

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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CARMINE A. LOPRESTI,

Plaintiff,

02 CV 6492 (SJ)

- against -

MEMORANDUM  
AND ORDER

CITIGROUP, INC., WENDY Z. GOLDSTEIN, MILES  
H. KUCKER, ALLEN SCHECHTER, HOWARD  
SMITH, WILLIAM D. MYHRE, DON GOLDSTEIN,  
STATE STREET CORP., CITISTREET, CITISTREET  
INC., CITISTREET ASSOCIATES LLC, CITISTREET  
EQUITIES LLC, CITISTREET FINANCIAL SERVICES,  
LLC, TRAVELERS INSURANCE COMPANY, BUCK  
CONSULTANTS, BUCK CONSULTANTS, INC.,  
LUTHERAN MEDICAL CENTER, MAYDA CASADO,  
JEAN DESJARDINS, JIM WILSON, SMITH BARNEY  
CORPORATE TRUST COMPANY, COPELAND  
ASSOCIATES, INC., DAVID A. SPINA, SANFORD  
I. WEILL, SALOMON SMITH BARNEY, INC.,  
CITISTREET LLC

Defendants.

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A P P E A R A N C E S:

HENRY M. GRUBEL, P.C.  
37 Prospect Street  
Freeport, NY 11520  
Attorney for Plaintiff

WEIL, GOTSHAL & MANGES  
767 Fifth Avenue  
New York, NY 10153  
By: David J. Lender  
Attorneys for Defendants Citigroup, Inc., Don Goldstein,

State Street Corporation, Citistreet Associates LLC,  
Citistreet Equities LLC, Citistreet Financial Services  
LLC, Travelers Insurance Company, Mayda Casado,  
Jean Desjardins, Jim Wilson, Smith Barney Corporate  
Trust Company, David A. Spina, Sanford I. Weill,  
Salomon Smith Barney, Inc., Citistreet LLC

SICHENZIA ROSS FRIEDMAN FERENCE LLP

1065 Avenue of the Americas, 21st floor

New York, NY 10018

By: Michael H. Ference

Attorneys for Defendants Wendy Z. Goldstein,  
Miles H. Kucker, Allen Schechter, Howard Smith,  
William D. Myhre, Lutheran Medical Center

MCCARTER & ENGLISH, LLP

245 Park Avenue

New York, NY 10167

By: Kimberly S. Penner

Attorneys for Defendants Buck Consultants,  
Buck Consultants, Inc.

SEDGWICK, DETERT, MORAN & ARNOLD, LLP

125 Broad Street, 39th Floor

New York, NY 11021

By: Maria Orrechio

Attorneys for Defendants Buck Consultants,  
Buck Consultants, Inc.

JOHNSON, Senior District Judge:

Plaintiff Carmine LoPresti ("Plaintiff") brings this action against Defendant Buck  
Consultants, Inc. d/b/a Buck Consultants ("Defendant" or "Defendant Buck"), as well as  
Defendants Citigroup, Inc., Don Goldstein, Citistreet Associates, LLC, Citistreet  
Equities, LLC, Citistreet Financial Services, LLC, Travelers Insurance Company, Mayda

Casado, Jean Desjardins, Jim Wilson, Smith Barney Corporate Trust Company, Sanford I. Weill, Salomon Smith Barney, Inc., Citistreet LLC (collectively, the “Citigroup Defendants”), Defendants State Street Corporation and David A. Spina (collectively, the “State Street Defendants”), and Defendants Wendy Z. Goldstein, Miles H. Kucker, Allen Schechter, Howard Smith, William D. Myhre, and Lutheran Medical Center (“LMC”) (collectively, “the LMC Defendants”).

Plaintiff’s Complaint sets forth fifteen Counts. As phrased in the Complaint, they consist of: 1) violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq.; 2) violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2; 3) violation of the Clayton Act, 15 U.S.C. §§ 15, 26; 4) violation of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et. seq.; 5) violation of the Donnelly Act, General Business Law § 340 of the State of New York; 6) violation of Article 22-A of the General Business Law of the State of New York §§ 349 et. seq.; 7) violation of § 2123 of the New York State Insurance Law; 8) violation of § 4226 of the New York State Insurance Law; 9) tortious interference with contract; 10) tortious interference with prospective economic advantage; 11) conspiracy; 12) defamation; 13) fraud; 14) unfair competition; and 15) constructive fraud. Counts 1 through 6 and 9 through 15 are against all Defendants, Count 7 is against all Defendants except Defendant Travelers Insurance Company, and Count 8 is only against Defendant Travelers Insurance Company.

Presently before this Court is Defendant Buck's Motion to Dismiss Plaintiff's Second Amended Complaint ("Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant Buck contends that this Court should: dismiss Count One because neither the Plaintiff nor Defendant Buck are an ERISA fiduciary of the same plan; dismiss Counts Two and Three because Defendant Buck is not a competitor of Plaintiff; dismiss Count Four because the Complaint fails to allege that Defendant Buck committed any predicate acts through participation in an enterprise that established a pattern of racketeering; and decline to exercise supplemental jurisdiction over the state law claims that form the basis of Counts Five through Fifteen. (Def.'s Mem. Law Supp. Mot. Dismiss.)

#### STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The court should not dismiss the complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). On a motion to dismiss a complaint under Rule 12(b)(6), a court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001). The following factual background is

therefore taken from the Plaintiff's Complaint.

### FACTUAL BACKGROUND

Plaintiff alleges that beginning in about 1976, he was engaged in selling and servicing Internal Revenue Code ("IRC") § 403(b) annuities to LMC employees, as one of six approved vendors of such plans. (Compl. ¶ 42.) Under these plans LMC employees contributed to their IRC § 403(b) annuities through monthly salary reductions. (Id. ¶ 56.) In approximately March of 2001, the LMC Defendants and Citigroup Defendants agreed that LMC would adopt an IRC § 401(k) plan, and LMC sent a notice to Plaintiff's customers informing them of the adoption of this plan. (Id. ¶¶ 59–60.) The LMC Defendants contracted with the Citigroup Defendants to sell and service § 403(b) Tax Sheltered Annuity ("TSA") plans and § 401k plans to LMC employees. (Id. ¶ 39.)

On July 24, 2001 the LMC Defendants caused to be distributed certain Pension Information Packages, authored or co-authored by Defendant Buck, to Plaintiff's customers. (Id. ¶ 61.) The packages included a letter that allegedly contained deceptive, fraudulent, incomplete, and misleading<sup>1</sup> sales and promotional materials for the then-existing and the proposed retirement plans. (Id. ¶¶ 61–62.) The sales materials allegedly "failed to properly disclose and explain" to Plaintiff's customers the drawbacks of

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<sup>1</sup> The Court notes that although it must accept Plaintiff's factual allegations as true at this stage of the proceedings, the Court is not required to defer to Plaintiff's suggested conclusions of law, see Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996), such as the assertion that the information was fraudulent.

enrolling and participating in Defendants' § 403(b) and § 401(k) plans as compared to the § 403(b) plan offered by Plaintiff. (Id. ¶ 63.) For example, Plaintiff asserts that Defendants did not disclose 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. (Id. ¶ 100.)

Additionally, Plaintiff asserts that the proposed new § 401(k) plan was to be administered by an entity known as Citistreet, which Plaintiff alleges does not exist, and that the promotional materials distributed did not reveal Citistreet's alleged non-existence. (Id. ¶¶ 59, 63.)

According to the Complaint, Defendants then had Plaintiff's customers transfer their accumulated § 403(b) annuities into Defendants' § 401(k) plans and/or transfer their monthly deductions into Defendants' § 401(k) and § 403(b) plans. (Id. ¶ 65.) The LMC Defendants gave the Citigroup Defendants exclusive rights to sell and service such plans, and denied Plaintiff all access to LMC premises in order to sell and service plans. (Id. ¶¶ 39, 66.) Plaintiff alleges that these actions violated ERISA and 11 NYCRR 51.5, among other laws and regulations. (Id. ¶¶ 72-73, 76.)

In a letter dated September 25, 2001 Plaintiff was informed that effective October 1, 2001 he could not enroll any LMC employees hired after that date into Plaintiff's § 403(b) plan because the employees would be required to enroll in the new §

401(k) plan administered by Citistreet. (Id. ¶ 68.) LMC did not give a Summary Plan Description to every participating beneficiary, which Plaintiff alleges is in violation of ERISA provisions. (Id. ¶ 76.) Plaintiff also alleges that the Participation Agreement utilized by Citistreet has not been approved by the New York State Insurance Department (“NYSID”), in violation of § 3201 of New York State Insurance Law. (Id. ¶ 87.)

Plaintiff alleges that the Citigroup Defendants are not licensed by NYSID to act as insurance agents or consultants, in violation of Article 21 of the New York State Insurance Law. (Id. ¶¶ 89–90.) Plaintiff also alleges that Defendants, including Defendant Buck, “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.” (Id. ¶ 93.)

Plaintiff contends that the literature distributed by Defendants – presumably referring to literature produced by Defendant Buck – states that the defendants would not notify the plan participants of any material changes in the plan benefits or features, which Plaintiff asserts is in violation of ERISA § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B). (Id. ¶ 135.) Plaintiff makes a number of additional allegations, none of which appear to be directed against Defendant Buck and which will therefore not be

addressed in this Order.<sup>2</sup>

## DISCUSSION

Before delving into the details of Defendant Buck's Motion to Dismiss, it is necessary to resolve a controversy between the parties as to which allegations in the Complaint Defendant must address when seeking dismissal. Defendant's Motion to Dismiss focuses on demonstrating the insufficiency of the few specific allegations against Defendant Buck included in the Complaint, while Plaintiff suggests, in response to Defendant Buck's arguments, that Defendant Buck must actually defeat every single allegation in the Complaint in order to obtain dismissal, either because Defendant Buck is simply automatically included in every allegation or because Defendant Buck was an agent of other defendants. (Pl. Mem. Law Opp'n Def. Buck Consultant's Mot. Dismiss. at 2 (asserting that the Complaint "includes Buck's activities whenever the terms 'defendants' and 'Citigroup defendants' appears" and that "it can be further construed, subject to discovery and proof, that Buck was an agent, servant, or employee of any co-defendants, and as such, Buck is liable to plaintiff in each count of the SAC".))

First, as to the agency theory, Plaintiff appears to misunderstand the tenets of agency-principle law, given that the result of finding an agent-principal relationship is the imposition of liability upon the principal for the acts of the agent, not imposition of liability upon the agent for the acts of the principal; only under rare circumstances,

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<sup>2</sup> The question of whether all claims in the Complaint may be construed as against Defendant Buck is discussed below.

which are not applicable in the case at bar, will liability be imposed upon an agent. See Anderson v. Radio Corp. of America, 216 N.Y.S.2d 182, 183 (N.Y.Sup. 1961); Restatement of Agency §§ 352–57. Additionally, no agency theory is advanced in the Complaint, nor does the Complaint set forth any facts needed to prove the existence of an agent-principal relationship; namely right of control over the agent and consent by the parties to an agent-principal relationship. Meese v. Miller, 436 N.Y.S.2d 496, 499 (N.Y. App. Div. 1981). Plaintiff cannot simply rely on discovery to provide a basis for liability without even pleading the basic components of liability in the Complaint.

Second, as to the question of whether Defendant Buck is implicitly included every time the word “defendants” is used, the Court notes that there are a number of allegations included in the Complaint that refer to “defendants” but certainly do not appear to include Defendant Buck. For example, Plaintiff states that in a letter dated December 31, 2001 and written on LMC letterhead, Defendant Kucker implied that Plaintiff is a terrorist. (Compl. ¶¶ 281–82.) This allegation is used to support a claim of defamation against “defendants.” (Id. ¶¶ 281–89.) There is no indication that Defendant Buck had any involvement in the writing of this letter or even knew of its existence, and the most recent involvement of Defendant Buck was alleged to have occurred on July 24, 2001 other, unrelated documents authored by Defendant Buck were distributed. (Id. ¶ 61.) The Court clearly has no basis to construe the defamation claim against Defendant Buck, given that Plaintiff has not pleaded a single fact that would support

such a claim against them. Plaintiff also claims at another point that “Defendants have used the underlying employer-employee relationship, to their competitive advantage.” (Id. ¶ 301.) Defendant Buck does not have an employer-employee relationship with LMC employees, and so it would be illogical to construe this claim against them. It is evident from the foregoing examples that construing every mention of “defendants” to include Defendant Buck would render much of the Complaint meaningless, and this Court therefore declines to do so.

Additionally, Federal Rule of Civil Procedure 9(b) requires that in Complaints charging fraud, the allegations of fraud against a defendant are to “be stated with particularity.” In such cases, “[t]he complaint may not rely upon blanket references to acts or omissions by all of the defendants, for each defendant named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged.” In re Blech Securities Litigation, 928 F.Supp. 1279, 1292–1293 (S.D.N.Y. 1996); see also O & G Carriers, Inc. v. Smith, 799 F.Supp. 1528 (S.D.N.Y. 1992) (dismissing claims after finding that indiscriminate grouping of defendants violates Rule 9(b) and that RICO counts lacked requisite particularity).

Although only two of the Counts explicitly refer to fraud in their titles (Compl. ¶¶ 290–95, 309–313), it is apparent that allegations of fraud underlie most or all Counts in the Complaint. Plaintiff repeatedly references fraud, fraudulent enterprises, and fraudulent activities throughout the Complaint. (E.g. id. ¶¶ 8, 10–19, 22, 27–35, 62,

65–67, 74, 84, 94–97, 99, 100, 102, 104, 114, 123.) Additionally, allegations of fraud are at the basis of Count One, regarding ERISA violations, because the alleged violations are grounded in part on Defendants’ alleged failure to disclose that they had chosen to do business with an allegedly non-existent business entity (Citistreet, elsewhere referred to as a fraudulent enterprise (e.g. id. ¶ 8)) and failure to make other disclosures regarding allegedly material disadvantages of the chosen plan, as well as Defendants’ decision to “hav[e] the plan participants falsely acknowledge the receipt of the Summary Plan Descriptions, which they never received.” (Id. ¶¶ 124–39.) Count Four, the RICO charge, also incorporates allegations of fraud, in that the predicate acts of racketeering described include mail fraud, committing or attempting to commit fraud upon a financial institution, and use of fraud to intimidate participants or beneficiaries. (Id. ¶ 193.) This Court therefore finds that it would be in violation of Federal Rule of Civil Procedure 9(b) to indiscriminately construe all claims as against Defendant Buck.

The Court’s discussion of Defendant Buck’s Motion to Dismiss will therefore be based only on the specific allegations against Defendant Buck included in the Complaint, namely that Defendant Buck prepared and circulated misleading pension comparisons to LMC employees (id. ¶¶ 26, 61) and that Defendant did so without being licensed by the NYSID, NASD or SEC. (Id. ¶¶ 92–93).

### COUNT ONE

In Count One, Plaintiff alleges that “[c]ertain of the defendants, if not all of

them, are fiduciaries under ERISA.” (Compl. ¶ 129.) Plaintiff argues that 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, and that “Defendants” have therefore made plaintiff a potential target of litigation by his § 403(b) plan participant customers, due to the defendants’ breaches of their fiduciary duties. (Compl. ¶¶130–31.) In fact, however, 29 U.S.C. § 1105(a) provides that:

a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary *with respect to the same plan* in the following circumstances:

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a) (emphasis added).

Plaintiff has declined to specify whether Defendant Buck is alleged to be a co-fiduciary of the same plan as Plaintiff, only stating that “certain” Defendants are co-fiduciaries. This vague allegation is clearly insufficient to support a claim against Defendant Buck, given that Plaintiff has failed to plead any facts to support the notion that Defendant Buck is a co-fiduciary of the same plan.

The plans discussed in the Complaint are Plaintiff’s plan, which Plaintiff

describes as an ERISA § 403(b) plan (Compl. ¶ 128)<sup>3</sup> and Defendants' § 403(b) and § 401(k) plans. (*Id.* ¶¶ 59–65.) These plans are clearly not the “same plan[s]”, as required by 29 U.S.C. § 1105(a); in fact, the primary concern expressed in the Complaint is that Defendants' plans were different and worse than Plaintiff's.

Moreover, Plaintiff has not alleged that Defendant Buck assumed fiduciary responsibilities as to *any* plan. Although Plaintiff alleges that certain Defendants' breach of fiduciary duties occurred, at least in part, through distribution of misleading literature – presumably the literature prepared by Defendant Buck– the allegation that Defendant Buck was in some way involved in other Defendants' misconduct does not suffice to establish Defendant Buck as a fiduciary. Merely authoring documents or providing advice on tax and benefits issues is not sufficient to establish status as a fiduciary if the entity performing these tasks has no decision-making authority. Bona v. Barasch, 2003 WL 1395932, \*21 (S.D.N.Y. Mar. 20, 2003) (citing Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347, 1353 (11th Cir. 1998); Reich v. Lancaster, 55 F.3d 1034, 1046 (5th Cir. 1995); Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988); Liss v. Smith, 991 F.Supp. 278, 301 (S.D.N.Y. 1998); Whitfield v. Tomasso, 682 F.Supp. 1287, 1305 (E.D.N.Y. 1988)). Plaintiff has not alleged that Defendant Buck had any discretionary, decision-making authority.

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<sup>3</sup> The Court finds that it is not necessary to rule at the present moment on the question of whether Plaintiff's plans were, in fact, ERISA plans or whether Plaintiff was an ERISA fiduciary (Def.'s Repl. Mem. Supp. Mot. Dismiss at 2), because even granting these assumptions in favor of Plaintiff the point that is relevant here is that Defendant Buck is not alleged to be a co-fiduciary of the same ERISA plan.

The cases Plaintiff cites to support the argument that Congress intended the definition of “fiduciary” in ERISA to be broadly construed (Pl. Mem. Law Opp’n Mot. Dismiss at 9–10) are inapposite because they stand for the proposition that when an entity has acted like a fiduciary, exercising control and authority regarding disposition of plan assets or administering the plan, the entity may be found to be a fiduciary. E.g. LoPresti v. Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997). Here, Plaintiff has failed to allege any exercise of control and discretion by Defendant Buck or to set forth any facts or allegations suggesting that Defendant Buck acted in the manner of a fiduciary, as discussed above, and therefore these cases do not advance Plaintiff’s case.

Plaintiff’s ERISA claim must therefore be dismissed as against Defendant Buck, because even accepting all facts alleged in the Complaint as true, Plaintiff has failed to state a claim upon which relief can be granted. Fed. R.Civ.P. 12(b)(6).

### COUNTS TWO AND THREE

Defendant asserts that the antitrust claims asserted in Counts Two and Three should be dismissed because Defendant Buck is not a competitor of Plaintiff and “[t]here can be no antitrust violation without a competitor[.]” In re European Rail Pass Antitrust Litigation, 166 F.Supp.2d 836, 841 (S.D.N.Y. 2001). This Court finds that the Complaint contains no factual allegations to suggest that Defendant was in competition with Plaintiff.

Plaintiff states in the reply to Defendant’s Motion to Dismiss that “Defendant

Buck is licensed to sell annuities in New York, they are ‘counseling’ and meeting with plaintiff’s LMC clients on behalf of the co-defendants as their agent, servant, or employee.” (Pl.’s Mem. Law Opp’n Mot. Dismiss at 12.) However, the Complaint at no point clearly states that Buck Consultants is counseling and meeting with Plaintiff’s clients; in fact, it says specifically that Buck Consultants merely authored documents that other Defendants utilized. (Compl. ¶ 26.) Additionally, the Complaint does not state that Defendant Buck is licensed to sell annuities in New York; rather, it asserts that Defendant Buck is *not* properly licensed by the NASD, SEC, or NYSID. (Compl. ¶ 92.) Finally, as discussed above, Plaintiff has also completely failed to allege any agent or servant relationship in the Complaint.

Plaintiff asserts that Defendant’s arguments involve questions of fact that are not amenable to resolution through a Motion to Dismiss. (Pl.’s Mem. Law Opp’n Mot. Dismiss at 12.) In fact, however, Plaintiff has failed to raise an issue of fact because Plaintiff’s pleadings provide no basis for finding that Plaintiff has stated a cause of action for antitrust violations even taking all factual allegations in the Complaint as true.

#### COUNT FOUR

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

foreign commerce.” Town of West Hartford v. Operation Rescue, 915 F.2d 92, 100 (2d Cir. 1990) (citing 18 U.S.C. § 1962(a)-(c) (1976)). The Complaint does not plead any facts regarding Defendant Buck’s involvement that would be sufficient to constitute a pattern of racketeering activity involving two or more acts, since the only specific allegations as to Defendant Buck are that Defendant authored certain documents issued on one occasion. (Compl. ¶¶ 26, 61, 92–93.)

In Plaintiff’s responsive papers Plaintiff attempts again to rely on a theory of agency liability, which again must fail for the reasons stated above. Plaintiff also attempts to argue that a pattern of activity is pleaded in the Complaint, but in order to do so Plaintiff is forced to rely on allegations made against other Defendants, not against Defendant Buck. For the reasons discussed above, this Court finds that claims against other Defendants cannot implicitly be construed as claims against Defendant Buck, and therefore the Complaint fails as a matter of law to raise any RICO claim against Defendant Buck.

#### **COUNTS FIVE THROUGH FIFTEEN**

As Plaintiff’s only federal causes of action have now been dismissed, this Court declines to exercise supplemental jurisdiction over Plaintiff’s remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3).

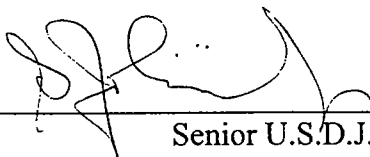
#### **CONCLUSION**

For the reasons set forth above, Defendant Buck Consultant’s Motion to Dismiss

under Fed. R. Civ. P. 12(b)(6) and 12(b)(1), is GRANTED. The Clerk of the Court is directed to enter a final judgment of dismissal.

SO ORDERED.

Dated: January 18, 2005  
Brooklyn, New York



Senior U.S.D.J.