleading and fraudulent information, a letter from LMC dated April 23, 2002, was sent to the LMC employees signed by the defendant KUCKER. It advised the employees that any information concerning the new § 401(k) plan that was not obtained from either "CITISTREET or LMC" "...may not fully or accurately describe the particulars of the plan or your participation in it". The letter urged the LMC employees to "contact CITISTREET who has a representative on site at LMC" (See Exhibit "P"), in a word "all the chickens in the coop should report to the fox".

85. The 4/23/02 letter was an obvious reference to the plaintiff's activities. Plaintiff is duly registered with the NASD and is also licensed to sell variable annuities. He is therefore competent to render opinions regarding the issues presented by defendants' wrongful actions.

86. The non-existent company known as CITISTREET is operating as an undefined business entity in violation of § 133 of the General Business Law of New York.

87. § 3201 of the NYS Ins. Law prohibits the use or circulation of any policy form, or application therefore, without it first having been approved by the NYSID. On information and belief, the "Participation Agreement" being used by the non-existent company/organization/enterprise known as CITISTREET, has not been submitted to, or approved for use by the NYSID. (See Exhibit "Q").

88. Article 21 of the NYS Ins. Law proscribes acting as an insurance agent, or consultant in the State of New York without being duly licensed to act as such by the NYSID.

89. On information and belief the following named defendants are not licensed by the New York State Insurance Department to act as either an insurance agent, or as an insurance consultant under § 2103 of the NYS Ins. Law:

- a) CITIGROUP, INC.
- b) STATE STREET CORPORATION
- c) CITISTREET LLC
- d) CITISTREET
- e) CITISTREET INCORPORATED
- f) CITISTREET EQUITIES, LLC
- g) CITISTREET FINANCIAL SERVICES, LLC
- h) LMC
- i) GOLDSTEIN, KUCKER, MYHRE, SCHECHTER, & SMITH
- j) SALOMON SMITH BARNEY
- k) WEILL & SPINA

90. On information and belief, all of the defendants named in the above paragraph 89, are involved illegally, in violation of Article 21 of the NYS Ins. Law, in either selling, promoting,

consulting, and/or rendering advice directly or indirectly regarding the annuities offered under the LMC § 401(k) plan, the former § 403(b) plan, or the new ERISA § 403(b) plan at LMC.

91. In order to be licensed to sell or offer variable annuities in the State of New York one must have first passed the applicable NASD or SEC examinations.

92. On information and belief, the following defendants are not registered or licensed by the NASD or the SEC.

- a. CITIGROUP, INC.
- b. STATE STREET CORPORATION
- c. CITISTREET, LLC
- d. CITISTREET
- e. CITISTREET INCORPORATED
- f. CITISTREET ASSOCIATES, LLC
- g. CITISTREET FINANCIAL SERVICES
- h. BUCK CONSULTANTS
- i. BUCK CONSULTANTS, INC.
- j. LMC
- k. GOLDSTEIN, KUCKER, MYHRE, SCHECHTER, & SMITH
- l. WIEL & SPINA

93. On information and belief, the defendants named in the above paragraph 92 have solicited applications for, and circulated, and caused to be circulated sales literature regarding variable annuities and mutual funds to plaintiff's customers without being properly licensed to do so by the NYSID, or the NASD.

94. CITISTREET and the LMC DEFENDANTS are having plaintiff's customers sign a certain fraudulent "Participation Agreement", (See Exhibit "Q"), to implement their enrollment in the § 401(k) and § 403(b) elective deferral plans. Said agreement states on the obverse side thereof the fiction that the participant has

received a Summary Plan Description and relevant prospectus, when, the Summary Plan Description and the prospectus' were in fact, not offered or received by the participants.

95. The fraudulent CITISTREET "Participation Agreement" contains the following four line self serving statement at the bottom thereof in the following size type :

You must understand that this form creates a legally binding contract. The back of this form explains the terms of this contract, certain rules for your investment Contract(s), and the provisions of your Plan, including important information about Plan withdrawal restrictions and investment options. **YOU MUST READ THE BACK OF THIS FORM BEFORE YOU SIGN ANYTHING.** If anything on this form makes you unsure about your decision to participate in the Plan, ask your CitiStreet representative to explain it again.

96. The defendants are deliberately not disclosing to the LMC employees that CITISTREET does not exist, or the full and entire meaning, and the consequences to the employees, concerning their consenting to the onerous terms and conditions set forth on the obverse side of the fraudulent "Participation Agreement". It also presumes to say that everything had already been explained to the employee, which is false. (See Exhibit "Q")

97. The fraudulent "Participation Agreement", being used to implement the elective deferrals creates a plan failure, in that it does not comply with the dictates of § 403(b) of the IRC, 26 C.F.R. § 1.403(b)-1 3. For example, the employer, LMC, does not appear to be a party to the agreement and CITISTREET does not exist. Per the Internal Revenue Manual 4.72.13.10.3. This will render all the contributions made thereunder includible in the gross income of the employee plan participants.

98. Some participants, who have elected to do business with CITISTREET, have not received timely proof, in the form of an

annuity policy, mutual fund certificate, and/or confirmation of their transaction with CITISTREET, and are being given improper forms to sign. (See Exhibit "X")

99. The defendants are fraudulently misleading plaintiff's customers by telling them that the defendants' fixed § 403(b) and/or § 401(k) plan annuities are the same as the fixed annuities written by the plaintiff, when it is not true.

100. The defendants are deliberately not disclosing to plaintiff's customers the details of the fraudulent non-existence of CITISTREET, the imposition of the new and increased surrender charges, different loan provisions, lower guaranteed interest rates, the full adverse impact of converting from a non-ERISA plan, to an ERISA status of their annuities, or the difference to them between an "individual" and a "group" annuity. Enrollment in the TRAVELERS fixed annuity is available only in conjunction with the purchase of certain variable annuity contracts from TRAVELERS, which contain higher costs, lower guaranteed interest rates, and more onerous terms, than the fixed annuities sold by the plaintiff. (See Exhibit "R").

101. The DEFENDANTS were instrumental in using their natural leverage as being or representing the employer, to exert subtle yet undue influence and persuasion upon plaintiff's customers to transfer their elective deferrals and/or accumulated account values from existing § 403(b) annuity plans into the defendants' retirement products, to be managed and administered by the non-existent defendant CITISTREET.

102. The defendants, by their agents, servants and employees have made and are continuing to engage in non-disclosure, unfair, fraudulent, and deceptive practices in order to convince plaintiff's customers to transfer their existing monthly elective deferrals from plaintiff's 403(b) annuities into the defendants' § 401(k) and/or § 403(b) plan annuities.

103. The inability of plaintiff's plan participants to obtain, or to see a copy of the LMC "Plan Document(s)", or the Summary Plan Description, not only violate ERISA, but makes any of plaintiff's plan participants' decisions on participation in any LMC elective deferral retirement plan, uninformed and speculative, all to the participants' prejudice and defendants' competitive monopolistic advantage, and to plaintiff's personal and fiduciary damage.

104. Plaintiff's now is at risk of being a future litigation target for breach of fiduciary duties, due to the misfeasance, malfeasance, non-disclosure, monopolistic, fraudulent and wrongful acts of the co-fiduciary defendants herein, 29 U.S.C. § 1105. Said prospective litigation exposes plaintiff to the costs thereof, and potential astronomical liabilities.

105. The defendants have violated Part 19 (Regulation 34-a) of the "Rules Governing Advertisements of Life Insurance and Annuity Contracts". Chapter IX "Unfair Trade Practices" under 11 NYCRR § 219.4(p) of the State of New York states in pertinent part:

"... An advertisement shall not use a trade name, an insurance group designation, name of the parent company or

affiliate of the insurer, name of a particular division of the insurer, service mark, slogan, symbol or other device or reference if such use would have the tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligation under a policy."

106. Part of Exhibit "G" is an advertisement for the products and services being offered to plaintiff's customers that include the names of the defendants CITISTREET, STATE STREET, CITIGROUP, CSE, CSA, and CSFS. It creates the impression that each company is guaranteeing the performance of the products offered, confuses the consumer, and thus violates Reg. 34-a, above.

107. Which, if any of these companies stand behind the product offerings being made is not clear. The identity and address of the insurer, TRAVELERS is wrongfully hidden or withheld from the customers, as is the fact that CITISTREET does not exist.

108. The defendants, some of whom are deemed, named or defacto fiduciaries under ERISA, have willfully and deliberately failed to disclose the favorable features of the NON-ERISA status of the plaintiff's customers' § 403(b) annuities, regarding the different and unfavorable rules and limitations regarding loans, withdrawals, beneficiary selections, and annuity options at their retirement, all in violation of the "for the exclusive benefit" rule of ERISA § 404(a), 29 U.S.C. § 1104, or the peril that CITISTREET's non-existence creates for the LMC plan participants.

109. On information and belief, the LMC DEFENDANTS have had, and still have a financial stake in promoting and sponsoring the changes in the HSRP retirement plan and the transfers from plaintiff's § 403(b) program, in that, LMC has pocketed or hypothecated whatever refunds or lower future pension deposits, that were due to plaintiff's customers, for discontinuing aspects of the HSRP plan, and/or they are profiting from the unlawful activities of CITISTREET and the other CITIGROUP DEFENDANTS, all in violation of ERISA § 403(6)(c), 29 U.S.C. § 1103(c).

110. The defendants in violation of ERISA § 404(a)(1)(A)&(B), 29 U.S.C. § 1104(a)(1)(A)&(B), have failed to process timely the requests of plaintiff's customers that request reinstatement of their accounts from the defendants' plan back into plaintiff's § 403(b) plan.

111. The defendants in violation of ERISA § 404(a)(1)(A)&(B), 29 U.S.C. § 1104(a)(1)(A)&(B), have failed to process timely plan participants' requests to increase the amounts of their elective deferrals into plaintiff's § 403(b) plan.

112. The plaintiff has submitted elective deferral agreements to the defendant LMC. LMC has deducted the salary reductions from employee's pay, but the LMC DEFENDANTS and/or the CITIGROUP DEFENDANTS have failed to remit the salary reductions timely to NANY on the employee's behalf, all in violation of ERISA § 404(a)(1)(A)&(B), 29 U.S.C. § 1104(a)(1)(A)&(B).

113. The LMC DEFENDANTS wrongfully turned over confidential trade secret data involving plaintiff's customers and their §

403(b) account values to the CITIGROUP DEFENDANTS herein for their use in soliciting and selling their retirement products to plaintiff's customers.

114. The defendants CITIGROUP, by WEILL and STATE STREET, by SPINA, are holding themselves out to the public as being "co-owners" of CITISTREET. This holding out appears on most all of the CITISTREET literature. Underneath the CITISTREET logo there always appears the legend "A State Street and Citigroup Company". This holding out is false, misleading and fraudulent, in that CITISTREET does not exist. The defendants WEILL and SPINA as CEOs of their respective organizations are charged with the knowledge of this fraudulent deception, which is being done at LMC and on a worldwide basis, by not revealing that the company/organization/enterprise known as CITISTREET does not exist. It may be a joint venture, in which event the joint venturers are liable as partners in a partnership. Disclosure of the joint venture agreement is necessary. CITIGROUP and STATE STREET trumpet the trillions of dollars in assets under management as being reflective of the economic strength of CITISTREET. This is false and misleading in that CITISTREET is an enterprise/organization/company that does not exist.

115. In November 2002 LMC expanded its presence in the financial services business, by engaging in marketing, endorsing, and converting the LMC lobby into a bazaar for the vendors of various insurance products to sell their insurance offerings to the LMC employees. (See Exhibit "S").

116. By its marketing and promotional activities aforesaid LMC is no longer directing 100% of its efforts to its corporate mission, the care and treatment of its patient population.

117. On information and belief LMC is thus engaging in *Ultra Vires* activities, which are beyond the scope of its charter.

118. On information and belief LMC is not licensed or authorized to sell or consult on annuities, mutual funds, or any insurance products.

119. LMC currently is a 501 C-3 organization. By engaging in this new financial services business, LMC puts its 501 C-3 status at risk, all to plaintiff's customers' extreme disadvantage. If LMC's 501 C-3 status is revoked, for its unauthorized and unlicensed entry into the sale, endorsement or consultation regarding financial and insurance products, the plaintiff's 403(b) annuities will no longer be tax qualified. IRM

4.72.13.10.1.

120. In furtherance of the defendant LMC's entry into the financial services business the defendant GOLDSTEIN, the President and CEO of LMC, addressed a letter to "All Lutheran Medical Center Staff". The letter dated November 6, 2002 and is written on LMC stationary. The letter patronizingly opines about the value to the LMC employees of buying automobile insurance, life insurance, home owners insurance, and other financial products being marketed by LMC, on behalf of Allstate Life Insurance Company of New York, Kemper Insurance Companies, Benefits Planning Corp. NS-LIJ Health System, Life Insurance

Company of Boston & New York, CompLink Cafeteria Plan Services, and the numerous mutual funds being endorsed by LMC, without it being properly licensed to do so. (See Exhibit "S").

121. Plaintiff has a property interest, based on his investment of time, skill, effort, and money in the § 403(b) annuity customers that the defendants have misappropriated and has interests and obligations and exposure as a deemed or actual fiduciary to protect herein.

122. Over the past 25 years plaintiff is unaware of any complaints regarding his advisement, sales, service, and due diligence activities at LMC. He has carried out his § 403(b) sales and due diligence activities faithfully, to the best of his abilities.

123. The defendants' monopolistic, fraudulent and illegal activities as herein set forth, have caused plaintiff's damage in future fiduciary exposure, in loss of income, inability to compete or conduct his due diligence activities, and the loss in the present and future value of his business.

COUNT ONE

**VIOLATIONS OF TITLE I OF THE EMPLOYEE RETIREMENT
INCOME SECURITY ACT OF 1974 (ERISA)
(29 U.S.C. §§ 1001 et seq.)
(Against all the Defendants)**

124. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "123" hereof, as if the same were set forth at length hereat.

125. A copy of this second amended complaint will be mailed to the U.S. Secretary of Labor and the U.S. Secretary of the Treasury, as required by ERISA § 502(h), 29 U.S.C. § 1132(h), and as required by New York State Law, to the Attorney General of the state of New York.

126. Plaintiff is a defacto, deemed, actual or named fiduciary under ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii).

127. Plaintiff's co-fiduciaries, as more fully set forth herein, have breached their fiduciary duties and failed to discharge their duties with respect to the LMC § 403(b) annuity plan, which duties must be exercised solely in the interest of the plan participants, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses in administering the plan as set forth in ERISA § 404, 29 U.S.C. § 1104.

128. The plaintiff's NON-ERISA § 403(b) program has, by the actions of the LMC DEFENDANTS, now been converted into an ERISA § 403(b) program, which makes plaintiff a fiduciary of the plan.

129. Certain of the defendants, if not all of them, are fiduciaries under ERISA. They have all breached their fiduciary duties under ERISA as herein more fully set forth.

130. ERISA § 405(a), 29 U.S.C. § 1105(a), provides for liability on a part of a fiduciary for a breach of any co-fiduciaries' obligations. The defendants have prevented the plaintiff from exercising reasonable efforts to remedy the defendants' breaches of their fiduciary obligations.

131. By their actions as set forth herein, the defendants have made plaintiff a potential litigation target at any time in the future, by his § 403(b) plan participant customers, due to the defendants' breaches of their fiduciary duties.

132. The defendants failed to disclose to the LMC employees that they would be doing business with a non-existent company. Further, they failed to disclose, as required by ERISA, the material differences between plaintiff's fixed § 403(b) annuity plan and that of the defendants', all in violation of the "for the exclusive benefit" rule of fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) including:

- a) The seven year rolling surrender charges,
- b) The market value adjustments,
- c) The differences in the loan provisions,
- d) Restrictions on withdrawals, transfers or rollovers,
- e) The high surrender charges,
- f) The annual administration charge,
- g) The loan application fee,
- h) The nonguaranteed aspects,
- i) The problems inherent to participants in an ERISA TSA plan as opposed to a NON-ERISA TSA plan,
- j) Differences between a Group and Individual annuity,
- k) The annual asset charge,
- l) The annuity payouts,
- m) The Enron type uncertainties created by the defendants' adoption of the ERISA plan.

n) The fact that the services herein were being provided pursuant to a contract between LMC and a non-existent company called CITISTREET.

133. The LMC DEFENDANTS in concert with the CITIGROUP DEFENDANTS have failed to comply with the regulatory provisions of Subtitle B of Title I (Reporting and Disclosure) of ERISA, in failing to provide a Summary Plan Description to the plan participants as required by ERISA §§ 102(a) & 104(b)(1)&(2); 29 U.S.C. § 1022(a), 29 U.S.C. § 1024(b)(1)&(2), yet having the plan participants falsely acknowledge the receipt of the Summary Plan Descriptions, which they never received.

134. The defendants failed to have or make available for inspection the "Plan Document" to the plan participants, in violation of ERISA § 104(b)(2), 29 U.S.C. § 1024(b)(2).

135. The LMC DEFENDANTS in concert with the CITIGROUP DEFENDANTS have failed to comply with ERISA § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B), in refusing to notify the participants of the material changes in the plan. The defendants' literature circulated to the LMC employees, specifically states that the defendants would not notify the plan participants of any material changes in the plan benefits or features. (See Exhibit "E")

136. The defendants by their actions have failed, as fiduciaries, to comply with the "Prudent Man Standard of Care" under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to discharge their duties "solely in the interest of the participant...", and in failing, as fiduciaries, to adhere to the "exclusive purpose" rule of providing benefits to participants and their

beneficiaries, per ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) in the following manner:

a) in denying plaintiff free access to his § 403(b) customers at LMC,

b) in denying post October 1, 2001 LMC hires from participation in the plaintiff's NANY § 403(b) plan,

c) in failing to disclose material information to plan participants, and to act solely in the best interests of the plan participants,

d) in failing to properly process and timely remit moneys already deducted from a participant's pay. The LMC DEFENDANTS have not remitted moneys to NANY that were deducted from participant's pay in the required time period, which is the 15th business day of the month following the month in which the participant's contributions are withheld, 61 Fed. Reg. 41220 (Aug. 7, 1996).

e) the defendants collectively have failed to reveal to the LMC employees that they will be purchasing from and entrusting their retirement accounts to the defendant known as CITISTREET, without revealing that CITISTREET does not exist.

137. The foregoing, are violations by the LMC DEFENDANTS, in concert with the CITIGROUP DEFENDANTS, of ERISA's fiduciary liability rules and its prohibited transaction rules. This can result in the imposition of personal and fiduciary liability on the plaintiff. ERISA § 409, 29 U.S.C. § 1109.

138. Federal criminal prosecution is also possible for the LMC DEFENDANTS' failure to timely and appropriately deposit contributions paid or withheld, and their numerous violations of the "Prudent Man Standard of Care" of ERISA § 404(a)(1)(A)&(B), 29 U.S.C. § 1104(a)(1)(A)&(B).

139. Plaintiff seeks declaratory and injunctive relief as requested in paragraph 314 hereof, plus reasonable attorney fees and the costs of the action, in an amount as the Court in its discretion deems appropriate pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1).

COUNT TWO

**VIOLATION OF THE SHERMAN ANTITRUST ACT
(15 U.S.C. §§ 1 & 2)
(Against all the Defendants)**

140. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "139" hereof, as if the same were set forth at length hereat.

141. The defendant LMC, by the LMC EXECS, are in possession of the monopoly power to restrain and restrict and eliminate competition in the sale and servicing of voluntary, salary reduction § 403(b) annuities in the relevant product market of its thousands of employees, in interstate commerce.

142. After over twenty five (25) years of allowing free and open competition in the sale and servicing of § 403(b) annuities among six vendors, the LMC DEFENDANTS have willfully applied, acquired and conspired to and/or maintained their antitrust powers to create the monopoly. The LMC DEFENDANTS have created

the monopoly in concert with the CITIGROUP DEFENDANTS, so as to exclude competition in the relevant LMC employees' § 403(b) market.

143. The LMC DEFENDANTS, have used their monopoly power to create a 100% market share for the § 403(b) annuity business as to all employees hired after October 1, 2001, and to engage the services of a non-existent company, the defendant CITISTREET, with all the consequent damage to the LMC employees that will flow from doing business with a non-existent company called CITISTREET.

144. The LMC DEFENDANTS, through their monopolistic actions in the relevant market have created an impenetrable barrier for plaintiff or others to enter the relevant market.

145. The LMC DEFENDANTS, have possession of monopoly power as aforesaid. Said monopoly power was not exercised until the LMC DEFENDANTS performed the purposeful act of a monopolist, in their predatory and coercive conduct, aimed at acquiring maintaining or conspiring to exercise monopoly power in violation of § 1 of the Sherman Antitrust Act by denying availability to the six previously authorized vendors that the LMC employees could choose from in selecting their preferred § 403(b) annuity vendor.

146. The previous vendors were: Lutheran Brotherhood, Mutual of America, New York Life Ins., Co., Prudential Ins. Co., Royal Life Ins. Co. (NANY), and Fidelity Investments.

147. The LMC DEFENDANTS, together with the CITIGROUP DEFENDANTS have thus engaged in exclusionary conduct, that

eliminated the competitive force of the above six vendors, which included plaintiff, by the anti-competitive denial of access of such vendors to the essential facility, which is the LMC premises, or to its employees hired after October 1, 2002.

148. The defendants have also violated § 2 of the Sherman Antitrust Act in their attempts to monopolize the § 403(b) market place. Their actions have a high probability of success, in that the LMC DEFENDANTS possessed the specific intent to monopolize the § 403(b) market available to its employees, by excluding plaintiff and the other 403(b) vendors from access to the LMC premises. This was anti-competitive conduct necessary to achieve their absolute monopoly power.

149. The defendants violated §§ 1 & 2 of the Sherman Antitrust Act, in that they were all consciously committed to the anti-competitive scheme aforesaid.

150. All of the defendants' actions aforesaid affect interstate commerce.

151. The relevant product market involved in this litigation consists of thousands of present, past, and future employees of LMC.

152. On information and belief LMC DEFENDANTS entered into a tying relationship with plaintiff's competitors, the CITIGROUP DEFENDANTS.

153. The LMC DEFENDANTS brought economic coercion upon plaintiff's customers whereby the LMC DEFENDANTS decreed that plaintiff's prospective future customers could not enroll in

plaintiff's § 403(b) plan, but would be forced to enroll solely and exclusively in the defendants' § 401(k) and/or § 403(b) plan.

154. The defendants wrongfully established the § 401(k) plan and tied in a § 403(b) plan under which the CITIGROUP DEFENDANTS, more particularly the defendant CITISTREET, the non-existent company, would have the exclusive right to meet with plaintiff's customers and prospective customers at LMC and would be the sole entity permitted to sell § 403(b) annuities to the LMC employees hired subsequent to October 1, 2001.

155. LMC DEFENDANTS aided and abetted the activities of the CITIGROUP DEFENDANTS, more particularly CITISTREET, in that they encouraged their employees in the product market, to discontinue doing legitimate business with the plaintiff and to direct the plaintiff's § 403(b) business to the non-existent defendant CITISTREET and the other CITIGROUP DEFENDANTS.

156. The anti competitive impact of the monopoly was to eliminate the plaintiff as a provider or services of § 403(b) annuities to the LMC employees, and to leave the LMC employees at the unrestrained mercy of the CITIGROUP DEFENDANTS' self-serving and self-dealing monopolistic tactics.

157. The foregoing acts involve a substantial amount of interstate commerce, to wit, the acquisition of new customers, some \$45 million dollars in customer account values, and about \$250,000 per month in voluntary monthly employee contributions via elective deferrals.

158. The defendants, through their concerted actions, via contract, agreement, arrangement, or combination have given to themselves the exclusive right to market these 403(b) retirement products to the LMC employees.

159. The defendants have by way of conspiracy, contracts, understandings, agreements, arrangements, or combinations thereof created a monopoly with regard to furnishing, selling, and servicing the 403(b) retirement products, in the relevant product market.

160. The monopolistic actions of the defendants have had the effect of restraining trade in interstate commerce, stifling competition, and preventing other vendors such as the plaintiff, from selling, engaging in due diligence, and servicing his existing customers and selling new customers his § 403(b) annuity products to LMC employees, all to plaintiff's damage and the consequent damage to the plaintiff's customers.

161. By reasons of the monopolistic actions of the defendants plaintiff has sustained injury to his business, with a loss of commission income by the plaintiff on the monthly contributions currently being made, the reduction in the market value of his business, and loss of future customers and income.

162. Defendants, in bad faith, in violation of 15 U.S.C. § 1 & 2, and/or by commercially immoral and illegal means, have misappropriated plaintiff's property interest in his § 403(b) annuity business for purposes of unfair commercial advantage to themselves, by their monopolistic actions.

163. The defendants, by contract, agreement, arrangement, or combination between and among themselves have acted in concert to create a monopoly, by agreeing that only they will be permitted to have access to the LMC employees for the sale of 403(b) or 401(k) annuities. The free and open exchange of ideas and information about competing annuity products has been denied by virtue of the arrangements between the defendants as herein indicated.

164. By denying plaintiff access to the LMC premises and issuing a gag order, the defendants have agreed that plaintiff's voice must be silenced and that his on-site contact with his customers must be prevented, in order to enhance and protect their monopolistic arrangement and prevent their anti competitive and fraudulent acts from being exposed.

165. The defendants fear that the free and open competition by the plaintiff will expose the misrepresentations, nondisclosures, fraud, deficiencies, and possible severe adverse tax consequences, of the defendants' activities aforesaid upon the LMC employees.

166. The defendants have conspired amongst themselves and made reciprocal arrangements to trade exclusively for their sole mutual economic advantage in the relevant market to enrich themselves, all to the detriment of the plaintiff's business.

167. Plaintiff has lost current income; the future value of ongoing rollovers of the expiring annuities that have been or will be replaced by the defendants; the loss of good will; the

reduction in value of his business; and sustained the potential of being targeted in litigation in the future, all to plaintiff's damage of approximately \$100 million, plus treble damages.

168. The defendants will, unless restrained, continue with their monopoly, attempted monopoly, conspiracy to monopolize the marketing and distribution of annuities qualified under I.R.C. § 403(b), in interstate commerce, at LMC, thereby precluding plaintiff's continuation as a competitor for such business.

169. Plaintiff is entitled under 15 U.S.C § 26 to injunctive relief against the threatened loss of business through defendants' continuation of the monopoly, attempted monopoly, or conspiracy to monopolize the marketing and distribution of the I.R.C. § 403(b) annuities at LMC.

170. The foregoing actions by the defendants were concerted actions engaged in via contract, agreement, arrangement, or combination, to advance the interests of a non-existent company the defendant CITISTREET, that has resulted in a monopoly or in an unreasonable restraint on competition at LMC in the sale of § 403(b) annuities, by reason of which the plaintiff and his customers have sustained injury.

171. Plaintiff also seeks injunctive relief to prevent and restrain the foregoing antitrust violations under the Sherman Antitrust Act, as set forth in the prayer for relief requested below in Count One hereof at paragraph 314.

COUNT THREE

VIOLATION OF THE CLAYTON ACT

(15 U.S.C. §§ 15,26)
(Against all the Defendants)

172. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "171" hereof, as if the same were set forth at length hereat.

173. Plaintiff is a "person" who is eligible to sue under § 4 of the Clayton Act (15 U.S.C. § 15) in that his business and his property have been injured by the monopolistic actions of the defendants herein which is a violation as hereinabove set forth of the Sherman Antitrust Act.

174. Plaintiff was injured in his business due to the monopolistic acts of the defendants. Plaintiff has actually been in business selling and servicing § 403(b) annuities at LMC for the past twenty five (25) years.

175. The injury to the plaintiff is the direct result of the defendants' actions aforesaid.

176. Plaintiff was among the competitors against whom the defendants' antitrust violations were directed.

177. The plaintiff's antitrust injury is the type of injury the antitrust laws were intended to prevent, and which flow from that, which made the defendants' conduct unlawful.

178. The plaintiff is entitled to recover for the lost profits that he could have earned in a freely competitive market and/or the decrease in value of the goodwill tangible and intangible property of his business.

179. Plaintiff has sustained present and future damages because of the unlawful acts of the defendants in the sum of \$100 million and seeks treble damages, the cost of this suit and reasonable attorney fees.

180. Plaintiff also seeks injunctive relief pursuant to 15 U.S.C. § 26 as set forth in the prayer for relief requested in Count One hereof at paragraph 314, to prevent and restrain the foregoing antitrust violations under the Clayton Act.

COUNT FOUR

**VIOLATION OF THE FEDERAL RACKETEER INFLUENCED
AND CORRUPT ORGANIZATIONS ACT (RICO)
(18 U.S.C. § 1961 et.seq.)
(Against all the Defendants)**

181. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "180" hereof, as if the same were set forth at length hereat.

182. At all relevant times the defendants were "persons" within the meaning of 18 U.S.C. § 1961(3) wherein "person" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property".

183. At all relevant times the defendants collectively comprised an "Enterprise" as defined under 18 U.S.C. § 1961(4).

184. At all relevant times the defendants were all associated in fact or employed with or by the "Enterprise" under 18 U.S.C. § 1961(4).

185. At all relevant times the defendant members of the "Enterprise" engaged in and affected interstate commerce, inter-se, and between New York, New Jersey, Iowa, and other states.

186. At all relevant times each of the defendants participated directly or indirectly in the affairs of the "Enterprise".

187. At all relevant times the enterprise known as CITISTREET was an ongoing phantom, and non-existent organization.

188. At all relevant times the various members of the enterprise functioned as a continuing unit.

189. At all relevant times the CITISTREET enterprise is an entity separate and apart from the pattern of activity in which it engages.

190. At all relevant times the defendants engaged in a pattern of certain predicate "racketeering activity" as defined in 18 U.S.C. § 1961(1), and as more fully itemized below in paragraph 191 hereof.

191. The defendants engaged in a "pattern of racketeering activity" under 18 U.S.C. § 1961(5). Said racketeering activities date from early to mid 2001. It continues to the present time and threatens to continue into the future, and it affects interstate commerce.

192. At all relevant times the plaintiff has standing to bring this RICO action, in that he is a person who has been injured in his business, by reason of the predicate acts of racketeering, as more fully set forth below, that were committed by the defendants, under 18 U.S.C. § 1964(c).

THE PREDICATE ACTS OF RACKETEERING

193. The defendants' predicate acts of racketeering activity set forth in 18 U.S.C. § 1961(1), all affecting interstate commerce, include, the following:

- a) Mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. The defendants engaged in diverse schemes, to defraud or obtain money or property by means of false or fraudulent presentations on behalf of the non-existent company/organization/enterprise known as CITISTREET, or promises to plaintiff's customers, that properly belonged to the plaintiff. This was done to the plaintiff by the defendants through the interstate use of the mails and wire to send and discuss sales materials that contained incomplete comparisons and false representations regarding their § 401(k) and § 403(b) annuity products. Said materials were sent and were violative of New York State Insurance Department ("NYSID") Regulation 60 ("REG 60"). On information and belief the defendants have also used the phones, inter-se, and to contact plaintiff's customers between New Jersey and New York. The defendants also used the mails between New Jersey and the State of Iowa, in furtherance of their fraudulent acts;

b) The defendants violated 18 U.S.C. § 1951(b) (2) (Interference with commerce by threats or violence) to mean, "the obtaining of property from another, with his consent, induced by wrongfully under color of official right". The defendants demanded that NANY refund to CITISTREET, the non-existent company/organization/enterprise, the sum of \$6,360.00, by claiming that for the previous five (5) months' payments, had allegedly been made by the non-existent CITISTREET in error to NANY. The moneys had already been deposited into the annuitant's account by NANY. The non-existent CITISTREET claimed to be "authorized agents for the employer". A signed authorization by the annuitant for the transfer of his funds to the non-existent CITISTREET was not obtained or enclosed by CITISTREET with the demand for the money. The annuitant was not told by the defendants that they were making this demand for payment out of the annuitant's account with NANY. The annuitant executed a certain wrongful "Participation Agreement" in September of 2001 and by September 2002 he had not received either a policy, or a certificate of participation, prior to the non-existent CITISTREET making the demand of NANY.

- c) The defendants violated 18 U.S.C. § 1344, in committing or attempting to commit fraud upon a financial institution, by means of the use of false or fraudulent pretenses, representations, and/or promises, to obtain moneys from NANY, a financial institution, particularly as the demand was made by the non-existent enterprise known as CITISTREET.
- d) The acts committed in furtherance of the defendants' scheme to convert to their own use of the moneys, funds, securities, premiums, credits, property and other assets contained in the LMC employee welfare benefit plans (those subject to Title 1 of ERISA) such as plaintiff's 403(b) plan, are more fully set forth in subparagraphs (e) through (p) hereof, the defendants, were violations of 18 U.S.C. § 664. (Theft or embezzlement from employee benefit plan).
- e) The defendants violated 18 U.S.C. § 664 in failing to timely remit funds withheld from a plan participant's pay to NANY.
- f) The defendants violated 18 U.S.C. § 664 in their failure to timely honor LMC employee salary reduction requests, submitted by the plaintiff on behalf certain of his customers.
- g) On information and belief, the defendants violated 18 U.S.C. § 664 in that the LMC DEFENDANTS failed to account to the LMC employees for the monetary

savings and refunds that LMC realized by their partial and full termination of the HSRP Plan.

- h) The defendants violated 18 U.S.C. § 664 for the refusal of the LMC DEFENDANTS to comply with certain provisions of Part 1 of ERISA, to wit, failing to provide a "Summary Plan Description" as required by ERISA §§ 102 and 104(b)(1), 29 U.S.C. §§ 1022, and 1024(b)(1).
- i) The defendants violated 18 U.S.C. § 664 for the defendants' stated refusal to notify the plan participants of any material changes in the annuity plan as required by ERISA § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1).
- j) The defendants violated 18 U.S.C. § 664 in that the defendants have violated § 511 of ERISA, 29 U.S.C. § 1141, which makes the use of coercive interference a crime via fraud to "...intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may be entitled under the plan...".
- k) The defendants violated 18 U.S.C. § 664 in that the monopolistic acts of the defendants as aforesaid are violations of Article 22 of the NYS Gen. Bus. Law. These violations under § 341 of the General Business Law of New York are declared to be Class E felonies.

- l) The defendants violated 18 U.S.C. § 664 in that the defendants engaged in monetary transactions improperly derived by violation of New York Penal Law, Article 105.05 by conspiring to violate Article 22 of the Gen. Bus. Law, of the State of New York.
- m) The defendants violated 18 U.S.C. § 664 in that on information and belief the defendants are acting as insurance agents/or consultants, in the business of soliciting and selling and advising and consulting on annuities and other insurance programs at LMC, notwithstanding the fact that they are either not licensed to do so by the New York State Insurance Department, or in the case of CITISTREET are a non-existent entity. These are violations of the New York State Insurance Law § 2102(a)(1). Such unlawful activity constitutes either a felony or a misdemeanor pursuant to § 109(a) of the NYS Insurance Law.
- n) The defendants violated 18 U.S.C. § 664 in that the defendants in furtherance of their predicate criminal acts have deliberately, failed to comply with the rules and regulations regarding the "Replacement of Life Insurance Policies and Annuity Contracts" as set forth in 11 NYCRR 51.1 through 51.8 of the State of New York and the enabling statutes as set forth in NYS Ins. Law §§ 2123, 4226,

by having plaintiff's customers rollover or terminate or redirect their monthly contributions from their existing § 403(b) retirement annuities to the defendants' § 401(k) and/or § 403(b) plan, without complying with the laws of the State of New York regarding misrepresentations and incomplete comparisons as aforesaid.

- o) The defendants violated 18 U.S.C. § 664 in that the violations of § 2123 of the NYS Insurance Law regarding "Misrepresentations, Misleading Statements, and Incomplete Comparisons", committed by all the defendants except TRAVELERS, constitute either a felony or a misdemeanor pursuant to § 109(a) of the NYS Insurance Law.
- p) The defendants violated 18 U.S.C. § 664 in that the violations of § 4226 of the NYS Insurance Law regarding "Misrepresentations, Misleading Statements, and Incomplete Comparisons by Insurers", committed by the defendant TRAVELERS, constitutes either a felony or a misdemeanor pursuant to § 109(a) of the NYS Insurance Law, and TRAVELERS is using the non-existent CITISTREET to act as an agent on TRAVELER's behalf.
- q) The defendants have committed two or more criminal acts, that were chargeable under Federal and NYS

Law, at the time they were committed, 18 U.S.C. § 1961(1) (A) & (B)

- r) The racketeering acts were committed within less than five years of each other, 18 U.S.C. § 1961(5)
- s) By forcing the LMC employees to deal with a non-existent company, to wit, the defendant CITISTREET, all contracts made with CITISTREET are on information and belief void or voidable and CITISTREET as a "non-existent" racketeering enterprise is not subject to audits, accountability, the filing of 10Ks and is not subject to SEC or NASD regulations or rules, and for which aggrieved parties have no recourse against the non-existent company.
- t) As a consequence of the defendant CITISTREET being non-existent the LMC employees' retirement funds which the LMC DEFENDANTS have delivered into the coffers of CITISTREET, none of the safeguards or legal remedies that would be available as against a bona-fide, existing, and duly licensed business entity would be available, if CITISTREET becomes insolvent.
- u) The LMC DEFENDANTS in concert with CITISTREET either by accident or design have agreed to allow the defendant CITISTREET to administer its employee

benefit plans, and they are charged with the knowledge that CITISTREET does not exist.

- v) That STATE STREET and CITIGROUP formed the "joint venture" known as CITISTREET in order to avoid the law, avoid taxes, and garner control over huge sums of retirement monies, without being held responsible or accountable therefore, if these huge sums of money should evaporate, in a debacle akin to economic terrorism, ala Enron, where some \$68 Billion evaporated. CITIGROUP is said to have been very much involved in the fraud that brought down Enron.

194. These predicate criminal acts form a pattern of "racketeering activity" as the term is defined in 18 U.S.C. § 1961(1). These acts have had the same or similar purposes, results, participants, victims and method of commission and thus constitute a "pattern of racketeering activity" as defined by 18 U.S.C. § 1961(5). The acts have been repeated, are capable of further repetition and are being repeated.

195. All of the DEFENDANTS are charged with the knowledge that CITISTREET, while it employs 3,000 people, and administers the retirement accounts of some 7.5 million people, and administers approximately \$180 billion dollars in assets in the U.S., (See Exhibit "Z-2"), CITISTREET does not exist as a business entity of any sort (See Exhibit "Z-3,4&5"), nor is it duly licensed or a duly authorized company to transact the business of insurance by

the NYSID, or to transact the security business by the NASD, or SEC. As such, it has morphed into being a large, outlaw, self styled enterprise, transacting insurance and security business, without having obtained the requisite licenses needed to lawfully transact such businesses, pay taxes, enter into contracts, or be properly regulated. This constitutes a felony or a misdemeanor under § 109(a) of the NYS Ins. Law and other Federal and State laws and regulations.

196. As a direct and proximate result of defendants' racketeering activities in violation of 18 U.S.C. § 1962(c) plaintiff and his 403(b) customers at LMC have and may suffer damages in the amount equal to the total value of the loss of the retirement accounts and losses to the plaintiff of \$100 million or more.

197. Under 18 U.S.C. § 1964(c), plaintiff is entitled to recover treble damages, costs of bringing this suit, and reasonable attorneys' fees.

COUNT FIVE

**VIOLATION OF THE DONNELLY ACT GENERAL BUSINESS
LAW § 340 OF THE STATE OF NEW YORK
(Against all the Defendants)**

198. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "197" hereof, as if the same were set forth at length hereat.

199. A copy of this second amended complaint will be sent to the Attorney General of the State of New York, as required by GBL § 340(5).

200. The relevant product market consists of the thousands of past, present, and future employees of LMC.

201. The defendants have conspired and attempted to conspire, by contracts, agreement, arrangements or combination between and among themselves, have acted in concert to make themselves the sole providers of voluntary, salary reduction § 403(b) annuity sales and services to the LMC employees, amongst other acts, by engaging and promoting the services of an allegedly company/organization/enterprise known as the non-existent CITISTREET, with all of the untoward legal consequences to the plaintiff and the plan participants that can flow therefrom.

202. The defendants have a unity of purpose or a common design and understanding to eliminate competition in their 403(b) market place, in doing business with the phantom defendant CITISTREET.

203. The effect of the conspiracy amongst the defendants has been to eliminate competition in the sale of the foregoing annuities. By eliminating competition the LMC employees have no choice as to where they purchase their fixed annuities from. They must purchase them from and through the fraudulent CITISTREET and the other members of the CITIGROUP DEFENDANTS. In doing so the employees, to their detriment, will pay higher, and rolling surrender charges, have more limited and costly loan provisions, incur annual asset based charges, lack the unfettered ability to transfer or roll over their annuities, be forced to name their spouses as beneficiaries, be forced to get spousal consent to make a loan, withdrawal, transfer, or to take an annuity benefit,

and have all their rights in the retirement § 403(b) annuity subject to a "Plan Document", that can be amended or changed at any time without employee consent and which "Plan Document", the employees have been denied access to see. It is a first step in the Enronization of the employees own retirement § 403(b) annuity moneys, all to the employee's damage by having eliminated any competition for the employee's voluntary, salary reduction § 403(b) annuity account business, and having no recourse against CITISTREET for any of its illegal activities and defalcations.

204. The conspiracy herein is by and between the LMC DEFENDANTS, the CITIGROUP DEFENDANTS, and the defendants WEILL and SPINA.

205. As to the tying claims the two distinct retirement products involved are the products in the § 401(k) plan and the retirement annuity products sold in the § 403(b) plan. The tying arrangement between the defendants is that in exchange for being in the § 401(k) plan the employees must have their § 403(b) annuities both sold and serviced exclusively by the fraudulent CITISTREET and the other CITIGROUP DEFENDANTS. Part of the exclusivity herein also involves the plaintiff's inability to service and perform the due diligence that is required by personal, one on one contact, with the employees. By denying plaintiff access to the LMC employees via denying plaintiff access to the LMC premises (and by denying all the other § 403(b) vendors similar access) a monopoly in the transaction of the

retirement benefits business has been created by the defendants herein.

206. The foregoing activities of the defendants involves many millions of dollars, which is a substantial volume of commerce that will grow annually.

207. CITISTREET and the other CITIGROUP DEFENDANTS never were competitors with the plaintiff for the fixed § 403(b) business being transacted at LMC. They now monopolize the § 403(b) business because of their contract, arrangement, agreement or understanding with the LMC DEFENDANTS.

208. The CITIGROUP DEFENDANTS' product offerings in the fixed individual § 403(b) annuity market place are below par and would never be able to withstand open and honest competition, that would exist if plaintiff were not foreclosed from being on the LMC premises, as he was for 25 years.

209. The only way that the CITIGROUP DEFENDANTS could gain entry into the multi million dollar involvement and the market place at LMC, is via the creation of the monopoly to preclude all other vendors from competing for the voluntary fixed § 403(b) annuity business in the subject market group.

210. Plaintiff is a business person and entrepreneur in that the plaintiff has expenses and obligations arising out of his tax sheltered annuity business that includes insurance, gas and oil, repairs, printing, postage, entertainment, taxes, and accounting fees.

211. The nature and effects of the defendants' acts of excluding plaintiff from the LMC premises is to deny plaintiff the ability to market and sell his § 403(b) fixed annuities to the LMC employees as he has for the last 25 years.

212. The tendency and effect of the arrangement or combination between the LMC DEFENDANTS, and the CITIGROUP DEFENDANTS aided and abetted by the actions of the defendants WEILL and SPINA, has been and will be to lessen, if not eliminate competition in the sale and servicing of voluntary, salary reduction, § 403(b) annuities to the employees of LMC.

213. The defendants have created monopolistic control of the sale and servicing of voluntary, salary reduction, § 403(b) annuities at LMC. The defendants have unreasonably interfered with and damaged plaintiff's business.

214. The defendants have converted plaintiff's § 403(b) annuities from non-ERISA to ERISA and the defendants have instituted § 403(b) group annuities rather than § 403(b) individual annuities, through the offices of the phantom and fraudulent organization known as CITISTREET, these actions may create Enron like problems for the employees, which the defendants, in the furtherance of their monopolistic scheme, have failed to properly address, explain or disclose to plaintiff's plan participants.

215. The defendants have acted in concert in refusing to allow the LMC employees to deal with the plaintiff in the sale and servicing of § 403(b) annuities.

216. Competition has also been eliminated via a tying arrangement by and between the LMC DEFENDANTS, and the CITIGROUP DEFENDANTS whereby the § 401(k) plan has been tied to the sale of § 403(b) annuities by the non-existent CITISTREET and the other CITIGROUP DEFENDANTS, thus excluding plaintiff from competition in the § 403(b), salary reduction, market place at LMC.

217. The defendants have entered into a contract, agreement, or combination whereby they have created a monopoly in the voluntary, salary reduction, § 403(b) annuity market place at LMC and thereby created a monopoly in the CITIGROUP DEFENDANTS for the furnishing of such services to the LMC employees.

218. The defendants have established an exclusive concession and/or franchise in the sale and servicing of voluntary, salary reduction § 403(b) annuities at LMC.

219. The defendants' acts of not allowing employees hired at LMC after October 1, 2001 to be eligible for participation in the IRC § 403(b) annuity program can result in the disqualification of plaintiff's existing IRC § 403(b) annuity contracts at LMC, according to the rules of the Internal Revenue Service.

220. The defendants have also excluded from the LMC premises the five (5) other previously approved vendors of IRC § 403(b) annuities, in order to further enforce their exclusive monopoly to market, sell, and service their § 403(b) retirement annuity products in the relevant market group, to the exclusion of all other vendors including the plaintiff.

221. Subsection 2 of § 340 of the New York General Bus. Law specifically makes § 340 of the General Business Law applicable to the business of insurance, in that it specifically shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, and other persons and organizations subject to the provisions of the Insurance Law.

222. The defendants in order to establish and maintain a monopoly to themselves over the voluntary salary reductions of the LMC employees, have unlawfully misappropriated to themselves plaintiff's annuity business at LMC and suppressed competition.

223. Plaintiff has sustained present and future damages because of the unlawful and wrongful acts of the defendants in the sum of \$100 million, plus costs up to \$10,000, reasonable legal fees, and treble damages.

COUNT SIX

VIOLATION OF THE ARTICLE 22-A OF THE GENERAL BUSINESS LAW OF THE STATE OF NEW YORK §§ 349 et. seq. (Against all the Defendants)

224. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "223" hereof, as if the same were set forth at length hereat.

225. The business practices employed by the defendants were deceptive or misleading in material respect. They failed to disclose that the enterprise CITISTREET was a non-existing company and they fraudulently held out that it was "A State Street and Citigroup Company", as if to say that these organizations stand behind the vacuous CITISTREET.

226. The defendants WEILL and SPINA as CEO's and Chairmen of CITIGROUP and STATE STREET respectively, are personally responsible for the deception and fraud that they created in forming the non-existent enterprise known as CITISTREET, with all the attendant lawless aspects of doing business as a non-existent organization, but stating that CITISTREET was "A State Street and Citigroup Company".

227. In addition to the deceptive acts, practices, and advertisements, as set forth herein, the defendants cloaked their comparison of their § 401(k) plan, based on comparisons between the existing HSRP plan and the new § 401(k) plan were misleading and deceptive, as to the purported differences and purported benefits of the § 401(k) plan as opposed to the existing HSRP plan.

228. LMC required anyone with age and years of service totaling the sum of less than sixty (60) to enroll in the § 401(k) plan and to be disqualified from continued participation in the existing HSRP plan.

229. LMC's implementation of the § 401(k) plan was deceptively marketed by the defendants as being an "enhanced retirement program".

230. The defendants then used the marketing of the § 401(k) plan to destroy the plaintiff's § 403(b) business, by denying him access to the LMC premises, and in rendering his § 403(b) plan unqualifiable by the IRS, by denying employees hired after October 1, 2000 the ability to participate in the plaintiff's §

403(b) program, and mandating that all new 403(b) enrollments will be limited to the fraudulent CITISTREET.

231. The employee illustrations regarding the purported benefits of the § 401(k) plan, were deceiving. They were created with unrealistic expectations, on the premise that the investment return would be paid at the unprecedented rate of either 6% or 9% annually. There was no mention in the illustration of the possibility of having lower investment returns or negative investment returns, and what impact such lower or negative investment returns would have on the employee's pension.

232. The HSRP plan was a defined benefit plan where all the investment risks was borne by the employer. Neither LMC or the CITIGROUP DEFENDANTS explained or revealed the fact to the LMC employees that all of the investment risks were now being shifted from LMC, to the LMC employees.

233. The defendants embarked upon a massive marketing campaign to lure the LMC employees into the LMC § 401(k) plan. As part of their deceit and deception, LMC did not provide the LMC employees with a mandated Summary Plan Description nor did they give the LMC employees access to the mandated Plan Document.

234. It is to be noted that notwithstanding the foregoing the defendants inserted an Enron type disclaimer that can result in an Enron disaster to the plan participants, in their solicitation materials by stating in pertinent part:

The availability and amount of benefits will be governed by the provisions of the legal documents under which the benefits are provided, as in

effect at the time you receive them. LMC intends to continue both plans indefinitely, but reserves the right to amend, change, suspend or terminate either or both plans, in whole or in part, at any time and for any reason, without notice to and without the consent of any current, future or former employee.

235. The defendants did not highlight or explain to the employees what the true impact of the foregoing disclaimer would be to the employees by LMC switching from the HSRP plan to the § 401(k) plan.

236. The switch from the HSRP to the § 401(k) plan was all part and parcel of eliminating plaintiff as a § 403(b) vendor and establishing the phantom organization called CITISTREET as the sole on site § 403(b) vendor at LMC without explaining to the LMC employees that CITISTREET is a non-existent organization.

237. LMC marketed its § 401(k) plan as if it was an improvement over the guaranteed HSRP plan benefits, in order to deceive the LMC employees into believing that the CITIGROUP DEFENDANTS were the only worthy vendors of § 403(b) annuities. With misleading written statements such as:

a) "...we strive to insure that our compensation and benefit programs reward you."

b) "We believe this will insure that the retirement needs of our existing staff and new employees will be met."

c) "While the HSRP is a quality retirement plan, it may not meet the needs of all employees. Many employees want to control how the contributions to their retirement plans are

invested. We must offer this feature to support our ability to retain the people we need."

d) "...you have the opportunity to tailor your retirement benefits to your individual needs."

e) "We are excited about offering this new plan and this opportunity for you to customize your benefits to your individual needs and preferences."

238. The CITIGROUP DEFENDANTS by CITISTREET attempted to deceive the LMC employees by stating that:

Lutheran Medical Center has made significant improvements to its retirement savings program by implementing a brand new 401(k) plan.

239. LMC provided logistical support to CITISTREET and the other CITIGROUP DEFENDANTS and arranged for individual meetings with the LMC employees and the non-existent CITISTREET. Said meetings were scheduled by the employees' department heads. By selling one on one, the transfers from plaintiff's § 403(b) annuity to defendants' annuity products were subject to the N.Y.S. Regulation 60 disclosure requirements, which requirements were willfully ignored by the defendants.

240. Employees were told by the LMC DEFENDANTS to bring a copy of their latest pay stub to show to the alleged CITISTREET agents. Thereby the alleged agents could see how much each LMC employee was reducing his or her salary, for purposes of making contributions into plaintiff's § 403(b) plan. Employees were told that their contributions will continue in the TSA program of the plaintiff or other vendors, "until you decide to redirect those

contributions into the new 401(k) plan", and that they will have the "opportunity" to transfer their existing § 403(b) assets into the new § 401(k) plan. The obvious implication being that LMC is saying that it is in the employee's best interest to redirect their TSA contributions and assets away from the plaintiff's plan and into the CITISTREET plan.

241. The reverse side to the CITISTREET "Participation Agreement" is deceptive and misleading and on information and belief, has not been approved by the NYS Ins. Dept. In addition, it may be void and therefore of no force and effect due to the fact that one cannot contract with a non-existent party under § 403(b).

242. The CITISTREET "Participation Agreement", (Exhibit "Q"), does not appear to have been approved by the NYS Ins. Dept, and on information and belief, does not conform to the requirements of IRS, in that amongst other things it is not a proper salary reduction agreement between the employee and the employer and CITISTREET is non-existent.

243. The defendants are using the aforesaid CITISTREET "Participation Agreement" not only for the § 401(k) plan, but also for its § 403(b) plan.

244. The CITISTREET and the other CITIGROUP DEFENDANTS circulated amongst plaintiff's customers, with the consent of the LMC DEFENDANTS, sales materials allegedly comparing the § 401(k) plan to the HSRP plan stating in bold type, "This comparison is

only a summary of major Plan Provisions. The terms of the Plan Document determine Plan Benefits."

245. Though duly requested the Plan Document was not made available to plaintiff's customers

246. The defendants have damaged plaintiff's business by use of deceptive acts and practices and advertisements as set forth herein, all to plaintiff's damage in the amount of \$100 million.

COUNT SEVEN

**VIOLATION OF § 2123 OF THE NEW YORK STATE INSURANCE LAW
(Against all the Defendants except for TRAVELERS)**

247. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "246" hereof, as if the same were set forth at length hereat.

248. The defendants violated § 2123(3) of the NYS Ins. Law, which mandates, that transfers of annuity account balances or contributions, from one annuity to another annuity requires compliance with the New York State Insurance Department ("NYSID") disclosure requirements as set forth in its Regulation 60 ("REG 60").

249. The defendants, by their agents, servants and employees used deceptive acts and practices, in violation of NYSID Regulation 60 ("REG 60"), 11 NYCRR 51.1 through 11 NYCRR 51.8, by not complying with the terms of Reg 60, which prohibit incomplete comparisons between existing annuity contracts and replacement annuity contracts by anyone.

250. A true copy of the data that is mandated by REG 60 is annexed here to as Exhibit "T". The defendants have failed to provide the disclosure information mandated by these forms under REG 60, to plaintiff's customers, when they transfer plaintiff's customers' monthly voluntary salary reductions and/or accumulated annuity account values from NANY into the defendants' annuities.

251. The defendants, by their agents, servants and employees have made and are continuing to make incomplete comparisons, in violation of REG 60 to convince plaintiff's customers to rollover or discontinue or transfer their NANY § 403(b) fixed annuities into the defendants' products.

252. The defendants' advertising and solicitation materials that are circulated to the LMC employees contain incomplete and misleading comparisons in violation of REG 60.

253. The defendants made misrepresentations, misleading statements and incomplete comparisons in violation of §2123 of the NYS Insurance Law as follows:

- a) LMC permitted the circulation of said misleading statements, incomplete comparisons and misrepresentations that were made by the codefendants herein;
- b) The misleading statements, incomplete comparisons and misrepresentations were made for the purpose of inducing or tending to induce plaintiff's customers to discontinue, transfer or replace their existing individual IRC § 403(b) annuity contracts with the variable or fixed annuities offered by or through the defendants herein;
- c) The defendants' actions, statements, comparisons and representations did not conform to the standards or requirements of REG 60 as promulgated by the

superintendent of insurance of the State of New York;

- d) Per § 2123(b) of the NYSIL the defendants' failure to conform to the requirements of REG 60, in advocating to plaintiff's customers that they discontinue, transfer, or replace their existing individual IRC § 403(b) annuity contracts, deems the statements, comparisons and representations that were made aforesaid to be incomplete comparisons per se;
- e) Under REG 60, there is no presumption allowed that plaintiff's customers knew of any of the provisions, terms, or benefits contained in any annuity contract;
- f) § 403(b) annuities may not, except in certain specific instances, (on information and belief not applicable herein), be transferred into a § 401(k) plan;
- g) The transfer documents in Exhibit "U" are deceiving in that the purported receiving § 403(b) plan is alleged to be an eligible § 403(b) plan and the SMITH BARNEY CORPORATE TRUST COMPANY, is named as custodian, and can not be currently located by the plaintiff.
- h) At no time did the defendants reveal that CITISTREET is a non-existing company and all of the consequences to the employees and to plaintiff that could reasonably flow therefrom.

254. By reason of the foregoing the defendants have committed either a felony or misdemeanor and plaintiff has been and will be irreparably harmed and damaged thereby.

255. All to plaintiff's damage in the statutory amount of the compensation or commissions, both present and future that were lost by the plaintiff due to the wrongful actions of the defendants as aforesaid, together with the loss of his business and the possible future litigation against him in the amount of

\$100 million, plus punitive damages and such other damages, as may be determined at the trial of this matter.

COUNT EIGHT

**VIOLATION OF § 4226 OF THE NEW YORK STATE INSURANCE LAW
(Against the Defendant TRAVELERS)**

256. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "255" hereof, as if the same were set forth at length hereat.

257. The defendant TRAVELERS is an insurer authorized by the NYSID to do business in the State of New York, and thus make and/or sell annuity contracts in the State of New York.

- a) TRAVELERS issued and circulated or caused or permitted to be issued or have circulated on its behalf certain illustrations, circulars, statements or memoranda that misrepresented the terms, benefits, or advantages of its annuities;
- b) TRAVELERS made or delivered by its agents, servants or employees incomplete comparisons of its annuity contracts and the plaintiff's annuity contracts;
- c) TRAVELERS purpose for the issuance of the incomplete comparisons was to induce or tend to induce plaintiff's customers to lapse, forfeit or surrender their existing annuity contracts, in favor of Travelers;
- d) TRAVELERS replaced said individual annuity contracts without conforming to the standards promulgated by

- law and of the regulations of the superintendent of insurance, implementing said laws;
- e) The regulation that travelers violated is known as REG 60, 11 NYCRR § 51.1 through 51.8.
 - f) By failing to conform to all of the requirements established by REG 60, all of its materials that were sent to or circulated to plaintiff's customers are deemed to have been incomplete comparisons per se.
 - g) There is no presumption that plaintiff's customers knew of any of the provisions, terms, or benefits contained in any annuity contract that was surrendered, lapsed or had contributions discontinued;
 - h) TRAVELERS knowingly violated the provisions of § 4226 of the NYS Insurance Law as aforesaid.
 - i) The violation of § 4226 of the NYS Insurance Law by the defendant TRAVELERS constitutes either a felony or a misdemeanor under § 109(a) of the NYS Insurance Law.
 - j) TRAVELERS failed to conduct a due diligence inquiry to determine that CITISTREET was duly licensed by the appropriate authorities to sell, market, and service its retirement products.
 - k) In failing to do its own due diligence TRAVELERS has allowed the non-existent, unlicensed enterprise

known as CITISTREET to conduct business on behalf of TRAVELERS, in violation of the NYS Insurance Law.

258. By reason of the foregoing plaintiff has been and will be irreparably harmed and damaged.

259. All to plaintiff's damage, in consequence of the foregoing in the statutory amount of the premiums received by TRAVELERS, both present and future which were wrongfully received by TRAVELERS, together with the loss of plaintiff's business and the possible future litigation against him in the amount of \$100 million, plus punitive damages and any other damages, which will be determined at the trial of this matter.

COUNT NINE

TORTIOUS INTERFERENCE WITH CONTRACT (Against all the Defendants)

260. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "259" hereof, as if the same were set forth at length hereat.

261. Plaintiff was the third party beneficiary of the existing annuity contracts that his customers had with NANY, in that he received ongoing commission income every time a customer made, or had made a deposit into the NANY annuity contract.

262. Plaintiff had an existing commission agreement between himself and NANY.

263. The defendants were aware of the existence of the NANY contracts.

264. Due to the wrongful and fraudulent acts of the defendants, certain of plaintiff's customers were interfered with and they were induced to cancel their § 403(b) annuity contracts with NANY.

265. The acts of the defendants were intentional and were substantial factors in plaintiff's customers canceling their annuity contracts with NANY and/or in stopping their monthly contributions into NANY.

266. The acts committed induced plaintiff's customers to breach their contracts with NANY.

267. As a result of the foregoing plaintiff has been damaged in the loss of the value of his business, plus the loss in income, plus possible future liability for future litigation against plaintiff.

268. As a consequence whereof the plaintiff has sustained damages in the amount of \$100 million, plus punitive damages.

COUNT TEN

TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE
(Against all the Defendants)

269. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "268" hereof, as if the same were set forth at length hereat.

270. The defendants have prevented any employees hired after October 1, 2001 from entering into an annuity contract with the plaintiff.

271. But for said interference many employees hired after October 1, 2001 would have entered into plaintiff's 403(b) annuity contracts.

272. The LMC decision aforesaid was a substantial factor in preventing plaintiff from selling his 403(b) annuity contracts.

273. The acts of the defendant LMC was done intentionally and it was done deliberately with the purpose of interfering with the ability of plaintiff to sell the 403(b) contracts to employees hired after October 1, 2001.

274. The defendants knew and was aware of plaintiff's 403(b) annuities.

275. The acts of the defendants were wrongful involving fraud and misrepresentations.

276. As a consequence whereof the plaintiff has sustained damages in the amount of \$100 million, plus punitive damages.

COUNT ELEVEN

**CONSPIRACY
(Against all the Defendants)**

277. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "276" hereof, as if the same were set forth at length hereat.

278. As a result of the conspiracy to allow the non-existent organization know as CITISTREET to operate in violation of NYS Penal Law § 105.5 and wrongful acts of the defendants aforesaid, defendants have deprived plaintiff of the profits of, and destroyed the value and the good will of his business. They have

made plaintiff exposed to future lawsuits and judgments, as the result of the defendants' actions.

279. All to plaintiff's damage in the amount of \$100 million, plus punitive damages.

COUNT TWELVE

**Defamation
(Against all the Defendants)**

280. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "279" hereof, as if the same were set forth at length hereat.

281. In a letter dated December 31, 2001, that was addressed to NANY in Des Moines, Iowa, on LMC letterhead, the defendant KUCKER, on behalf of his codefendants stated in pertinent part:

In light of recent events in New York, and changes Lutheran Medical Center made to its Retirement Program, Lutheran Medical Center is limiting access to its facilities. Effective immediately we will no longer provide your representative with access to its premises. (Exhibit "L").

282. The wording of the foregoing letter "In light of recent events" refers to the World Trade Center tragedies. By innuendo it implies that plaintiff is or may be a terrorist. The defendants knew that the statement and the innuendo was false.

283. The letter was deliberately sent to the NANY home office without a word of prior warning to the plaintiff in order to injure the plaintiff.

284. The statement suggesting that plaintiff is a terrorist that was made in the letter was made deliberately with malice.

285. The suggestion of plaintiff being a terrorist in the December 31, 2001 letter exposed plaintiff to public hatred, shame, contempt, and ridicule in the members of plaintiff's community of customers and in his insurance company.

286. The December 31, 2001 letter is defamatory per se. It injures the plaintiff in his occupation.

287. The forgoing December 31, 2001 letter was circulated by NANY. It prompted a response in a letter dated January 28, 2002 by Stephen P. Horvat, Jr., the Senior Vice President - Legal and Secretary of NANY. (See Exhibit "V").

288. As to the defamatory statement suggesting that the plaintiff is a terrorist, it is noteworthy to be aware that the largest CITIGROUP shareholder is said to be Saudi Prince, Alwaleed bin Talal, a partner of Col. Khadafy. (See Exhibit "W").

289. Plaintiff has been damaged in the amount of \$100 million, plus punitive damages.

COUNT THIRTEEN

Fraud (Against all the Defendants)

290. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "289" hereof, as if the same were set forth at length hereat.

291. Defendants deliberately allowed CITISTREET to operate without revealing the fact that CITISTREET was neither licensed or existent. The defendants misrepresented the comparisons between the terms and conditions of plaintiff's customers NANY

annuities and those of the defendants', in that they failed to furnish plaintiff's customers with the required disclosures under the New York State Insurance Law, and REG 60 thereunder.

292. The plaintiff's customers relied on the defendants' misrepresentations, nondisclosures, and deceptions in transferring, rolling over, or discontinuing their NANY § 403(b) annuities into the defendants' retirement annuity plans.

293. On information and belief the purported custodian SMITH BARNEY CORPORATE TRUST COMPANY set forth in Exhibit "U" does not exist.

294. The plaintiff's customers, in reliance on defendants' non-disclosures, falsities, and failure to comply with the applicable laws transferred their annuity account balances and/or their monthly contributions into the CITIGROUP DEFENDANTS' § 401(k) and/or § 403(b) annuities, without being informed that CITISTREET was a non-existent organization/company/enterprise, and the problems that this creates for plaintiff's customers.

295. Plaintiff has been damaged in the amount of \$100 million, plus punitive damages.

COUNT FOURTEEN

Unfair Competition (Against all the Defendants)

296. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "295" hereof, as if the same were set forth at length hereat.

297. The information regarding the identity of the LMC employees that were plaintiff's NANY annuity customers; how much they were contributing; and how much they had accumulated in plaintiff's NANY annuities, was a trade secret. It was not information known outside of the business.

298. This NANY information was not generally known by other employees at LMC, except those in payroll handling the salary reductions.

299. NANY kept the information confidential from third parties; the amount of the contributions and the accumulated account values, was proprietary property belonging to the plaintiff, and was of great value to the fraudulent CITISTREET and the other CITIGROUP DEFENDANTS for targeting and then marketing to the LMC employee customers of the plaintiff which plaintiff spent some 25 years developing, servicing, selling, marketing, and conducting due diligence in securing his customers' patronage in person at LMC; said information, which was plaintiff's customer list, could not be duplicated or properly acquired by the CITIGROUP DEFENDANTS, but for the wrongful disclosure of the NANY annuity contributions and the identity of plaintiff's customers by the LMC DEFENDANTS to the CITIGROUP DEFENDANTS, so as to provide the fraudulent CITISTREET with a competitive advantage, in appropriating plaintiff's NANY annuity business to themselves.

300. In implementing the wrongful appropriation of plaintiff's annuity business, the LMC DEFENDANTS instructed their employees

to bring their pay stubs, which reflected the monthly contributions, to the face to face sales meetings with CITISTREET sales reps. The CITIGROUP DEFENDANTS then used the Trade Secret information revealed by LMC to direct its sales people to appropriate plaintiff's customers to themselves.

301. The foregoing LMC activities and the use of the trade secrets by the CITIGROUP DEFENDANTS provided the defendants with a competitive advantage as to plaintiff's customer list and customer information. Defendants have used the underlying employer-employee relationship, to their competitive advantage. The not so subtle need to curry employer favor, coupled with fear of retaliation, if the employee questions or balks at doing the LMC employer's bidding, also gives the defendants an unfair competitive advantage over the plaintiff.

302. On information and belief defendants have deliberately and falsely misled plaintiff's customers into thinking that CITISTREET is a bona fide organization and that the defendants' fixed annuities were the same as the plaintiff's fixed annuities, in order to induce plaintiff's customers to discontinue plaintiff's annuities and enroll in the defendant's annuity products. These representations were false and the defendants knew they were false, when made, and the plaintiff suffered damage therefrom.

303. The defendants have wrongfully misappropriated to themselves the results of the skill, expenditures and labors of the plaintiff.

304. The defendants have unlawfully interfered with plaintiff's business.

305. Plaintiff has been damaged as a result of the defendants' acts.

306. Plaintiff will be further damaged in the future.

307. Plaintiff demands damages in the amount of \$100 million, plus punitive damages.

COUNT FIFTEEN

**Constructive Fraud
(Against all the Defendants)**

308. Plaintiff repeats, reiterates and realleges each and every statement contained in paragraphs "1" through "307" hereof, as if the same were set forth at length hereat.

309. The defendants misrepresented the status of the fraudulent enterprise known as CITISTREET and the terms and conditions of plaintiff's customers NANY fixed annuities, in that they failed to furnish plaintiff's customers with the disclosures that are required under the New York State Insurance Law, and REG 60, and they failed to be duly licensed to transact insurance business in the State of New York.

310. The defendants by unfairness, artifice, non-disclosure misrepresentation and fraud have injured plaintiff's business by inducing plaintiff's customers to believe that the defendants' § 401(k) fixed annuities and § 403(b) fixed annuities were the same as plaintiff's § 403(b) fixed annuities, and the CITISTREET was a bona fide company.

311. The plaintiff's customers relied on the defendants' misrepresentations and nondisclosures in transferring, rolling over, or discontinuing their MANY § 403(b) annuities.

312. Plaintiff's customers, in reliance on the defendants' falsities and failure to comply with the applicable federal and state laws transferred their annuity account balances and/or redirected their monthly contributions into the § 401(k) and § 403(b) annuities sold by the CITIGROUP DEFENDANTS.

313. Plaintiff has been damaged in the amount of \$100 million, plus punitive damages.

PRAYER FOR RELIEF

WHEREFORE, plaintiff seeks judgment awarding plaintiff:

314. On Count One, (ERISA), reasonable attorneys fees and the costs of this action in an amount to be determined by the Court in its discretion, together with the following declaratory and injunctive relief under 15 U.S.C. § 26, providing:

- a) that plaintiff be given the same access to LMC as he had in the twenty five (25) years prior to being denied access to the LMC premises;
- b) that LMC reinstate plaintiff as an approved vendor of I.R.C. § 403(b) annuities;
- c) that the defendants comply with REG 60 of New York when making replacements, etc., in all appropriate situations;
- d) that the defendants comply with I.R.C. § 402(f)(1)(E);

- e) that the defendant LMC not continue to imperil the qualified status of the I.R.C. § 403(b) by limiting its availability only to LMC employees hired prior to October 1, 2001;
- f) that the defendants cease and desist from circulating the deceptive sales materials that contain the names of all of the corporate defendants, as if they all stood behind their retirement plans, all in violation of NYS Insurance Law;
- g) that the defendants provide the plaintiff and all LMC employees with a copy of the Summary Plan Description, as required by ERISA § 102, 29 U.S.C. § 1022;
- h) that the defendants provide the LMC employees and the plaintiff with access to copy the Plan Document, as required by ERISA § 104(b)(2), 29 U.S.C. § 1024(b)(2);
- i) that the defendants cease and desist from using the "Participation Agreement" annexed hereto as Exhibit "Q"; and that they only use such other forms as are approved by the New York State Insurance Department;
- j) that the CITIGROUP DEFENDANTS only use forms approved by the NYS Insurance Department in the sale of its fixed and variable annuity products;
- k) that the defendants cease and desist from offering variable annuities to the LMC employees in the § 401(k) or 403(b) plan, due to their high costs, which

are not being explained fully to plaintiff's customers, as well as the non-suitability thereof;

- l) that the defendants provide the plaintiff with the name of each employee who has discontinued monthly contributions into the IRC § 403(b) plan, in favor of diverting said monthly contributions to the LMC retirement annuity, a/k/a the IRC § 401(k) or 403(b) plan;
- m) that the defendants provide the plaintiff 30 days in advance with the name of each employee who may discontinue monthly contributions into the plaintiff's IRC § 403(b) plan, in favor of diverting said monthly contributions to the LMC retirement annuity, a/k/a the IRC § 401(k) plan or § 403(b) plan;
- n) that the defendants cease and desist from selling and servicing their § 401(k) and § 403(b) variable and fixed annuity products unless they are duly licensed to do so by the Insurance Department of the State of New York, registered with the NASD, and authorized to do business in the State of New York;
- o) that the defendants refund to the plaintiff's customers accounts at NANY, any and all moneys that they have received from plaintiff's customers as transfers or recurring monthly contributions, upon request without penalties, or withdrawal fees;

- p) that the defendant LMC cease and desist from engaging in the financial services business;
- q) that the defendant LMC be required to comply in all respects with the provisions of Title 1 of ERISA;
- r) that the defendant LMC cease and desist from treating LMC employee lawful requests that are submitted by the plaintiff regarding their 403(b) annuities;
- s) that the defendant LMC take those steps necessary to reconvert the LMC § 403(b) TSA plan into a non-ERISA § 403(b) plan.
- t) That full disclosure be made about the true status of CITISTREET and the consequences that can flow therefrom and that only licensed organizations be allowed at LMC.
- u) That all the transactions in which the phantom non-existent organization known as CITISTREET was involved in, be deemed unlawful and that full refunds and return of any deposits be made by the defendants to the plan participants and that all participants and parties be given the opportunity to be returned to their *status quo ante*.
- v) That CITIGROUP and STATE STREET agree to indemnify and hold harmless all of the plan participants and the plaintiff for any damages that may occur from the unlawful acts of CITISTREET and the other co-defendants herein.

w) That CITISTREET be permanently enjoined from doing any business whatsoever at LMC

315. On Count Two, (Sherman Antitrust), the injunctive and equitable relief requested in paragraph 314 above, together with awarding plaintiff such ancillary damages as are appropriate, including his costs, expenses, and reasonable attorney fees and such other and further relief as may be just and proper.

316. On Count Three, (Clayton Act), compensatory damages in the amount of not less than \$100 million, plus treble damages, together with attorney's fees, the costs of this litigation, and prejudgment interest at the maximum rate allowed by law, together with the equitable relief requested in Count One.

317. On Count Four, (RICO), compensatory damages in the amount of not less than \$100 million, plus treble damages, together with attorney's fees, the costs of this litigation, and prejudgment interest at the maximum rate allowed by law; adjudging and decreeing that defendants have engaged in the conduct alleged herein, acting in concert as alleged herein, and declaring that by such conduct defendants have violated provisions of the Racketeering Influenced Corrupt Organizations Act; the common law of New York and Articles 22 and 22-A of the Gen. Bus. Law, and the Federal and State Statutes as alleged herein.

318. On Count Five, (Donnelly Act), compensatory damages in the amount of not less than \$100 million, plus treble damages, together with attorney's fees, the costs of this litigation, and

prejudgment interest at the maximum rate allowed by law, together with the equitable relief requested in Count One.

319. On Count Six, (Article 22-a of the General Business Law), compensatory damages in the amount of not less than \$100 million, plus treble damages, together with attorney's fees, and the costs of this litigation,

320. On Count Seven, (Section 2123 of the NYS Ins. Law) compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation and punitive damages.

321. On Count Eight, (Section 4226 of the NYS Ins. Law), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

322. On Count Nine, (Tortious Interference with Contract), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

323. On Count Ten, (Tortious Interference with Prospective Economic Advantage), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

324. On Count Eleven, (Conspiracy), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

325. On Count Twelve, (Defamation), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

326. On Count Thirteen, (Fraud), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

327. On Count Fourteen, (Unfair Competition), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

328. On Count Fifteen, (Constructive Fraud), compensatory damages in the amount of not less than \$100 million, together with attorney's fees, in the costs of this litigation, prejudgment interest at the maximum rate allowed by law, plus punitive damages.

JURY TRIAL DEMAND

Plaintiff demands trial by jury on all issues so triable.

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 1.9

Plaintiff certifies that he has no corporate or other parents, subsidiaries, or affiliates, securities or other interests therein which are publicly held.

Dated: Freeport, New York
February , 2003

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