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April 16, 2009

BY HAND

The Honorable Harold Baer, Jr.
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York

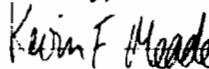
Re: *Lopresti v. Weil, Gotshal & Manges LLP, et al.*,
09 Civ. 2328

Dear Judge Baer:

We represent defendants in the above titled action. Enclosed please find courtesy copies of defendants' motion to (i) dismiss plaintiff's complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, (ii) sanction plaintiff and his counsel, Henry M. Grubel, pursuant to 28 U.S.C. § 1927 and the Court's inherent power and (iii) enter a filing injunction against plaintiff and Mr. Grubel. This motion was electronically filed with the Court yesterday.

Defendants respectfully request oral argument on this motion.

Sincerely,



Kevin F. Meade

Encs.

cc: Henry M. Grubel (via overnight mail) (w/o enc.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CARMINE A. LOPRESTI,

Plaintiff,

v.

WEIL, GOTSHAL & MANGES LLP,
STEPHEN J. DANNHAUSER,
DAVID J. LENDER, PETER J. HAGEMAN,
GREGORY S. COLEMAN, and
EDWARD C. DAWSON,

Defendants.
-----X

:
: 09 Civ. 2328 (HB) (HBP)
:

:
: **ORAL ARGUMENT**
: **REQUESTED**
:

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, dated April 15, 2009, the Declaration of David J. Lender, sworn to on April 10, 2009, and the Declaration of Tina Campbell, sworn to on April 15, 2009, Defendants will move this Court, before the Honorable Harold Baer, United States District Judge, Southern District of New York, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, on a date and time to be set by the Court, for an Order: (i) dismissing the Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, (ii) sanctioning Plaintiff and his counsel, Henry M. Grubel, Esq., pursuant to 28 U.S.C. § 1927 and the Court's inherent power, (iii) issuing a filing injunction against Plaintiff and Mr. Grubel, and (iv) for such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served on the undersigned by April 29, 2009.

Dated: April 15, 2009
New York, New York

/s Howard B. Comet
Howard B. Comet
Kevin F. Meade
Weil, Gotshal & Manges LLP
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Attorneys for Defendants

TABLE OF CONTENTS

PRELIMINARY STATEMENT1

STATEMENT OF FACTS3

 I. Plaintiff and Mr. Grubel Seek to Demonstrate That “Citistreet” Is A Separate
 Entity From Citistreet LLC5

 II. Plaintiff Now Once Again Asserts The Same Allegations12

ARGUMENT13

 I. The Court Lacks Subject Matter Jurisdiction13

 II. The Complaint Was Brought In Bad Faith And Sanctions Are Proper Under
 28 U.S.C. § 1927 And The Court’s Inherent Power14

 III. The Court Should Enjoin Plaintiff And Mr. Grubel From Filing Any Further
 Actions Relating To The Existence Of “Citistreet”17

CONCLUSION.....20

TABLE OF AUTHORITIES

FEDERAL CASES

<i>60 E. 80th St. Equities, Inc. v. Sapir</i> , 218 F.3d 109 (2d Cir. 2000)	14
<i>Association of Holocaust Victims for Restitution of Artwork and Masterpieces v. Bank Austria Creditanstalt AG, et al.</i> , 2005 U.S. Dist. LEXIS 17411 (S.D.N.Y. Aug. 19, 2005)	14
<i>Bridgewater Operating Corp. v. Feldstein</i> , 346 F.3d 27 (2d Cir. 2003)	14
<i>Gollomp v. Spitzer</i> , 2007 U.S. Dist. LEXIS 8524 (N.D.N.Y. 2007)	14
<i>Herrick Co, Inc. v. SCS Commc'ns, Inc.</i> , 251 F.3d 315 (2d Cir. 2001)	13
<i>Iwachiw v. New York City Board of Education</i> , 194 F. Supp. 2d 194 (E.D.N.Y. 2002)	19
<i>Linardos v. Fortuna</i> , 157 F.3d 945 (2d Cir. 1998)	13
<i>Lopresti v. Citigroup Inc.</i> , 2005 U.S. Dist. LEXIS 15051 (E.D.N.Y. April 18, 2005)	11
<i>Lopresti v. Citigroup Inc.</i> , 171 Fed. Appx. 900 (2d Cir. 2006)	11
<i>Malley v. New York Board of Education</i> , 112 F.3d 69 (2d Cir. 1997)	17
<i>In re Martin-Trigona</i> , 737 F.2d 1254 (2d Cir. 1984)	19
<i>Palazzo v. Corio</i> , 232 F.3d 38 (2d Cir. 2000)	13
<i>Pentagen Techs. International Ltd. v. United States</i> , 172 F. Supp. 2d 464 (S.D.N.Y. 2001), <i>aff'd</i> , 63 Fed. Appx. 548 (2d Cir. 2003)	14
<i>Revson v. Cinque & Cinque, P.C.</i> , 221 F.3d 71 (2d Cir. 2000)	14
<i>Safir v. United States Lines, Inc.</i> , 792 F.2d 19 (2d Cir. 1986)	17, 18
<i>Ulysses I & Co. v. Feldstein</i> , 2002 U.S. Dist. LEXIS 14541 (S.D.N.Y. Aug. 8, 2002), <i>aff'd sub nom., Bridgewater Operating Corp. v. Feldstein</i> , 346 F.3d 27 (2d Cir. 2003)	18

DOCKETED CASES

<i>Lopresti v. Citigroup, et al.</i> , No. 02 Civ. 6492 (SJ)	1
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FEDERAL STATUTES

28 U.S.C. § 19271,3, 12, 14, 15
Fed. R. Civ. P. 12(b)(1).....1

Defendants¹ respectfully submit this memorandum of law in support of their motion: (i) to dismiss the Complaint filed by plaintiff Carmine A. Lopresti (“Plaintiff”), pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction; (ii) for sanctions, pursuant to 28 U.S.C. § 1927 and the Court’s inherent power, against Plaintiff and his counsel, Henry M. Grubel (“Mr. Grubel”); and (iii) for a permanent injunction, barring Plaintiff and Mr. Grubel from making any further filings, in any federal court, relating to the allegations in the Complaint.

PRELIMINARY STATEMENT

Plaintiff, a citizen of New Jersey, alleges federal subject matter jurisdiction in this action based on the Court’s diversity jurisdiction. Plaintiff apparently believes that diversity jurisdiction exists because none of the individual Defendants is a citizen of New Jersey, and Defendant Weil, Gotshal & Manges LLP (“WGM”) is a New York partnership. For diversity jurisdiction purposes, however, a partnership is deemed to be a citizen of every state in which any of its partners is a citizen. Here, several partners of WGM are citizens of New Jersey. Accordingly, complete diversity of citizenship does not exist and the Complaint must be dismissed.

The Court should also sanction Plaintiff and Mr. Grubel, pursuant to 28 U.S.C. § 1927 and the Court’s inherent power, for bringing this action, which is bad faith and harassing litigation. At the core of this action lies an entirely unexceptional fact – that “Citistreet” (a defendant in an earlier action also brought by Plaintiff)² was not an

¹ As used throughout, “Defendants” refers to all named defendants.

² See *Lopresti v. Citigroup, et al.*, No. 02 Civ. 6492 (SJ)(VP) (the “EDNY Action”).

independent legal entity, but rather was simply a trade name used by Citistreet LLC (also a defendant in the EDNY Action). Citistreet LLC, in turn, was until recently a joint venture owned by Citigroup Inc. and State Street Corporation. In his Complaint, Plaintiff alleges that “Citistreet” was somehow a separate legal entity from Citistreet LLC, that “Citistreet” failed to respond to the complaint in the EDNY Action, and that Plaintiff therefore would have recovered a default judgment against “Citistreet” if Defendants had not intentionally misrepresented that “Citistreet” was simply a trade name used by Citistreet LLC.

These allegations simply have no foundation or merit, and neither Plaintiff nor Mr. Grubel could plausibly believe otherwise. Plaintiff and Mr. Grubel have now sought *nine* times to assert that “Citistreet” is somehow a different legal entity from Citistreet LLC. Plaintiff and Mr. Grubel previously made this same argument to the Eastern District of New York, the Second Circuit Court of Appeals, and the Departmental Disciplinary Committee for the Appellate Division, First Department of the New York Supreme Court. Plaintiff and Mr. Grubel were unsuccessful in each of their eight prior attempts.

Moreover, in the EDNY Action, the Eastern District rejected the allegations that form the basis for the current Complaint. Specifically, the Eastern District not only concluded that “Citistreet” did respond to the Complaint in the EDNY Action (and thus did not default) and that Defendants did not make any misrepresentations to the court concerning “Citistreet’s” legal status, but it also expressly endorsed Defendants’ position that “Citistreet” was simply a trade name used by Citistreet LLC and not a separate legal entity. The Eastern District also dismissed the EDNY action for failure to state a claim (a

decision that was affirmed by the Second Circuit). Therefore, any dispute about whether “Citistreet” and Citistreet LLC are the same legal entity was rendered moot, since Plaintiff’s claims (against any entity) were determined to lack merit in any event.

Despite these facts, Plaintiff and Mr. Grubel now once again claim that (i) “Citistreet” is somehow distinct from Citistreet LLC, (ii) “Citistreet” defaulted in the EDNY action, and (iii) Plaintiff would have recovered a default judgment against “Citistreet” if not for Defendants’ “fraud.” Plaintiff and Mr. Grubel simply cannot have any plausible good faith basis to believe that these claims have merit. Accordingly, the Court should sanction them under 28 U.S.C. § 1927 and the Court’s inherent power, and award Defendants their costs and expenses incurred in responding to this frivolous Complaint.

Finally, in light of the repeated filings by Plaintiff and Mr. Grubel relating to “Citistreet’s” legal status, and the complete lack of merit of the present action, the Court should enter a permanent injunction, barring Plaintiff and Mr. Grubel from filing any further actions in any federal court relating to “Citistreet’s” legal status, without first obtaining this Court’s authorization.

STATEMENT OF FACTS

The underlying facts relevant to the present Complaint and this motion stem from the EDNY Action. Plaintiff, a New Jersey citizen, sold and serviced Internal Revenue Code (“IRC”) § 403(b) annuities to employees of Lutheran Medical Center (“LMC”). *See* Declaration of David J. Lender (“Lender Dec.”) ¶ 3. In mid-2001, LMC changed the retirement benefits being offered to its employees, adopting the use of an IRC § 401(k) plan. *Id.* As part of this overall change, LMC, as of October 1, 2001, declined to provide

salary reduction services for IRC § 403(b) plans as offered by Plaintiff. *Id.* LMC subsequently declined to permit Plaintiff, as well as other vendors of IRC § 403(b) products, onto its premises to solicit business. *Id.*

Alleging that this action and other conduct by LMC was unlawful, Plaintiff filed suit in the New York Supreme Court on or about October 17, 2002 (the “State Court Complaint”). *Id.* Plaintiff’s State Court Complaint named, among others, both Citistreet LLC and “Citistreet” as defendants.³ *Id.* The State Court Complaint asserted several claims under various federal laws, including the Sherman and Clayton Acts, RICO and ERISA. *Id.* Plaintiff, however, voluntarily dismissed his State Court Complaint after WGM, which represented Citistreet LLC, the Citigroup Defendants and the State Street Defendants, informed Mr. Grubel that the federal courts had exclusive jurisdiction over several of Plaintiff’s claims. *Id.*

On or about December 11, 2002, Plaintiff re-filed his action in the United States District Court for the Eastern District of New York, again naming the Citigroup Defendants and the State Street Defendants. *Id.* ¶ 3. Plaintiff once again also named both Citistreet LLC and “Citistreet” as defendants. *Id.* ¶ 4.

Prior to May of 2008, Citistreet LLC was a joint venture, organized as a limited liability company, between Citigroup Inc. and State Street Corporation. *Id.* “Citistreet,” however, was merely a trade name used by Citistreet LLC. *Id.* WGM therefore informed

³ The State Court Complaint also named as defendants, among others, Don Goldstein, Citistreet Associates LLC, Citistreet Equities LLC, Citistreet Financial Services LLC, Travelers Insurance Company, Mayda Casado, Jean Desjardins, Jim Wilson, Salomon Smith Barney, Inc., Smith Barney Corporate Trust Company, and Sanford I. Weill (collectively, the “Citigroup Defendants”), as well as State Street Corporation and David A. Spina (collectively, the “State Street Defendants”).

Mr. Grubel that “Citistreet” did not exist as a separate legal entity, and asked him to amend his pleading accordingly. *Id.* at 5.⁴ While Mr. Grubel subsequently filed both a First and Second Amended Complaint, he did not remove “Citistreet” from the pleadings. *Id.*

Based on “Citistreet’s” purported failure to respond to the complaint, Plaintiff and Mr. Grubel began the first of many attempts to demonstrate that “Citistreet” was somehow distinct from Citistreet LLC, and thus obtain a default judgment against “Citistreet.” Although WGM informed Mr. Grubel numerous times before he made his first request for a default judgment that “Citistreet” did not exist independently of Citistreet LLC, Plaintiff and Mr. Grubel continued to pursue the action as against “Citistreet.”

I. Plaintiff and Mr. Grubel Seek to Demonstrate That “Citistreet” Is A Separate Entity From Citistreet LLC

On March 13, 2003, Plaintiff *first* raised the issue of “Citistreet’s” legal status by requesting that the Clerk of the Eastern District enter a default judgment against “Citistreet.” *Id.* ¶ 6.⁵ Mr. Grubel subsequently wrote a letter, dated March 19, 2003, to the Clerk of the Court, Robert Heinemann, requesting that he note a default against “Citistreet.” *Id.* The Clerk took no action on this request. *Id.*

⁴ Copies of letters from WGM to Mr. Grubel are attached as Exhibit 1 to the Lender Dec.

⁵ Copies of Plaintiff’s request to the Clerk of the Court, and Mr. Grubel’s letter to Mr. Heinemann, are attached as Exhibits 2 and 3 to the Lender Dec.

On or about April 24, 2003, Plaintiff raised this issue for a *second* time by filing a motion for a default judgment against “Citistreet” (among others). *Id.* ¶ 7.⁶ In opposition, defendants submitted an affidavit from Robert C. Dughi, the President of Citistreet LLC. In his affidavit, Mr. Dughi testified, among other things, that there was no legally cognizable entity just named “Citistreet.” *Id.* ¶ 9.⁷

On May 8, 2003, the Citistreet Defendants and the State Street Defendants served a motion to dismiss the Complaint in its entirety, and specifically moved to dismiss the complaint as against “Citistreet” on the ground that it did not exist as an independent legal entity. *Id.* ¶ 8. In his opposition, Plaintiff contested this point, once again asserting that “Citistreet” was somehow independent from Citistreet LLC – the *third* time that Plaintiff raised this issue. *Id.*⁸

On July 7, 2003, the assigned Magistrate Judge for the EDNY Action, Judge Pohorelsky, held a hearing on Plaintiff’s motion for a default judgment.⁹ *Id.* ¶ 10. At that hearing, Mr. Grubel explained that he wanted to obtain a default judgment against “Citistreet,” and execute the same against Citigroup Inc. and State Street Corporation. *See* Lender Dec., Ex. 8 at 7:21-8:8. Judge Pohorelsky, however, expressly endorsed defendants’ position that no cognizable entity named “Citistreet” existed, and stated that

⁶ A copy of Plaintiff’s motion for a default judgment is attached as Exhibit 5 to the Lender Dec.

⁷ A copy of Mr. Dughi’s affidavit, submitted in opposition to Plaintiff’s motion for a default judgment, is attached as Exhibit 7 to the Lender Dec.

⁸ A copy of Plaintiff’s opposition to defendants’ motion to dismiss is attached as Exhibit 6 to the Lender Dec.

⁹ A copy of the transcript from the July 7, 2003 hearing is attached as Exhibit 8 to the Lender Dec.

Plaintiff was simply “playing games” by suggesting that he could execute a default judgment on “Citistreet” against Citigroup Inc. and State Street Corp. (the owners of Citistreet LLC):

The Court: So what are you going to do if you get a judgment that says Citistreet? What are you going to do? Are you going to find a company named Citistreet? There is no company named Citistreet.

Mr. Grubel: I disagree with that.

The Court: And then what are you going to do? Are you going to execute against Citistreet? Are you going to try to?

Mr. Grubel: Sure. And then if that returns unsatisfied, then against Citistreet and State Street.

The Court: On what basis?

Mr. Grubel: On the basis that they are the owners of this joint venture.

The Court: That’s not what the law really allows, to play games with names like this in order to go after somebody else. In other words, you want a judgment that you can execute against the parties that have answered the complaint. Is that right?

Mr. Grubel: I want a judgment against the parties who are responsible for the allegations in the complaint.

The Court: That’s right, and you have answering parties who are saying, we’re ready to step up and we’re not going to say that Citistreet, not Citistreet LLC is responsible for this. . . . They’re [defendants] saying there is no such company [“Citistreet”] really with any assets. The company with assets is us and we’re prepared to step up and answer the claims. You’re just trying to – you’re just fooling around with words. You’re just playing games is what you’re doing. I don’t see any other way to explain it because what you just told me is what you’re going to do with this judgment, if you get it, this default judgment, is you’re going to go after the assets of Citigroup LLC and Citigroup, Inc., and they’re here.

See Lender Dec., Ex. 8 at 7:21-8:19; 8:20-9:5.

At the end of that hearing, the court deferred deciding Plaintiff's motion for a default judgment on the basis that defendants' motion to dismiss could potentially moot the issue. *See* Lender Dec. ¶ 10. Notwithstanding the court's deferral of Plaintiff's motion for a default judgment, Mr. Grubel continued to pursue this issue, and, on April 23, 2004, raised it for the *fourth* time by sending another letter to the Clerk of the Court, again requesting that the Clerk note a default against "Citistreet." *Id.* ¶ 11.¹⁰ The Clerk denied this request on May 7, 2004.¹¹ In response, on July 2, 2008, Plaintiff raised the issue for a *fifth* time by filing a petition for a writ of mandamus with the Second Circuit Court of Appeals, seeking to compel Mr. Heinemann to note a default against "Citistreet." *Id.* ¶ 12.¹² That petition was denied on September 4, 2004, and the Second Circuit directed Plaintiff first to seek relief from the District Court. *Id.* ¶ 12.¹³

On July 8, 2004, shortly after filing his petition with the Second Circuit, Plaintiff raised the issue of "Citistreet's" legal status for a *sixth* time by filing a motion for sanctions under Rule 11 against, among others, WGM, David Lender and Peter Hageman. *Id.* ¶ 13.¹⁴ In his motion, Plaintiff argued that defendants lacked legal and factual support for their statements that "Citistreet" was not a separate legal entity from

¹⁰ A copy of Mr. Grubel's April 23, 2004 letter to the Clerk of the Court is attached as Exhibit 9 to the Lender Dec.

¹¹ A copy of the Clerk of the Court's May 7, 2004 letter to Mr. Grubel is attached as Exhibit 11 to the Lender Dec.

¹² A copy of Plaintiff's petition to the Second Circuit Court of Appeals is attached as Exhibit 12 to the Lender Dec.

¹³ A copy of the September 4, 2004 Order of the Second Circuit Court of Appeals, denying Plaintiff's petition, is attached as Exhibit 13 to the Lender Dec.

¹⁴ A copy of Plaintiff's motion for sanctions is attached as Exhibit 14 to the Lender Dec.

Citistreet LLC. *Id.* The court referred this motion, along with Plaintiff's latest request for a default judgment, to Judge Pohorelsky, who held a hearing on November 30, 2004. *Id.* ¶ 14.¹⁵

At that hearing, Judge Pohorelsky pointed out that defendants had moved to dismiss the complaint as against *all* defendants, including "Citistreet" (due to the fact that it was not a separate legal entity). *See* Lender Dec., Ex. 15 at 27:17-23. The court therefore recommended that Plaintiff's motion for a default judgment be denied because "[t]here is no basis for the clerk of the Court to enter a notation of default as to the entities that do not exist or that assert they do not exist, *because they have in fact appeared*. They have put in a response to the complaint." *Id.* at 26:12-20 (emphasis added); *see also* 27:17-23. Plaintiff failed to object to this recommendation within the required time period, and the Hon. Sterling Johnson adopted this recommendation on January 11, 2005. *See* Lender Dec. ¶ 14.¹⁶

At the November 30, 2004 hearing, the court also addressed Plaintiff's motion for sanctions, and noted that defendants' position concerning "Citistreet's" legal status had been based on "ample evidence," including the affidavit that Mr. Dughi provided. *Id.* ¶ 15; Ex. 15 at 22:14-23:11. The court, therefore, expressed its doubt that it could "ever find" that defendants violated Rule 11 "based on what Mr. Lender has submitted" in support of defendants' position. *See id.* at 23:10-11. Despite that fact, the court

¹⁵ A copy of the transcript from the November 30, 2004 hearing, is attached as Exhibit 15 to the Lender Dec.

¹⁶ A copy of Judge Johnson's order adopting the Magistrate Judge's recommendation is attached as Exhibit 16 to the Lender Dec.

scheduled an evidentiary hearing to determine whether Mr. Dughi had a good-faith basis for making the assertions in his affidavit. *See id.* at 25:21-26:6.

On January 5, 2005, Judge Pohorelsky held an evidentiary hearing, at which Mr. Dughi testified. *See* Lender Dec. ¶ 16.¹⁷ During his testimony, Mr. Dughi stated, among other things, that:

- Citistreet LLC was formed in April of 2000 as a Delaware limited liability corporation. *See* Lender Dec., Ex. 17. at 9:22-10:1.
- Citistreet LLC is a joint venture, owned 50% by Citigroup Inc. and 50% by State Street Corporation. *See id.* at 10:2-17.
- “Citistreet” is a protected service mark, owned by Citigroup Inc., and filed with the United States Patent and Trademark Office. *See id.* at 10:22-11:1.
- There is no separate entity that is just called “Citistreet.” *See id.* at 12:9-17.

Following Mr. Dughi’s testimony, and oral argument from the parties, the court recommended that Plaintiff’s motion for sanctions be denied. *See* Lender Dec. ¶ 17; Ex. 17 at 123:16-17. In doing so, the court concluded that Mr. Dughi’s testimony was credible and backed by relevant documentation demonstrating “that there is no separate entity apart from the LLC, that there is no joint venture apart from the LLC.” *See* Lender Dec. ¶ 17; Ex. 17 at 121:15-18. The court further noted that “[e]qually supportable on the basis of the facts that were adduced by – through the testimony of Mr. Dughi is that there is no entity, there is no joint venture separate from the LLC and there is no

¹⁷ A copy of the transcript from the January 5, 2005 hearing is attached as Exhibit 17 to the Lender Dec.

Citistreet that's a legal entity apart from the LLC or the various entities that are under the umbrella of the LLC.”¹⁸ See Lender Dec., Ex. 17 at 123:9-15.

On April 18, 2005, Judge Johnson granted defendants' motion to dismiss for failure to state a claim, and dismissed the complaint in its entirety. See *Lopresti v. Citigroup Inc.*, 2005 U.S. Dist. LEXIS 15051 (E.D.N.Y. April 18, 2005); Lender Dec. ¶ 19.¹⁹ That decision was affirmed by the Second Circuit Court of Appeals by summary order dated March 23, 2006. See *Lopresti v. Citigroup Inc.*, 171 Fed. Appx. 900 (2d Cir. 2006); Lender Dec. ¶ 19.²⁰

Approximately one year later, however, Plaintiff asserted the same issue for a *seventh* time by filing a disciplinary complaint against WGM and Mr. Lender with the Department Disciplinary Committee for the Appellate Division, First Department of the New York Supreme Court (the “Disciplinary Committee”). That complaint alleged that Mr. Lender falsely represented in the EDNY Action that “Citistreet” was not a separate entity from Citistreet LLC. The Disciplinary Committee dismissed the complaint without even informing WGM or Mr. Lender that a complaint had been filed. See Lender Dec. ¶ 21. Not deterred, Plaintiff raised this issue for an *eighth* time by requesting reconsideration of the Disciplinary Committee's dismissal of his complaint. In response,

¹⁸ The court also rejected another central basis for the current complaint – that under New York and Delaware law, a limited liability company cannot be a joint venture. See Lender Dec. at ¶ 18; see also Lender Dec., Ex. 17 at 121:24-123:7.

¹⁹ A copy of Judge Johnson's memorandum and order is attached as Exhibit 18 to the Lender Dec.

²⁰ A copy of the Second Circuit Court of Appeals' summary order is attached as Exhibit 19 to the Lender Dec.

the Disciplinary Committee affirmed its original decision to dismiss the complaint. *See* Lender Dec. ¶ 21.²¹

II. Plaintiff Now Once Again Asserts The Same Allegations

On March 12, 2009, Plaintiff, again represented by Mr. Grubel, filed this present action, asserting claims against Defendants based on a purported violation of the New York Judiciary Law, as well as for purported fraud and fraudulent inducement. In his Complaint, Plaintiff once again alleges that “Citistreet” failed to appear in the EDNY Action, and that Plaintiff was deprived of a default judgment against “Citistreet” because of Defendants’ “deceit and deception” in claiming that “Citistreet” was not a cognizable legal entity. Compl. ¶ 8-9, 11, 17-18. Based on these allegations, which have been repeatedly raised and rejected, Plaintiff asks the Court to treble the \$100 million in damages that he sought in the EDNY Action (which was dismissed on its merits for failure to state a claim), as well as award him punitive damages, attorney’s fees (both for this action and the EDNY Action), and costs.

As discussed below, the Court lacks subject matter jurisdiction over Plaintiff’s claims, and the Complaint must be dismissed. The Court has jurisdiction, however, to sanction Plaintiff and Mr. Grubel and to prevent any further harassment of Defendants. Since Plaintiff and Mr. Grubel cannot possibly have a good faith belief that Plaintiff’s claims have merit, sanctions are appropriate pursuant to 28 U.S.C. § 1927 and the Court’s inherent power. Finally, a filing injunction should be ordered to prevent Plaintiff and Mr. Grubel from filing any further actions concerning the same allegations.

²¹ A copy of the Disciplinary Committee’s letter to Plaintiff denying reconsideration is attached as Exhibit 20.

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction

In the Complaint, Plaintiff alleges subject matter jurisdiction based on diversity of citizenship, alleging that he is a citizen of New Jersey, and that Defendants are all citizens of states other than New Jersey. In regard to defendant WGM, Plaintiff alleges that it is a “New York State, Domestic Registered, Limited Liability Partnership, law firm.” Compl. ¶ 27.

For diversity jurisdiction purposes, however, a partnership is a citizen of every state in which its partners are citizens. *E.g., Herrick Co, Inc. v. SCS Commc'ns, Inc.* 251 F.3d 315, 322 (2d Cir. 2001) (“First, for purposes of establishing diversity, a partnership has the citizenship of each of its partners”) (*citing Carden v. Arkoma Assoc.*, 494 U.S. 185, 192-95 (1990)). An individual’s citizenship is determined by his or her domicile, meaning the “place where a person has his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning.” *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000) (*quoting Linardos v. Fortuna*, 157 F.3d 945, 948 (2d Cir. 1998)).

As sworn to in the Lender Dec., several WGM partners are permanent residents, and therefore citizens, of New Jersey. *See* Lender Dec. ¶ 22. Because Plaintiff is a citizen of New Jersey, complete diversity of citizenship does not exist. Accordingly, the Court lacks subject matter jurisdiction and the Complaint must be dismissed in its entirety.

II. The Complaint Was Brought In Bad Faith And Sanctions Are Proper Under 28 U.S.C. § 1927 And The Court's Inherent Power

Sanctions are proper here against Plaintiff and Mr. Grubel under 28 U.S.C. § 1927, which provides that the Court may sanction “[a]ny attorney. . .who so multiplies the proceedings in any case unreasonably and vexatiously,” as well as the Court’s inherent power to impose sanctions on parties and their counsel to punish vexatious and harassing conduct.²² Sanctions are appropriate under both 28 U.S.C. § 1927 and the Court’s inherent power where there is bad faith, which may be inferred where the offending party’s claims are entirely “without color.” *See 60 E. 80th St. Equities, Inc. v. Sapir*, 218 F.3d 109, 115 (2d Cir. 2000); *Pentagen Techs. Int’l Ltd. v. United States*, 172 F. Supp. 2d 464, 473-74 (S.D.N.Y. 2001), *aff’d*, 63 Fed. Appx. 548 (2d Cir. 2003); *Ass’n of Holocaust Victims for Restitution of Artwork and Masterpieces*, 2005 U.S. Dist. LEXIS 17411, *17-18. A claim has merit “when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim.” *See Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 79 (2d Cir. 2000).

Here, neither Plaintiff nor Mr. Grubel can possibly have a good faith belief that Plaintiff’s claims in this action have any merit. The reason is simple: as explained above and in the accompanying Lender Dec., Plaintiff and Mr. Grubel have unsuccessfully

²² The Court may award sanctions pursuant to 28 U.S.C. § 1927 and its inherent power, notwithstanding the fact that this action must be dismissed for lack of subject matter jurisdiction. *See Bridgewater Operating Corp. v. Feldstein*, 346 F.3d 27, 30 n.4 (2d Cir. 2003); *Ass’n of Holocaust Victims for Restitution of Artwork and Masterpieces v. Bank Austria Creditanstalt AG, et al.*, 2005 U.S. Dist. LEXIS 17411, *8-12 (S.D.N.Y. Aug. 19, 2005) (dismissing for lack of subject matter jurisdiction and imposing sanctions under Rule 11, 28 U.S.C. § 1927, and the court’s inherent power); *see also Gollomp v. Spitzer*, 2007 U.S. Dist. LEXIS 8524 (N.D.N.Y. 2007).

asserted that “Citistreet” is somehow a separate entity from Citistreet LLC on *eight* prior occasions. *See supra* pp. 5-12. Moreover, the Eastern District specifically rejected the core allegations in the current Complaint, concluding that (i) “Citistreet” had responded to the complaint in the EDNY Action, and thus did not default, and (ii) Defendants’ representations concerning “Citistreet” were both factually and legally supported. Furthermore, the Eastern District also concluded that Plaintiff’s claims in the EDNY action lacked any merit, and thus any dispute concerning “Citistreet’s” legal status is moot because all claims in the EDNY Action (against all defendants) were dismissed.

Based on these facts, there is no reasonable basis for Plaintiff or Mr. Grubel to believe that Plaintiff’s claims have any merit. Indeed, the only plausible conclusion is that this action has been brought to harass Defendants. Plaintiff’s own allegations simply confirm this fact. For example, the Complaint alleges that Defendants’ “fraud” became “manifest and incontrovertible when the allegedly non-existent entity known as Citistreet was sold by Citigroup, Inc. and State Street Corporation for \$900 million to the ING Group in 2008.” Compl. ¶ 19. The ING Group press releases announcing the transaction, however, make it clear that the entity that was sold was Citistreet LLC. ING’s May 1, 2008 press release states, in the very first line, that “ING Group announced today that it has reached an agreement to acquire *Citistreet LLC*. . . .” *See* Ex. 1 to the Declaration of Tina Campbell (“Campbell Dec.”) (emphasis added). ING’s July 1, 2008 press release states that ING had “received regulatory approvals and today completed its acquisition of *Citistreet LLC*. . . .” *See* Ex. 2 to the Campbell Dec. The Campbell Dec. also conclusively demonstrates that the ING Group acquired the ownership interests in Citistreet LLC. *See* Campbell Dec. at ¶ 5.

Moreover, the Complaint further alleges that “[t]he defendants continued their deceit concerning the non existence of Citistreet, in their response to plaintiff’s complaint regarding their deceit, to the First Judicial Department Disciplinary Committee in 2007.” Compl. ¶ 24. The Disciplinary Committee, however, dismissed Plaintiff’s disciplinary complaint without informing WGM or Mr. Lender that it had been filed. WGM and Mr. Lender were not even aware of the complaint until Plaintiff filed the present action and referenced the disciplinary complaint in his Complaint in this Court. *See* Lender Dec. at ¶ 21. Therefore, Plaintiff and Mr. Grubel have asserted allegations of fraudulent conduct without having any possible factual basis for those allegations.

In the EDNY action, Judge Johnson described Mr. Grubel’s litigation conduct as an “abuse of the judicial process” and warned him of the court’s authority to enjoin him from filing further motions and letters without the court’s permission:

Plaintiff’s counsel has demonstrated a tendency in this case towards excessive filing of letters addressed to the Court, rather than formal motions, often encompassing multiple aspects of the case and widely varying procedural issues within a single letter, frequently lacking in any citation to supporting or opposing case law, filed with such frequency that the Court and Defendants must respond on a nearly daily basis. Plaintiff counsel is advised that this mode of litigation may be in violation of the American Bar Association’s Model Rules of Professional Conduct R. 3.1,²³ is an abuse of the judicial process, and is in violation of the Local Rules for the Eastern District of New York. . . .Plaintiff counsel is also reminded that the Court has the authority to issue a filing injunction against Plaintiff that would enjoin Plaintiff from filing further motions and letters without the Court’s permission.

²³ “A lawyer shall not. . .assert or controvert an issue. . .unless there is a basis in law and fact for doing so that is not frivolous. . . .”

See Lender Dec. ¶ 20; Ex. 20 at 4-5.²⁴

Enough is enough. Accordingly, sanctions are appropriate against Plaintiff and Mr. Grubel pursuant to 28 U.S.C. § 1927 and the Court's inherent powers.

III. The Court Should Enjoin Plaintiff And Mr. Grubel From Filing Any Further Actions Relating To The Existence Of "Citistreet"

In addition to sanctioning Plaintiff and Mr. Grubel, the Court also should impose a permanent injunction, barring Plaintiff and Mr. Grubel from filing any further actions in any federal court, relating to the allegation that "Citistreet" is a separate legal entity from Citistreet LLC, or that Defendants falsely represented to the contrary. It is without question that federal courts may enjoin a party from initiating future vexatious litigation. See *Malley v. New York Bd. of Educ.*, 112 F.3d 69 (2d Cir. 1997). Moreover, the Court can impose such an injunction even though it lacks subject matter jurisdiction over Plaintiff's claims in this action. See *Bridgewater Operating Corp.*, 346 F.3d 27, 30 n.4.

In determining whether to restrict a litigant's future access to the courts, courts in the Second Circuit consider (i) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (ii) the litigant's motive in pursuing the litigation, *e.g.*, does the litigant have an objective good faith expectation of prevailing?; (iii) whether the litigant is represented by counsel; (iv) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (v) whether other sanctions would be adequate to protect the courts and other parties. See *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d

²⁴ This statement was based, in part, on the fact that Plaintiff had filed multiple baseless motions to disqualify Judge Pohorelsky, including a petition for a writ of mandamus.

Cir. 1986). “Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties.” *Safir*, 792 F.2d at 24. Each factor identified by the Second Circuit in *Safir* weighs in favor of issuing an injunction in this case.

First, the Eastern District has already noted Mr. Grubel’s propensity to abuse the judicial system, and specifically warned him of the court’s power to issue a filing injunction. Plaintiff and Mr. Grubel therefore have a demonstrated history of filing harassing and vexatious litigation.

Second, as explained above, Plaintiff and Mr. Grubel cannot have a subjective good faith belief – let alone an objective one – that the present Complaint has any merit.

Third, Plaintiff is represented by counsel, which weighs in favor of an injunction. *See Ulysses I & Co. v. Feldstein*, 2002 U.S. Dist. LEXIS 14541, *43-44 (S.D.N.Y. Aug. 8, 2002), *aff’d sub nom.*, *Bridgewater Operating Corp.*, 346 F.3d 27 (2d Cir. 2003).

Fourth, Plaintiff and Mr. Grubel have caused Defendants in this action, as well as defendants in the EDNY action, to incur substantial time and expense responding both to this Complaint and Plaintiff’s numerous baseless motions and other applications in the EDNY action.

Fifth, in light of Plaintiff’s eight prior attempts to demonstrate that “Citistreet” is a separate entity from Citistreet LLC, and the fact that Plaintiff filed a disciplinary complaint against WGM and Mr. Lender after his complaint in the EDNY action was dismissed for failure to state a claim, it is not realistic to believe that anything short of an injunction will protect Defendants, the courts, or other litigants from Plaintiff and Mr. Grubel.

Accordingly, an injunction applying to all federal district courts is warranted. *See, e.g. Bridgewater Operating Corp.*, 346 F.3d at 30; *Iwachiw v. New York City Board of Education*, 194 F. Supp. 2d 194, 208 (E.D.N.Y. 2002) (requiring plaintiffs to seek leave from the court before filing any additional actions arising out of or relating to certain allegations). It is also proper for this Court to require Plaintiff and Mr. Grubel, prior to filing any additional action in any state court relating to the allegations in the present Complaint, to inform the state court of this Court's judgment and injunction by attaching a copy of this Court's judgment to the initial pleading in state court. *See Bridgewater Operating Corp.*, 346 F.3d at 30; *In re Martin-Trigona*, 737 F.2d 1254, 1261-62 (2d Cir. 1984) (affirming an injunction limiting a litigant's access to the federal courts and imposing a notice requirement on a litigant's access to state courts).

CONCLUSION

For all of the foregoing reasons, (i) Defendants' motion to dismiss for lack of subject matter jurisdiction should be granted, (ii) Defendants should be awarded their costs and expenses incurred in defending against this frivolous action, and (iii) the Court should issue a permanent injunction, barring Plaintiff and Mr. Grubel from filing any further actions in federal court relating to the allegations contained in the current Complaint, and requiring Plaintiff and Mr. Grubel to inform any state court, prior to filing any action relating to the allegations contained in the current Complaint, of this Court's judgment and injunction.

Dated: April 15, 2009
New York, New York

/s Howard B. Comet
Howard B. Comet
Kevin F. Meade
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of (i) Defendants' Notice of Motion; (ii) Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), For Sanctions Pursuant to 28 U.S.C. § 1927 and the Court's Inherent Power, and to Enjoin Future Filings; (iii) Declaration of David J. Lender in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), For Sanctions Pursuant to 28 U.S.C. § 1927 and the Court's Inherent Power, and to Enjoin Future Filings; and (iv) Declaration of Tina Campbell in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), For Sanctions Pursuant to 28 U.S.C. § 1927 and the Court's Inherent Power, and to Enjoin Future Filings, was filed electronically with the Clerk of Court of the United States District Court for the Southern District of New York on this 15th day of April 2009 by using the CM/ECF system, which provides electronic service on each attorney registered for ECF notification.

Dated: April 15, 2009

/s Kevin F. Meade
Kevin F. Meade
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8487

Counsel for Defendants

I represented Citigroup Inc., Citistreet LLC, Don Goldstein, Citistreet Associates LLC, Citistreet Equities LLC, Citistreet Financial Services LLC, Travelers Insurance Company, Mayda Casado, Jean Desjardins, Jim Wilson, Salomon Smith Barney, Inc., Smith Barney Corporate Trust Company, and Sanford I. Weill (collectively, the "Citigroup Defendants"), as well as State Street Corporation and David A. Spina (collectively, the "State Street Defendants").

3. On or about October 17, 2002, Plaintiff filed a complaint in New York State Supreme Court (the "State Court Complaint") against, among others, the Citigroup Defendants and the State Street Defendants, in which Plaintiff named both Citistreet LLC and "Citistreet" as a defendant. Plaintiff alleged that he sold and serviced Internal Revenue Code ("IRC") § 403(b) annuities to employees of Lutheran Medical Center ("LMC"). In mid-2001, LMC changed the retirement benefits being offered to its employees, adopting the use of an IRC § 401(k) plan. As part of this overall change, LMC, as of October 1, 2001, declined to provide salary reduction services for IRC § 403(b) plans as offered by Plaintiff. LMC subsequently declined to permit Plaintiff, as well as other vendors of IRC § 403(b) products, onto its premises to solicit business. Based on this purported conduct, Plaintiff asserted a number of federal claims, including, but not limited to, claims under the Sherman and Clayton Acts, RICO, and ERISA. After my office informed Mr. Grubel that exclusive jurisdiction for a number of these claims rested in the federal courts, Plaintiff voluntarily dismissed his State Court Complaint and subsequently re-filed it in the Eastern District of New York on or about December 11, 2002.

4. Plaintiff's original complaint in the EDNY action, however, again named both "Citistreet" as well as Citistreet LLC as defendants. I conducted a diligent investigation to learn the proper identification of the "Citistreet" entities and, from that investigation, I learned that "Citistreet" did not exist as a separate legal entity from Citistreet LLC. Rather, "Citistreet" is merely a trade name that was used by Citistreet LLC, which was a joint venture that was 50%/50% owned by Citigroup Inc. and State Street Corporation.

5. Thereafter, my office exchanged numerous letters with Mr. Grubel, informing him, among other things, that "Citistreet" did not exist as a separate legal entity, and asking him to amend his pleadings. True and correct copies of our letters to Mr. Grubel are attached hereto as Exhibit 1. Mr. Grubel, however, refused to remove "Citistreet" from the pleadings, and "Citistreet" remained a named defendant in both the First and Second Amended Complaints.

6. In March of 2003, Plaintiff and Mr. Grubel made their *first* attempt to persuade the Eastern District to enter a default judgment against the non-existent "Citistreet." Specifically, Plaintiff requested on March 13, 2003, that the Clerk of the Court enter a default judgment against "Citistreet," and Mr. Grubel subsequently wrote a letter on March 19, 2003 to the Clerk of the Court, Robert Heinemann, requesting that the Clerk note a default against "Citistreet." The Clerk took no action on this request. True and correct copies of Plaintiff's request to the Clerk of the Court, and Mr. Grubel's letter to Mr. Heinemann, are attached hereto as Exhibits 2 and 3. A true and correct copy of my letter to the Clerk of the Court opposing Plaintiff's request for a default judgment is attached hereto as Exhibit 4.

7. On or about April 24, 2003, Plaintiff served a motion for a default judgment against, among others, "Citistreet" – his *second* attempt to place this issue before the Eastern District. A true and correct copy of Plaintiff's motion for a default judgment is attached hereto as Exhibit 5.

8. On May 8, 2003, the Citistreet Defendants and the State Street Defendants served a motion to dismiss the Complaint in its entirety, and specifically also moved to dismiss the Complaint against "Citistreet" on the ground that it did not exist as an independent legal entity. Plaintiff's opposition to the motion to dismiss amounted to the *third* time that Plaintiff contested the issue of the existence of "Citistreet." A true and correct copy of Plaintiff's opposition to the motion to dismiss is attached hereto as Exhibit 6.

9. In opposition to Plaintiff's motion for a default judgment against "Citistreet," Robert C. Dughi, the President of Citistreet LLC and Chief Executive Officer of Citistreet Associates LLC, filed an affidavit in which he confirmed what I had repeatedly told Mr. Grubel – that there is no legally cognizable entity just named "Citistreet." A true and correct copy of Mr. Dughi's affidavit is attached hereto as Exhibit 7.

10. At the July 7, 2003 hearing on Plaintiff's motion for a default judgment, the Court expressly endorsed the Citigroup Defendants' and State Street Defendants' factual showing, and admonished Mr. Grubel for "playing games." A true and correct copy of the full transcript of the July 7, 2003 hearing is attached hereto as Exhibit 8. The Court ultimately reserved ruling on Plaintiff's motion for a default judgment until after

the ruling on defendants' motion to dismiss, which, as noted above, was directed at the entire complaint.

11. Notwithstanding the fact that the court reserved ruling on Plaintiff's motion for a default judgment, Mr. Grubel raised the issue of the existence of "Citistreet" for a *fourth* time in a letter to the Clerk of the Court on April 23, 2004, in which Mr. Grubel once again requested that the Clerk of the Court note a default against "Citistreet." By letter dated April 29, 2004, I explained to the court that Plaintiff had already sought to have the Clerk enter a default a year earlier, and that the court had already conducted a hearing (in connection with the motion for a default judgment) on the very same issue that Plaintiff was now attempting to raise yet again. True and correct copies of Mr. Grubel's letter, as well as my letter, dated April 29, 2004, are attached hereto as Exhibits 9 and 10. Once again, the Clerk declined to take any action on Mr. Grubel's request. A true and correct copy of the letter from the Clerk of the Court, dated May 7, 2004, is attached hereto as Exhibit 11.

12. On July 2, 2004, Plaintiff raised this issue for a *fifth* time by filing a petition for a writ of mandamus with the Second Circuit Court of Appeals, seeking to compel the Clerk of the Court to note a default as against "Citistreet." This request was denied by the Second Circuit on September 4, 2004, and the Second Circuit directed Plaintiff first to seek relief from the District Court. True and correct copies of Plaintiff's petition for a writ of mandamus, and the Second Circuit's order denying this petition, are attached hereto as Exhibits 12 and 13.

13. On July 8, 2004, Plaintiff raised this issue for a *sixth* time by filing a motion for sanctions under Rule 11 against, among others, WGM, Peter Hageman, and

myself. In his motion, Plaintiff claimed that the assertion that "Citistreet" was not a separate legal entity from Citistreet LLC lacked factual and legal support. A true and correct copy of Plaintiff's motion for sanctions is attached hereto as Exhibit 14.

14. Plaintiff's motion for sanctions, along with his latest request for a default judgment, were referred to the assigned Magistrate Judge, Magistrate Judge Pohorelsky, who held a hearing on November 30, 2004. A true and correct copy of the transcript from the November 30, 2004 hearing is attached hereto as Exhibit 15. Following that hearing, Magistrate Judge Pohorelsky recommended that Plaintiff's motion for a default judgment be denied, because defendants had moved to dismiss all claims against "Citistreet," and "Citistreet" had thus responded to the Complaint. *See* Exhibit 15 at 26:12-20; 27:17-23. Plaintiff failed to object to this recommendation during the permissible time period, and the Hon. Sterling Johnson adopted this recommendation on January 11, 2005. A true and correct copy of Judge Johnson's order adopting the Magistrate Judge's recommendation is attached hereto as Exhibit 16.

15. At the November 30, 2004 hearing, Magistrate Judge Pohorelsky also noted that defendants' position concerning "Citistreet's" legal status had been based on "ample evidence," including the affidavit that Mr. Dughi had provided. *See* Ex. 15 at 22:14-23:11. The court, however, scheduled an evidentiary hearing in order to determine whether Mr. Dughi had a good-faith basis for the assertions in his affidavit. *See id.* at 25:21-26.

16. On January 5, 2005, Magistrate Judge Pohorelsky held an evidentiary hearing, at which Mr. Dughi testified. A true and correct copy of the transcript from the January 5, 2005 hearing is attached hereto as Exhibit 17. During his testimony, Mr.

Dughi testified, among other things, that (i) Citistreet LLC was formed in April of 2000 as a Delaware limited liability corporation; (ii) Citistreet LLC is a joint venture, owned 50% by Citigroup Inc. and 50% by State Street Corporation; (iii) “Citistreet” is a protected service mark, owned by Citigroup Inc. and filed with the United States Patent and Trademark Office; and (iv) there is no separate entity that is just called “Citistreet.” *See Exhibit 17 at 9:22-10:5; 10:22-11:1; 12:9-17.*

17. Following Mr. Dughi’s testimony and oral argument from the parties, the court recommended that Plaintiff’s motion for sanctions be denied. *See id.* at 123:16-17. In so doing, the court concluded that Mr. Dughi’s testimony was credible and, along with relevant documentation, demonstrated that “there is no Citistreet that’s a legal entity apart from the LLC or the various entities that are under the umbrella of the LLC.” *See id.* at 123:8-13.

18. In denying Plaintiff’s motion for sanctions, the court also rejected another central basis for the current Complaint – that under New York and Delaware law, a limited liability company cannot be a joint venture. *See id.* at 121:24-123:7.

19. On April 18, 2005, Judge Johnson granted defendants’ motion to dismiss for failure to state a claim, and dismissed the complaint in its entirety. A true and correct copy of the court’s memorandum and order is attached hereto as Exhibit 18. This decision was affirmed by the Second Circuit Court of Appeals by summary order dated March 23, 2006. A true and correct copy of the Second Circuit’s summary order is attached hereto as Exhibit 19.

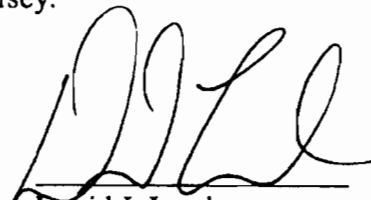
20. A true and correct copy of the court’s January 24, 2005 Order, describing Mr. Grubel’s litigation conduct as an “abuse of the judicial process” and warning him of

the court's authority to enjoin him from filing further motions and letters without the court's permission, is attached hereto as Exhibit 20.

21. In his current Complaint, Plaintiff claims that Defendants "continued their deceit concerning the non existence of Citistreet, in their response to plaintiff's complaint regarding their deceit, to the First Judicial Department Disciplinary Committee in 2007." Compl. ¶ 24. Prior to receiving Plaintiff's current Complaint, I was not aware that a disciplinary complaint had been filed against WGM or myself. Since the filing of the current Complaint, however, I now understand that the Disciplinary Committee dismissed the complaint without informing anyone at WGM that a complaint had been filed, and that no response of any type was submitted. I also now understand that the Disciplinary Committee affirmed its decision to dismiss the complaint after Plaintiff sought reconsideration. A true and correct copy of the Disciplinary Committee's letter to Plaintiff denying reconsideration is attached as Exhibit 21.

22. I have been a partner at WGM since January of 2001. I am currently co-chair of WGM's Complex Commercial Litigation Department and a member of the firm's Management Committee. Several partners of WGM reside in, and are citizens of, New Jersey. Among others, Robert Berezin, Steven Glazer and Michael Lubowitz are WGM partners that reside in, and are citizens of, New Jersey.

Dated: April 10, 2009
New York, New York



David J. Lender

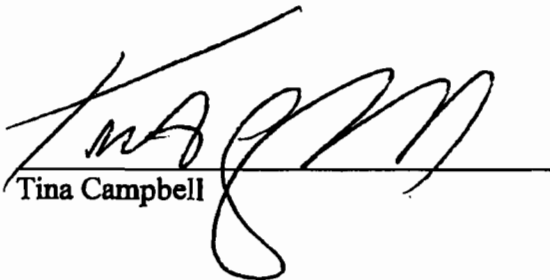
3. The joint venture was formed through the contribution of the existing retirement services and plan administration businesses of each of Citigroup and State Street to CitiStreet LLC. Following the contributions, CitiStreet LLC was 50% owned directly or indirectly by each of Citigroup and State Street.

4. The name, CitiStreet, is an amalgamation of "Citigroup" and "State Street". "CitiStreet" was a registered trademark and a trade name through which CitiStreet LLC conducted its business.

5. On July 1, 2008, the previously announced sale of CitiStreet LLC to an indirect wholly-owned subsidiary of ING Groep N.V. ("ING Group") was consummated. Pursuant to the terms of the purchase agreements, an indirect wholly-owned subsidiary of ING Groep acquired 100% of the outstanding membership interests of CitiStreet LLC. A copy of ING Group's press releases announcing its entry into an agreement to purchase CitiStreet LLC and its closing of the acquisition are attached hereto as Exhibits 1 and 2, respectively.

6. There has never been a legal entity (organized or unorganized) named simply "CitiStreet".

Dated: April 15, 2009
Quincy, MA



Tina Campbell