

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LoPRESTI, Individually, and )  
in his fiduciary capacity under the )  
EMPLOYEE RETIREMENT INCOME SECURITY )  
ACT of 1974, under the Lutheran Medical )  
Center § 403(b) Tax Sheltered Annuity )  
Plan )

CV 02-6492  
(SJ) (VVP)

Plaintiff, )

-against- )

CITIGROUP, INC., WENDY Z. GOLDSTEIN, )  
MILES H. KUCKER, ALLEN SCHECHTER, )  
HOWARD SMITH, WILLIAM D. MYHRE, )  
DON GOLDSTEIN, STATE STREET CORPORATION, )  
CITISTREET, )  
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, [s/h/a SALOMON SMITH) )  
BARNEY, INC.], and, )  
COPELAND ASSOCIATES, INC., )  
individually, and in their fiduciary )  
capacities, under EMPLOYEE RETIREMENT )  
INCOME SECURITY ACT of 1974 )

Defendants. )

NOTICE  
OF  
APPEAL

-----X  
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This document gives notice that plaintiff Carmine A.  
LoPresti, appeals from the orders entered by the U.S.  
District Court of the Eastern District of New York on:

January 10, 2005, docket number 182;

January 10, 2005, docket number 183;

January 12, 2005, docket number 185;

January 14, 2005, docket number 188;

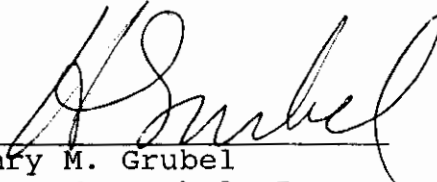
January 26, 2005, docket number 193;

January 28, 2004, docket number 194;

January 31, 2005, docket number 197.

The appeal of the foregoing orders is made to the  
United States Court of Appeals for the Second Circuit.

Dated: February 1, 2005  
Freeport, New York

/s   
Henry M. Grubel  
Henry M. Grubel, P.C.  
Attorney for Plaintiff,  
Carmin A. LoPresti  
37 Prospect Street  
Freeport, New York 11520  
516-623-4130

To:

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Attorneys for the Lutheran Hospital defendants

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New York, N.Y. 11021  
Attorneys for Buck Consultants

ECF

**U.S. District Court  
Eastern District of New York (Brooklyn)  
CIVIL DOCKET FOR CASE #: 1:02-cv-06492-SJ-VVP**

LoPresti v. Citigroup, Inc. et al  
Assigned to: Judge Sterling Johnson, Jr  
Referred to: Magistrate-Judge Viktor V. Pohorelsky  
Demand: \$100000000  
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

Date Filed: 12/11/2002  
Jury Demand: Plaintiff  
Nature of Suit: 791 Labor: E.R.I.S.A.  
Jurisdiction: Federal Question

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
01/07/2005	186	TRANSCRIPT of Hearing held on 1/5/05 before Judge Pohorelsky. Counsel for parties present. Court Transcriber: Aria Transcriptions c/o Elizabeth Barron. (Fernandez, Erica) (Entered: 01/12/2005)
01/10/2005	<u>183</u>	MEMORANDUM AND ORDER: Plaintiff has sought, in a motion dated 6/25/04, to have Mag Pohorelsky removed from this case for bias; Plaintiff's motion is DENIED . Signed by Judge Sterling Johnson Jr. on 1/4/05. c/m by chambers(Fernandez, Erica) (Entered: 01/10/2005)
01/10/2005	<u>182</u>	MEMORANDUM AND ORDER; Plaintiff's Motion to Rescind the Scheduling Order is therefore DENIED; Plaintiff's Motion to withdraw the Rule 11 Motion without prejudice is therefore DENIED. Signed by Judge Sterling Johnson Jr. on 1/4/05. C/M by chambers (Fernandez, Erica) (Entered: 01/12/2005)
01/11/2005	<u>184</u>	MEMORANDUM in Opposition to Plaintiff's Motion to Rescind Orders by Magistrate Judge and for His Disqualification by Don Goldstein, State Street Corporation, Citistreet Associates, LLC, Citistreet Equities, LLC, Citistreet Financial Services, LLC, Travelers Insurance Company, David A. Spina, Sanford I. Weill, Salomon Smith Barney, Inc., Citistreet LLC, Mayda Casado, Jean Desjardins, Jim Wilson, Smith Barney Corporate Trust Company, Citigroup, Inc.. (Lender, David) (Entered: 01/11/2005)
01/12/2005	<u>185</u>	MEMORANDUM AND ORDER adopting Report and Recommendations OF Magistrate Judge Pohorelsky made on 11/30/2004 and denying Plaintiff's Motion for Default Judgment and Motion to Compel the Clerk of Court to enter Defaults as to Defendants Copeland Associates and Citistreet.. Signed by JudgeSterling Johnson Jr. on 01/11/2005. (Marziliano, August) (Entered: 01/12/2005)
01/13/2005	<u>187</u>	Letter from Henry Grubel to Hon. Judge Stering Johnson, Jr. Regarding plaintiff's request that he withdraw his order datede 1-12-05 in that it is predicated on the erroneous statement that plaintiff failed to timely file his motion under Rule 72, appealing the dispositive orders of the magistrate judge dated 11-30-04, when in fact plaintiff had timely filed

		his rule 72 appeal and supporting papers. (Grubel, Henry) (Entered: 01/13/2005)
01/14/2005	<u>188</u>	ORDER denying <u>161</u> Motion to Amend/Correct. Signed by JudgeSterling Johnson Jr. on 01/13/2005. (Marziliano, August) (Entered: 01/14/2005)
01/19/2005	<u>189</u>	Letter from Henry Grubel to Hon. Magistrate Judge Pohorelsky Regarding Mr. Grubel's request for specificity about what the bases are for counter sanctions against him and his request to be heard on the issues presented, if any regarding counter sanctions before addressing them with papers in opposition. (Grubel, Henry) (Entered: 01/19/2005)
01/20/2005	<u>190</u>	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Carmine A. LoPresti re <u>180</u> Motion Hearing,,,,, (Grubel, Henry) (Entered: 01/20/2005)
01/21/2005	<u>191</u>	ORDER re <u>189</u> Letter, declining the plaintiffs' request for a statement of how the court feels about the defendants' cross motion for an award of fees, and extending time for the plaintiffs' counsel to submit opposition to the cross-motion. Signed by Judge Viktor V. Pohorelsky on 1/21/2005. (Pohorelsky, Viktor) (Entered: 01/21/2005)
01/21/2005	<u>192</u>	NOTICE of entry of an order: ORDER re <u>189</u> Letter, declining the plaintiffs' request for a statement of how the court feels about the defendants' cross motion for an award of fees, and extending time for the plaintiffs' counsel to submit opposition to the cross-motion. Signed by Judge Viktor V. Pohorelsky on 1/21/2005. (Vaughn, Terry) (Entered: 01/21/2005)
01/26/2005	<u>193</u>	MEMORANDUM AND ORDER directing the plaintiff to examine more carefully the Orders by this Court as well as plaintiff's previous filings before filing objections to Court's Orders. Plaintiff is further directed to attempt to consolidate his arguments and evidence into clearly organized motions. Plaintiff's counsel is directed to refrain from filing unnecessarily redundant and excessive letters and motions, and to comply with usual procedures regarding issuance of Orders.. Signed by Judge Sterling Johnson Jr. on 1/24/2005. (Marziliano, August) (Entered: 01/26/2005)
01/28/2005	<u>194</u>	MEMORANDUM AND ORDER: For the reasons forth above, Deft 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. Signed by JudgeSterling Johnson Jr. on 1/18/05. (fwd for judgment) (Fernandez, Erica) (Entered: 01/28/2005)
01/28/2005	<u>195</u>	MEMORANDUM in Opposition re <u>190</u> Appeal of Magistrate Judge Decision to District Court <i>Defendants' Response to Plaintiff's Objection to Findings of Magistrate Judge Made at Jan. 5, 2005 Hearing</i> by Don Goldstein, State Street Corporation, Citistreet Associates, LLC, Citistreet Equities, LLC, Citistreet Financial Services, LLC, Travelers Insurance Company, David A. Spina, Sanford I. Weill, Salomon Smith Barney, Inc., Citistreet LLC, Mayda Casado, Jean Desjardins, Jim Wilson, Smith Barney Corporate Trust Company, Citigroup, Inc.. (Lender, David)

		(Entered: 01/28/2005)
01/28/2005	<u>196</u>	AFFIDAVIT <i>in memorandum form in opposition to the imposition of further sanctions against plaintiff or his counsel under his Rule 11 motion for sanctions</i> by Carmine A. LoPresti. (Grubel, Henry) (Entered: 01/28/2005)
01/31/2005	<u>197</u>	CLERK'S JUDGMENT directing that plaintiff take nothing of the debt; that the Court declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims, that debt, Buck Consultant's motion to dismiss is granted; and that final judgment of dismissal is hereby entered . Signed by Robert C. Heinemann, Clerk of Court on 1/28/05. c/m with appeal pkg.(Fernandez, Erica) (Entered: 01/31/2005)

<b>PACER Service Center</b>			
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02/01/2005 14:48:50			
<b>PACER Login:</b>	hg0302	<b>Client Code:</b>	cal
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:02-cv-06492-SJ-VVP Documents: 182
<b>Billable Pages:</b>	3	<b>Cost:</b>	0.24

**DOCKET # 182**

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ OCT 10 2005 ★

P.M. \_\_\_\_\_  
TIME A.M. \_\_\_\_\_

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
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, LUTHERAN MEDICAL  
CENTER, BUCK CONSULTANTS, BUCK  
CONSULTANTS, INC., 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.  
-----X

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

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Attorney for Plaintiff

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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

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Miles H. Kucker, Allen Schechter, Howard Smith,  
William D. Myhre, Lutheran Medical Center

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Attorneys for Defendants Buck Consultants,  
Buck Consultants, Inc.

JOHNSON, Senior District Judge:

Presently before this Court are: 1) Plaintiff's June 25, 2004 motion to disqualify Judge Pohorelsky ("Motion to Disqualify"); 2) Plaintiff's December 13, 2004 motion to rescind Magistrate Judge Pohorelsky's November 30, 2004 Order scheduling a hearing

regarding Plaintiff's Motion for Rule 11 Sanctions ("Motion to Rescind the Scheduling Order"); and 3) Plaintiff's December 13, 2004 motion for permission to withdraw his Motion for Rule 11 Sanctions without prejudice if the motion to rescind the scheduling order is denied ("Motion to Withdraw the Rule 11 Motion Without Prejudice"). Because Plaintiff's contentions in the December 13, 2004 motions appear to be contingent on the Motion to Disqualify, this Court will decide all three of these motions in this Order. For the reasons stated herein, Plaintiff's Motions are DENIED.

On May 5, 2003 Plaintiff sent a letter to Magistrate Judge Pohorelsky requesting that Judge Pohorelsky recuse himself from the case because Judge Pohorelsky had served as an Assistant U.S. Attorney in the Southern District of New York at the same time as an individual who is currently employed as the Vice President and General Counsel of Lutheran Medical Center, a defendant in this case.

On June 25, 2004 Plaintiff filed the Motion to Disqualify. The Motion to Disqualify was based in part on Plaintiff's dissatisfaction with Judge Pohorelsky's handling of a previously filed motion for default judgment against Defendants Citistreet and Copeland Associates ("Motion for Default Judgment") (Motion to Disqualify ¶¶ 11-17), and in part on Judge Pohorelsky's tenuous connection to counsel for various Defendants (Motion to Disqualify ¶¶ 18-24). Plaintiff does not cite a single case, Federal Rule of Civil Procedure, or Local Rule to support his contention that either of these arguments is sufficient to support the recusal or disqualification of Judge Pohorelsky, either in the Motion to Disqualify or in the Reply Affidavit in Further

Support of the Motion to Disqualify.

On July 16, 2004, Judge Pohorelsky denied Plaintiff's Motion to Disqualify. On August 24, 2004 Plaintiff filed a Petition for Writ of Mandamus and/or Writ of Prohibition compelling Judge Pohorelsky to disqualify himself from the case. Plaintiff's Writ was denied by the Second Circuit on September 2, 2004 on the grounds that Plaintiff had not demonstrated that the relief he sought was unavailable from this Court. This Court will therefore consider Plaintiff's Motion to Disqualify.

Plaintiff's Motion to Disqualify contends that in the July 7, 2003 hearing Judge Pohorelsky "pre-judged the issues" and therefore "was not conducting a hearing" because Judge Pohorelsky suggested that he had already come to the conclusion advocated by Defendants, i.e. that Citistreet and Copeland Associates are non-existent entities. (Motion to Disqualify ¶¶ 14-15.) This contention is startling considering Plaintiff's voluminous filings prior to the July 7, 2003 hearing,<sup>1</sup> which were clearly intended to encourage the Court to consider the issues and come to a conclusion regarding the merits of Plaintiff's Motion for Default Judgment, and which naturally

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<sup>1</sup> Plaintiff's filings prior to the July 7, 2003 hearing include: a letter to David Lender arguing that Defendants Citistreet and Copeland Associates exist as legal entities, dated February 5, 2003; a Request for Entry of Default against Defendants Citistreet and Copeland Associates entered March 13, 2003; a letter to Robert Heinemann, Clerk of the Court, from Plaintiff requesting entry of a default judgment against Defendants Citistreet and Copeland Associates, dated March 19, 2003; Plaintiff's Motion for Default Judgment, dated April 21, 2003; Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Default Judgment, dated April 21, 2003; Plaintiff's Affidavit in support of Plaintiff's Motion for Default Judgment, dated April 21, 2003; Plaintiff's Reply Affidavit in Support of the Motion for Default Judgment, dated May 13, 2003; a letter to Judge Johnson providing materials in support of Plaintiff's Motion for Default Judgment, dated May 14, 2003; Plaintiff's Supplemental Reply Affidavit in support of the Motion for Default Judgment, dated May 19, 2003; Plaintiff's Proposed Order to Assess Damages by Jury, entered May 22, 2003; and 62 pages of newspaper articles, news releases, financial statements, telephone directory printouts, and other documents attached as exhibits to the Motion for Default Judgment, entered May 23, 2003.

prompted Defendants to respond by asserting their own arguments regarding the Motion. Judge Pohorelsky did, in fact, ask Plaintiff questions during the July 7, 2003 hearing and gave Plaintiff the opportunity to argue the merits of the Motion, as indicated in the transcript attached to Plaintiff's Motion to Disqualify (Motion to Disqualify Ex. C).

Judge Pohorelsky's alleged connections to counsel for Defendants do not merit a substantial discussion. Plaintiff has chosen to sue over twenty-five defendants, including various large corporate defendants, each of which presumably employs a large number of attorneys. There is no indication that Judge Pohorelsky has any stronger connection to Defendants than any other Judge or Magistrate Judge in this District. Judge Pohorelsky's Memorandum dated July 22, 2004 clarified that Judge Pohorelsky's contact with counsel to Defendants was minimal to non-existent and would not affect his ability to decide the case with impartiality.

Plaintiff has cited no case law to indicate that his Motion to Disqualify stands on anything more than his dissatisfaction with the outcome of the hearing, nor has he demonstrated that there are any reasonable grounds for the Motion, and this Court therefore upholds Judge Pohorelsky's Order DENYING Plaintiff's Motion to Disqualify.

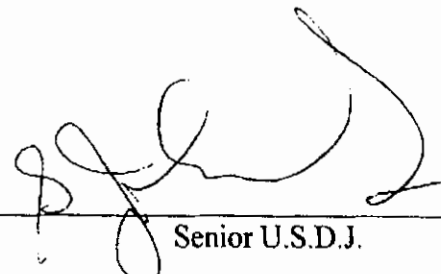
Plaintiff's Motion to Rescind the Scheduling Order similarly lacks any citation to support Plaintiff's contention that any rules Judge Pohorelsky may have set for the planned hearing regarding Rule 11 sanctions are in violation of any Federal Rule of Civil Procedure, case law, or Local Rule. Instead, Plaintiff relies on the conclusory allegations that Judge Pohorelsky's guidelines for the hearing are "discriminatory, biased and

prejudicial” and that they “violate plaintiff’s rights in so many respects.” (Motion to Rescind the Scheduling Order at 4.) Plaintiff has not set forth any legal basis for these contentions. Plaintiff’s Motion to Rescind the Scheduling Order is therefore DENIED.

Plaintiff’s Motion to Withdraw the Rule 11 Motion also lacks any apparent support in case law, Federal Rules of Civil Procedure, or Local Rules. Plaintiff appears to suggest that the withdrawal without prejudice is necessary because Judge Pohorelsky is biased against Plaintiff, but given that this Court has denied Plaintiff’s Motion to Disqualify Judge Pohorelsky these claims of bias and prejudice are unavailing. Judge Pohorelsky has been granted the authority to consider Plaintiff’s Motion for Rule 11 Sanctions, and to the extent that any procedural irregularities may occur during Judge Pohorelsky’s hearing, Plaintiff’s remedy lies in the fact that Plaintiff will have the opportunity to submit objections to Judge Pohorelsky’s Report and Recommendation to this Court following the issuance of the Report and Recommendation, which this Court will consider at that time. Plaintiff’s Motion to Withdraw the Rule 11 Motion Without Prejudice is therefore DENIED.

SO ORDERED.

Dated: January 4, 2005  
Brooklyn, New York



Senior U.S.D.J.

**DOCKET # 183**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
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,  
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I. WEILL, SALOMON SMITH BARNEY, INC.,  
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Defendants.

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

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37 Prospect Street  
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**ATTORNEY GENERAL STATE OF NEW YORK**

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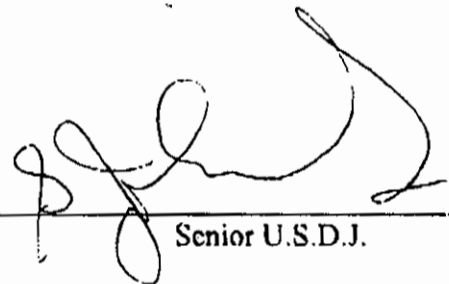
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SO ORDERED.

Dated: January 4, 2005  
Brooklyn, New York



Senior U.S.D.J.

**DOCKET # 185**

---

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
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  
J. WEILL, SALOMON SMITH BARNEY, INC.,  
CITISTREET LLC

Defendants.

-----X  
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LLC, Travelers Insurance Company, Mayda Casado,  
Jean Desjardins, Jim Wilson, Smith Barney Corporate  
Trust Company, David A. Spina, Sanford I. Weill,  
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By: Maria Orrechio  
Attorneys for Defendants Buck Consultants,  
Buck Consultants, Inc.

JOHNSON, Senior District Judge:

Plaintiff Carmine LoPresti ("Plaintiff") brings this action against 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, Lutheran Medical Center, and Buck Consultants.

On March 13, 2003 Plaintiff filed a request that the Clerk of Court for the Eastern District of New York enter default judgments as to the Defendants Citistreet and Copeland Associates, Inc. due to these Defendants' failure to answer or appear. On March 17, 2003 the Citigroup Defendants and State Street Defendants responded to Plaintiff's request, alleging that Defendants Citistreet and Copeland Associates, Inc. do not exist, in the case of Copeland Associates because it merged into Citistreet Associates LLC, and in the case of Citistreet because there is no cognizable legal entity entitled "Citistreet."

This Court referred Plaintiff's request for an entry of default judgment to Magistrate Judge Viktor Pohorelsky. On July 7, 2003 Magistrate Judge Pohorelsky held a hearing regarding Plaintiff's Default Motion, and determined that discovery was required in order to resolve the question of the existence or non-existence of the allegedly defaulting Defendants.

On April 29, 2004 Plaintiff filed an additional request with the Clerk of Court that he enter a default judgment against Defendants Citistreet and Copeland Associates, Inc. On May 5, 2004 Plaintiff sent yet another letter to the Clerk of Court requesting

that the default of Defendants Citistreet and Copeland Associates be noted on the docket.

The Clerk of Court issued a letter to Plaintiff on May 7, 2004 informing him that the Clerk had considered Plaintiff's request for an entry of default judgment and that having reviewed the facts of the case the Clerk did not believe that entry of a Rule 55(a) notation of default was appropriate.

On July 2, 2004 Plaintiff applied to the Second Circuit for a writ of mandamus to compel the Clerk of the Court to enter a notation of the default on the docket of the Court, or in the alternative a writ of prohibition to prevent the Clerk from refusing to note the default. The Second Circuit denied this writ on September 2, 2004, due to the fact, among other reasons, that Plaintiff had not demonstrated that the relief he sought was not available from this Court.

On October 26, 2004 this Court referred Plaintiff's more recent motions and requests regarding entry of default judgment to Magistrate Pohorelsky for report and recommendation. On November 30, 2004 Magistrate Pohorelsky held a hearing at which he considered Plaintiff's motions regarding default judgment and issued a report and recommendation on the record that the motions be denied. This report and recommendation was placed on the record by December 12, 2004.

A district court judge may designate a magistrate to hear and determine certain motions pending before the Court and to submit to the Court proposed findings of fact

and a recommendation as to the disposition of the motion. See 28 U.S.C. § 636(b)(1). Within ten days of service of the recommendation, any party may file written objections to the magistrate's report. See id. Upon *de novo* review of those portions of the record to which objections were made, the district court judge may affirm or reject the recommendations. See id.

The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. See Thomas v. Arn, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections may waive the right to appeal this Court's Order. See 28 U.S.C. § 636(b)(1); Small v. Sect'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

In this case, no objections to the Report and Recommendation have been filed with this Court despite expiration of the deadline for filing. Upon review of the Report and Recommendation, this Court adopts and affirms Magistrate Pohorelsky's recommendations made on November 30, 2004. Plaintiff's Motion for Default Judgment and Motion to Compel the Clerk of Court to Enter Defaults as to Defendants Copeland Associates, Inc. and Citistreet are hereby DENIED.

SO ORDERED.

Dated: January 11, 2005  
Brooklyn, New York

  
Senior U.S.D.J.

**DOCKET # 188**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
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,  
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CORPORATE TRUST COMPANY, COPELAND  
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Defendants.

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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

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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 Plaintiff's Motion to Amend the Second Amended Complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Plaintiff

initially filed a Complaint on December 11, 2002. Plaintiff amended the Complaint on January 24, 2003. Plaintiff amended the Complaint again on February 24, 2003. The Second Amended Complaint filed on that date has been the document that all parties have relied upon in drafting the numerous motions to dismiss already filed in this case. Nevertheless, nearly two years after the filing of the Second Amended Complaint Plaintiff has sought leave to amend the Complaint yet again.

Federal Rule of Civil Procedure Rule 15(a) provides that leave to amend a Complaint after the first responsive pleading may be granted "when justice so requires." Plaintiff's Motion to Amend the Second Amended Complaint does not cite a single case or other authority to indicate that there is precedent for granting leave to amend under circumstances such as these. The Motion states that new facts have been discovered since service of the Second Amended Complaint, but given that new facts are routinely discovered during the course of litigation, it is not apparent why it is necessary to amend the Second Amended Complaint in this instance. The proposed amendments do not significantly alter the substance of Plaintiff's accusations, and no precedent has been cited by Plaintiff to support the claim that this case is distinguishable from others in which new facts are discovered during litigation.

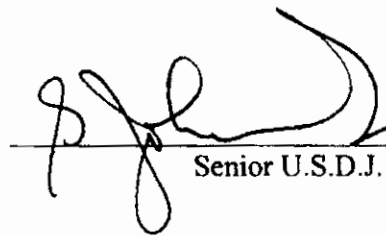
The Court also notes that the Second Amended Complaint already borders on a violation of Federal Rule of Civil Procedure 8(a), which requires that a Complaint consist of "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" As the Second Circuit has explained, "[t]he statement should be short because

'unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.' Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988). Although the Court does not find it necessary to determine at the present time whether Defendants have been forced to sort through excessive verbiage thus far in responding to the 328-paragraph, 15-count Complaint, the Court notes that it would certainly place an "unjustified burden" on Defendants to force each of them to sort through yet another amended Complaint and determine whether they must revise every previously filed motion.

Plaintiff's Motion to Amend the Second Amended Complaint is therefore  
DENIED.

SO ORDERED.

Dated: January 13, 2005  
Brooklyn, New York



Senior U.S.D.J.

**DOCKET # 193**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LOPRESTI,

Plaintiff,

02 CV 6492 (SJ)

- against -

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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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

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By: Maria Orrechio  
Attorneys for Defendants Buck Consultants,  
Buck Consultants, Inc.

JOHNSON, Senior District Judge:

On January 12, 2005 this Court issued an Order adopting Magistrate Judge Pohorelsky's Report and Recommendation dated November 30, 2004 regarding entry of default judgment against Defendants Citistreet and Copeland Associates, Inc., based on the lack of objections by any party to the Report and Recommendation. Plaintiff counsel Henry Grubel has since filed a notice with this Court asserting that he did in

fact file objections to the Report and Recommendation, in a letter to the Court dated December 13, 2004, filed as ECF Docket # 164, which opposing counsel responded to in a letter dated December 15, 2004, filed as ECF Docket # 167. Mr. Grubel's letter of December 13, 2004 clearly states that he is writing to "request[] that you rescind *a certain order* of the magistrate judge issued on November 30, 2004. *Said order directed that a hearing be held on plaintiff's motion for sanctions under Rule 11* against Weil Gotshal & Manges, attorneys for the CITIGROUP defendants herein." (Letter from Henry Grubel to the Court, December 13, 2004 (emphasis added).) The letter is clearly directed to the order that a hearing be held regarding Rule 11 sanctions, not to the order regarding entry of default judgments. Opposing counsel's letter of December 15, 2004 appears to have also interpreted Plaintiff counsel's letter in this manner, because it also addresses only the issue of the Rule 11 hearing.

The fact that Plaintiff counsel objected to other orders issued by the Magistrate on the same date is utterly irrelevant to the question of whether this Court should adopt the Magistrate's Report and Recommendation on default judgments. To the extent that Plaintiff counsel's letter makes any mention of the default judgment issue, it is to contest the Magistrate's impartiality and suggest that the Magistrate should not have been granted the authority to hold hearings on the subject of the default motion. This Court has already issued rulings on the subject of the Magistrate's impartiality, in an Order dated January 4th and an addendum to that Order that the Court issued in

response to yet another letter from Plaintiff counsel on the issue of disqualification (the letter referencing Judge Pohorelsky's mortgage with Citibank). Plaintiff counsel's letter of November 30, 2004 provides no new substantive arguments regarding the Report and Recommendation on default judgments, nor does it address the Report itself (as contrasted with the issue of whether the Magistrate had the authority to issue the Report).

Plaintiff 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.<sup>1</sup> Plaintiff counsel is advised that this mode of litigation may be in violation of the American Bar

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<sup>1</sup> These letters include, at minimum, letters to this Court dated December 17, 2002; May 14, 2003; June 23, 2004; October 4, 2004; October 15, 2004 (two letters); October 19, 2004; November 8, 2004; November 15, 2004; December 13, 2004; December 22, 2004; December 26, 2004; January 3, 2005; and January 13, 2005, as well as letters to Magistrate Judge Pohorelsky dated May 5, 2003; June 22, 2004; November 11, 2004; and January 19, 2005. These letters largely address the same issues raised by Plaintiff in his voluminous filings, which include but are not limited to a letter to David Lender arguing that Defendants Citistreet and Copeland Associates exist as legal entities, dated February 5, 2003; a Request for Entry of Default against Defendants Citistreet and Copeland Associates entered March 13, 2003; a letter to Robert Heinemann, Clerk of the Court, from Plaintiff requesting entry of a default judgment against Defendants Citistreet and Copeland Associates, dated March 19, 2003; Plaintiff's Motion for Default Judgment, dated April 21, 2003; Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Default Judgment, dated April 21, 2003; Plaintiff's Affidavit in support of Plaintiff's Motion for Default Judgment, dated April 21, 2003; Plaintiff's Reply Affidavit in Support of the Motion for Default Judgment, dated May 13, 2003; Plaintiff's Supplemental Reply Affidavit in support of the Motion for Default Judgment, dated May 19, 2003; Plaintiff's Proposed Order to Assess Damages by Jury, entered May 22, 2003; and 62 pages of newspaper articles, news releases, financial statements, telephone directory printouts, and other documents attached as exhibits to the Motion for Default Judgment, entered May 23, 2003.

Association's Model Rules of Professional Conduct R. 3.1,<sup>2</sup> is an abuse of the judicial process, and is in violation of the Local Rules for the Eastern District of New York. E.g. Local Civil Rules for the Southern and Eastern Districts of New York 7.1.<sup>3</sup>

Plaintiff counsel is reminded that this Court has the discretion to dismiss motions that are not filed in accordance with local rules. See, e.g., Feldman v. L & M Mowing, Inc., 1999 WL 284983, \*2 (E.D.N.Y. May 3, 1999). Plaintiff counsel is also reminded that this 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. See, e.g., Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir.2000).

Plaintiff is therefore directed to examine more carefully the Orders issued by this Court, as well as Plaintiff counsel's own previous filings, before filing objections to the Court's Orders. Plaintiff is further directed to attempt to consolidate his arguments and evidence into clearly organized motions, with separation between different topics, supported by case law or acknowledging the absence of applicable law. Plaintiff counsel is directed to refrain from filing unnecessarily redundant and excessive letters and motions, and to comply with usual procedures regarding issuance of Orders. If

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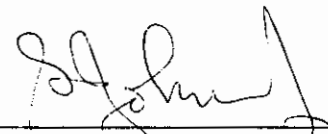
<sup>2</sup> "A lawyer shall . . . assert or controvert an issue . . . unless there is a basis in law and fact for doing so that is not frivolous. . . ."

<sup>3</sup> Except as otherwise permitted by the court, all motions and all oppositions thereto shall be supported by a memorandum of law, setting forth the points and authorities relied upon in support of or in opposition to the motion, and divided, under appropriate headings, into as many parts as there are points to be determined. Willful failure to comply with this rule may be deemed sufficient cause for the denial of a motion or for the granting of a motion by default.

Plaintiff counsel fails to comply with the Local Rules regarding internal structuring and organizing of memoranda, and continues to file repetitive motions and letters on the same topics, this Court will take appropriate action.

SO ORDERED.

Dated: January ~~24~~ 2005  
Brooklyn, New York



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Senior U.S.D.J.

**DOCKET # 194**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
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  
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Defendants.

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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).

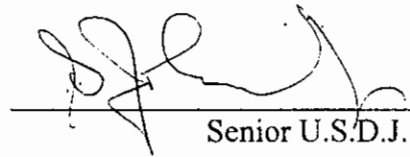
#### **CONCLUSION**

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.

**DOCKET # 197**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LOPRESTI,

Plaintiff,

-against-

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.  
-----X

JUDGMENT  
02-CV- 6492 (SJ)

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ JAN 31 2005 ★

P.M. \_\_\_\_\_  
TIME A.M. \_\_\_\_\_

Memorandum and Order of Honorable Sterling Johnson Jr., United States District Judge, having been filed on January 28, 2005, ordering that the Court declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims, pursuant to 28 U.S.C. § 1367(c)(3); granting defendant, Buck Consultant's motion to dismiss; and directing the Clerk to enter a final judgment of dismissal; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendant; that the Court declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims; that defendant, Buck Consultant's motion to dismiss is granted; and that final judgment of dismissal is hereby entered.

Dated: Brooklyn, New York  
January 28, 2005

ROBERT C. HEINEMANN  
Clerk of Court

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CARMINE A. LOPRESTI,

Plaintiff,

CV-02-6492 (SJ) (VVP)

-against-

CERTIFICATE OF SERVICE

CITIGROUP, INC., et. al.

Defendants.

-----X

I, Henry M. Grubel, the attorney of record for the plaintiff in this action, certify that on February 1, 2005. I personally served the Notice of Appeal with accompanying copies of the decisions being appealed, by sending copies thereof via first class U.S. mail, upon the attorneys for the defendants who have appeared in this action addressed as follows:

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Dated: February 1, 2005  
Freeport, N.Y.



\_\_\_\_\_  
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