

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARMINE A. LOPRESTI,

CV-02-6492 (SJ) (VVP)

Plaintiff,

-against-

REPLY
AFFIDAVIT

CITIGROUP, INC., et al.,

Defendants.

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Henry M. Grubel, declares and affirms under penalty of perjury as follows:

I am the attorney for the plaintiff herein. This affidavit is submitted in reply to the opposition to the plaintiff's motion to amend his second amended complaint, filed by Sichenzia, Ross, Friedman Ference LLP on behalf of the Lutheran Medical Center and its named employee defendants.

The statements made in the preliminary statement by the Lutheran defendants are conclusory, argumentative and non dispositive. Their opposition is a rehash of their F.R.C.P. 12(b)(6) motions. They also assume, argue and assert that their motion will be granted.

Lutheran does not rebut the laws cited in the plaintiff's motion, nor do they rebut the essential facts pleaded in support of this motion.

Lutheran asserts that the I.R.C. § 403(b) pension program at Lutheran is not subject to ERISA. This is a question of law that will be resolved based upon the facts abduced herein at the trial of this action.

Plaintiff, as more fully detailed in his reply to the opposition interposed by the Citigroup and State Street defendants, only became aware of the Federal Form 5500 filings and the fact that transfers were being made into § 401(k) plans.

There is no reason why this court should not allow plaintiff to serve his proposed third amended complaint. The Lutheran Medical Center defendants have not pleaded any bona-fide prejudice to them, by plaintiff's filing of this third amended complaint.

WHEREFORE, it is respectfully requested that the Court grant plaintiff's motion for leave to amend his second amended complaint in its entirety, and allow him to serve his proposed third amended complaint.

Dated: December 24, 2004
Freeport, New York

/s

Henry M. Grubel (HG-3211)
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