

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----x  
CARMINE A. LOPRESTI

Index No. 12719/04

Justice DEMAREST

Plaintiff,

-against-

MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY; et al.,

PLAINTIFF'S CONSOL-  
IDATED AFFIDAVIT IN  
OPPOSITION TO  
MOTIONS TO DISMISS  
PURSUANT TO CPLR §§  
3211(a)(7), 3013 &  
3016

Defendants.  
-----x

HENRY M. GRUBEL, an attorney duly admitted to practice law before all of the Courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am the attorney for the plaintiff herein and fully familiar with the facts heretofore had herein, and submit this Consolidated Affirmation and the separate Consolidated Memorandum of Law, both in opposition to the motions by the defendants, to dismiss plaintiff's complaint pursuant to CPLR §§ 3211(a)(7), 3013, and 3016.

2. Plaintiff's complaint alleges causes of actions under General Business Law § 340, the Donnelly Act; violations of N.Y.S. Insurance Law § 2123(b); Tortious Interference With Contract; and Tortious Interference With Prospective Contractual Relations and/or Economic Advantage.

3. This is a case of apparent first impression in the United States, in that an employer's unilateral elimination of

competitive vendors for its employees' VOLUNTARY retirement savings programs, is being challenged.

4. While not stated in the complaint, plaintiff was told by Rene Delgado, of the Human Resources Department of WYCKOFF, in a phone conversation held on or about January 5, 2004, that there were seventeen § 403(b) annuity vendors at WYCKOFF before they were reduced to only two vendors. See Exhibit 'A'.

5. Plaintiff is suing on his own, and does not bring this action on behalf of any of the other vendors who were also eliminated as IRC § 403(b) vendors by the actions of the defendants.

6. Some of the concepts and issues involved herein and how they are to the employees' detriment, were addressed in a recent editorial in BARRON'S, the Dow Jones Business and Financial Weekly, on July 12, 2004. See Exhibit 'B', attached hereto and made a part hereof.

7. The July 12, 2004 editorial in BARRON'S, addressed the problems associated with employers like WYCKOFF, who refuse to allow competition amongst the vendors for its employees' 401(k) (or 403(b)) voluntary salary reductions.

8. All of the annuities at issue herein were purchased by WYCKOFF employees via voluntary payroll deductions, in accordance with IRC § 403(b). Every employee had a salary reduction agreement between herself, WYCKOFF and plaintiff's insurance

company, North American Company for Life and Health Insurance of New York, 'NACOLAH', as required by IRC § 403(b).

9. By memo dated November 23, 2003 WYCKOFF informed plaintiff's customers that if they wished to continue their participation in the IRC § 403(b), program they would have to discontinue remitting their salary deductions to plaintiff's insurer, NACOLAH, and redirect their salary deductions to one of the co-defendants herein. See Exhibit 'C'.

10. Unless the remittance of the employee's salary reduction is made by WYCKOFF to the specified § 403(b) plan, the employee may not deduct the amounts remitted from her income tax.

11. When the amounts remitted by WYCKOFF are made in accordance with § 403(b) into a 'qualified' plan, then the employee does not declare her salary reductions as income. Income taxes are paid upon withdrawal of the funds, and no taxes are payable on the yearly inside build up of the annuity.

12. There are innumerable qualified IRC § 403(b) plans. Most insurance companies, brokerage firms and mutual funds offer these plans. The terms and conditions of these offerings are extremely complex and vary tremendously. A word here or there can prejudice the employee or her beneficiaries immensely for decades to come.

13 The employers, like WYCKOFF, limit the available choices for its employees, to the mutual funds, insurance companies, or brokerage houses that the employer selects. All

without regard to the needs of the employees and their beneficiaries. It is always better for the employee to have competing plans from which to choose.

13. It is reasonable to infer from the actions of WYCKOFF as set forth in the complaint, that the favored defendant mutual funds, insurance companies, and the brokerage house, which "*services the accounts of senior management only*" (see page 2, line 3, of the McNeil affidavit, attached to the WYCKOFF affidavit in support), are consistent with the direct or indirect incentives to WYCKOFF, in the form of money, services, benefits, or other goodies, as mentioned in the BARRON'S editorial.

14. The affidavits in support of the motions to dismiss are bereft of any documentary proof in support of their motions. The affidavits in support by counsel, consist of conclusory and self serving arguments. These affidavits do not have any probative value on this motion to dismiss pursuant to CPLR §§ 3211(a)(7), or under CPLR §§ 3013 and 3016.

15. The defendants' submissions give rise to numerous questions of fact, the resolution of which are not appropriate to seeking dismissal under CPLR 3211(a)(7).

16. Plaintiff lacks knowledge at this time, prior to any discovery being held or answers filed, to rebut the protestations of innocence by the defendants, except to say that they raise questions of material fact, particularly the statement in the

McNeil affidavit, annexed to the WYCKOFF motion papers, wherein he states that:

There was no consultation of any kind whatsoever with 403B participant companies that were eliminated or with those who would remain active participants in the 403B program.

17. This is an obvious attempt by WYCKOFF to exonerate itself, its co-conspirators, its co-defendants herein, and avoid liability under the Donnelly Act. However, no documentary evidence of any kind is submitted in support thereof. Mr. McNeil can not have been privy to every utterance, email, understanding, letter or other communication between the defendants herein.

18. As more fully set forth in plaintiff's Consolidated Memorandum of Law, the Court's sole function on this motion, is to determine if plaintiff has set forth in his complaint sufficient facts *and inferences to be drawn from those facts*, to establish any cause of action.

19. It is not the Court's function herein at this stage to resolve issues relating to contested questions of fact.

20. WYCKOFF states by counsel in ¶7 that it is "financially distressed". WYCKOFF admits that it has been unable to keep its own financial house in order. An admission that WYCKOFF lacks the financial acumen to dictate with whom its employees should entrust their lifetime retirement savings.

21. Employees who wish to remain employed, fear suing their employers. Employees need their paycheck. Employees cannot risk retaliation by their employer by bringing suit against their employer.

22. None of the affidavits or memos of law submitted by the defendants in support of their motions to dismiss, devote a single drop of ink as to whether the WYCKOFF employees will see any benefit from eliminating plaintiff and fourteen other vendors as competitors.

23. As the complaint states, WYCKOFF has determined that it alone will be the sole arbiter of whom its employees can purchase their IRC § 403(b) annuities from. Even though no employer funds are involved. It is all the employees' own funds.

24. The bleats of innocence expressed by the defendants are more properly expressed in an answer to the complaint, rather than in a motion under CPLR §§ 3211(a)(7), 3013, and 3016.

25. WYCKOFF attempts to justify its creation of the monopoly with the ridiculous excuse that it wanted to relieve itself from the 'burden' of writing a few extra checks at the end of each month.

26. WYCKOFF now refuses to transmit monies that its employees have voluntarily had withheld from their pay checks each month, to NACOLAH. They must now send their funds to one of the co-defendants.

27. Accordingly, WYCKOFF no longer honored the salary reduction agreements it had entered into with each of plaintiff's customers.

28. It is an insult to anyone's intelligence to assert that the WYCKOFF'S *raison d'etra* for eliminating competition is to save the cost of writing a few extra checks each month.

29. It must be emphasized that every penny deposited by plaintiff's customers into their IRC § 403(b) annuities are the employees' own funds. There is no employer money involved.

30. In order to implement the § 403(b) annuity for his customers, each customer and WYCKOFF were required under § 403(b) to enter into a salary reduction agreement. See Exhibit "B" annexed hereto.

31. WYCKOFF agreed therewith, *inter alia*, to reduce the employee's pay by the stated amount and transmit the reduction in the employee's pay to the plaintiff's insurance company, NACOLAH. The customer then applied to NACOLAH for an annuity contract.

32. When the specially constructed, tax qualified § 403(b) annuity contract was issued by NACOLAH to plaintiff's customer, WYCKOFF would send the agreed upon payroll deductions to NACOLAH.

33. Plaintiff received a commission from NACOLAH on the amount of the remittances made by WYCKOFF on behalf of each of his customers, pursuant to the commission agreement plaintiff had

with NACOLAH. Plaintiff was the third party beneficiary of the agreements between his customers and WYCKOFF.

34. WYCKOFF has deliberately eliminated all competition. The effects of eliminating all but two of the seventeen vendors as competitors, is the basis for an entire body of law in the Federal and State antitrust arena.

35. The co-defendants have wrongfully appropriated to themselves the business and good will, plaintiff had created in over more than 20 years of work at WYCKOFF.

36. WYCKOFF'S purported purpose of promoting 'administrative efficiency' is a catch all excuse that goes to motive and intentions, not all of which are pure. 'Administrative efficiency' is not a cognizable defense to creating a monopoly and eliminating competition.

37. WYCKOFF has exercised its power over its employees to enforce and create an anti-competitive monopoly.

38. The Goliaths in the financial services industry welcome the ability to create these anti-competitive monopolies amongst employers.

39. Granting this motion to dismiss is a nail in the coffin of an employee's economic freedom to have the power of choice. The Goliaths are all, ready and willing to serve as pall bearers.

40. As more fully set forth in plaintiff's Consolidated Memorandum of Law, plaintiff's complaint has pleaded facts sufficient to meet the elements of the pleaded causes of action.

41. In order to establish his claim for tortious interference with prospective economic advantage the plaintiff has demonstrated that the defendants' interference with plaintiff's prospective business relations, was accomplished by the defendants through the wrongful means of creating a monopoly, in violation of the Donnelly Act.

42. The plaintiff has pleaded the elements of a tortious interference with contract claim. Plaintiff has alleged the existence of a valid contract, the defendants' knowledge of the contract, the defendants' intentional and wrongful interference with plaintiff's contract, the resulting breach and damages.

43. Where contracts terminable at will are involved, the courts have upheld complaints and recoveries, in actions seeking damages for interference with at will contracts, when the alleged means employed, by the ones interfering were wrongful.

44. Plaintiff has claimed a violation of the Donnelly Act. He has identified the relevant product market, described the nature and effects of the conspiracy, and alleged how the economic impact of that conspiracy, results in an anti-competitive restraint trade, in the marketing of § 403(b) annuities at WYCKOFF.

45. A number of the defendants herein have asserted their innocence, in that they had nothing to do with the creation of the anti-competitive monopoly in restraint of trade at WYCKOFF. The actual facts surrounding the conspiracy involved in the creation of the monopoly await discovery.

46. It is clearly reasonable to infer from the stated facts in the complaint, that the defendants conspired to eliminate plaintiff and all of their other then existing competitors, in order to create their monopoly position. It did not happen by accident. They all were aware of what was happening and became participants in the anti-competitive arrangement made by the defendants.

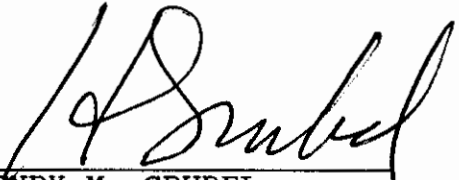
47. Plaintiff has pleaded facts sufficient to seek damages under NYS Insurance Law § 2123(b). When the NACOLAH annuity contracts were discontinued, as the result of the anticompetitive acts of the defendants.

48. Plaintiff did not receive any of the usual notifications that are mandated when an insurance company selling fixed or variable annuities, complies with § 2123(b) on the NYS Ins. Law and the regulations promulgated thereunder. None of the insurance company defendants have submitted any documentation on their motions to dismiss, with regard thereto, to rebut or deny plaintiff's allegations of their non compliance.

49. The existing statutory and case law of the State of New York, allows this Court to deal with the issues of apparent first impression raised in the complaint herein.

WHEREFORE, for the reasons set forth herein, and in plaintiff's separately submitted Consolidated Memorandum of Law, it is respectfully requested that the Court deny the defendants' motions to dismiss plaintiff's complaint in their entirety, and grant such other and further relief to the plaintiff, as the Court deems just and proper.

Dated: Freeport, New York  
July 24, 2004



---

HENRY M. GRUBEL  
Attorney for Plaintiff  
HENRY M. GRUBEL, P.C.  
37 Prospect Street  
Freeport, New York 11520  
516-623-4100

**EXHIBIT 'A'**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
CARMINE A. LOPRESTI

Index No. 12719/04

Plaintiff,

Justice DEMAREST

-against-

AFFIDAVIT

MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY; et al.,

Defendants.  
-----X


STATE OF NEW JERSEY)

)SS.:

COUNTY OF MONMOUTH )

**CARMINE A. LOPRESTI**, being duly sworn deposes and says  
as follows:

1. I am the plaintiff in the above captioned matter.
2. I am an adult resident of the State of new Jersey.
3. I give this affidavit in opposition to the motions  
by the defendants to dismiss this case pursuant to CPLR §  
3211(a)(7).
4. On or about January 5, 2004 I had a telephone  
conversation with RENE DELGADO, from the Human Resources  
Department at WYCKOFF HEIGHTS MEDICAL CENTER.
5. During our conversation Ms. DELGADO told me that  
there had been a total of 17 vendors of § 403(b) annuities  
prior to them eliminating all but two of said vendors.

  
\_\_\_\_\_  
CARMINE A. LOPRESTI

SWORN TO BEFORE ME  
THIS 26<sup>th</sup> DAY OF JULY 2004

**EXHIBIT 'B'**

# Faithless Fiduciaries

## "Pay to play" is just another way of saying "breach of trust"

There is a financial equivalent of Newton's third law of motion: For every bribe, there is an equal and opposite extortion.

The SEC is investigating the possibility that mutual-fund companies have been making payments to employers to induce the employers to offer their funds in employer-sponsored defined-benefit retirement plans such as 401(k) plans.

The Office of Compliance Inspections and Examinations is asking 20 mutual-fund companies to provide information on payments they may be making to employers. Officials don't know how common such payments are, or how they might affect the performance of retirement investments. And they don't know whether it's bribery or extortion.

About \$920 billion of employer-sponsored defined-benefit retirement-plan assets were invested in mutual funds at the end of last year—48% of the total.

Considering how vigorously some fund companies have scattered money around to make brokerages friendly to their products, the Securities and Exchange Commission is right to be suspicious. Wall Street has made many such arrangements it calls "pay to play."

If some mutual-fund companies would pay to play with brokerage customers, surely they would shell out to ensnare the very best kind of customers for their funds—captive customers. A participant in a 401(k) has only the investment choices that his employer allows him to have; participants rarely change their weekly or monthly payroll deductions, and they hardly ever change their original investment allocations.

It's good that the SEC has picked up on the idea that mutual-fund companies might be paying off employers to select their funds for the employer-sponsored 401(k) retirement plans. But it looks as though the commission is targeting only the companies it regu-

lates—the mutual-fund families. That would be a mistake. Employers who take such payments under the table should be targeted for breaching their fiduciary duty to their plan participants. The participants, not the employers, are actually bearing the cost of operating 401(k) plans.

The real solution to this kind of playing around, however, is to free the captives. There is no good reason for having employers operate retirement plans of any kind, except that the tax code only shelters contributions to pension and savings plans that are sponsored by an employer.

As usual: If you see or suspect that something stupid and underhanded is going on in American business, you can bet that the income-tax code is at fault. ■

Editorial Page Editor Thomas G. Donlan receives e-mail at [tgdonlan@barrons.com](mailto:tgdonlan@barrons.com).

BARRON'S JH2004

**EXHIBIT 'C'**



**North American Company**  
for Life and Health Insurance of New York

**Annuity Service Center:**  
P. O. Box 79902  
Des Moines, IA 50325  
Telephone: (800) 922-0331

### SALARY REDUCTION AGREEMENT FOR 403(b) (1) PROGRAM

Employee: \_\_\_\_\_ Address: \_\_\_\_\_

#### Part 1. Employee Information:

Name: \_\_\_\_\_ Social Security: \_\_\_\_\_  
Address: \_\_\_\_\_ Present Salary: \_\_\_\_\_  
\_\_\_\_\_ Date of Employment: \_\_\_\_\_

#### Part 2. Contribution Information: (Select all that apply)

- Initiate new salary reduction Please deduct the amount of \$\_\_\_\_\_ or \_\_\_\_\_% per pay.
- Change salary reduction This is notification to change the amount of my TSA salary reduction from \$\_\_\_\_\_ or \_\_\_\_\_% to \$\_\_\_\_\_ or \_\_\_\_\_%
- Discontinue salary reduction. Please discontinue my TSA salary reduction.
- Employee is utilizing catch-up provision/special elections.

Implementation Date: Salary reduction instructions shall be implemented in accordance with employer's administrative schedule.

#### Part 3. Agreement:

The above named Employee agrees to modify his/her salary as indicated above. Employer agrees to contribute this amount on Employee's behalf into an annuity contract issued by North American Company for Life and Health Insurance of New York (the Company). It is intended that the requirements of all applicable state or federal income tax rules and regulations (Applicable Law) will be met. The Employee understands and agrees to the following.

1. This Salary Reduction Agreement is legally binding and irrevocable with respect to amounts paid or available while this agreement is in effect;
2. This Salary Reduction Agreement may be terminated at any time for amounts not yet paid or available, and that a termination request is permanent and remains in effect until a new Salary Reduction Agreement is submitted;
3. This Salary Reduction Agreement may be changed with respect to amounts not yet paid or available in accordance with the Employer's administrative procedures; and
4. The company is furnishing this form as an accommodation to me and has made no representation concerning my tax treatment under the Internal Revenue Code.

Employee acknowledges that Employer has made no representation to Employee regarding the advisability, appropriateness or tax consequences of the purchase of the annuity described herein. Employee agrees Employer shall have no liability whatsoever for any and all losses suffered by Employee with regard to his/her selection of the annuity; its terms; the selection of the Company; the financial condition, operation of or benefits provided by the Company. Nothing herein shall affect the terms of employment between Employer and Employee. This agreement supersedes all prior salary reduction agreements and shall automatically terminate if Employee's employment is terminated.

**IMPORTANT INFORMATION**

1. Employer does not choose the annuity contract in which your contributions are invested.
2. Employees are responsible for setting up and signing the legal documents to establish your annuity contract.
3. In order to receive the expected tax results, Employees are responsible for investing in annuity contracts that meet the requirements of Section 403(b) of the Internal Revenue Code.
4. Employees are responsible for naming a death beneficiary under annuity contracts. This is normally done at the time the contract is established. Beneficiary designations should be reviewed periodically.
5. Employees are responsible for all distributions and any other transactions with the Company. All rights under contracts are enforceable solely by Employee beneficiary or Employee's authorized representative. Employee must deal directly with the Company to make loans, transfer to different contracts or custodial accounts, begin distributions, or any other transactions.
6. Employees are responsible for determining that salary reductions do not exceed the allowable contribution limits under applicable law. You are strongly encouraged to have an annual maximum exclusion calculation performed.

**Part 4. Employee Signature:**

I certify that I have read this complete agreement and that my salary reductions do not exceed contribution limits as determined by applicable law. I understand my responsibility as an Employee under this Program, and I request that Employer take the action specified in this agreement. I understand that all rights under the annuity established by me under the Program are enforceable solely by me, my beneficiary or my authorized representative.

Employee Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Part 5. Employer Signature**

Employer hereby agrees to this Salary Reduction Agreement.

Employer Signature: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----x  
CARMINE A. LOPRESTI

Index No.

Plaintiff,

12719/04

-against-

CERTIFICATE OF  
SERVICE

MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY; et al.,

Defendants.  
-----x

HENRY M. GRUBEL, an attorney duly admitted to all the  
courts of the state of New York, affirms as follows:

I am the attorney for the plaintiff in the above  
matter. On July 26, 2004, I personally caused a true and  
correct copy of plaintiff's AFFIDAVIT IN OPPOSITION, and  
MEMORANDUM OF LAW in opposition to the defendants' motions  
to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7)  
to be properly addressed and sent by FEDEX priority  
overnight service, to be delivered to the following  
attorneys on July 27, 2004:


Mitchell H. Cobert, Esq  
Attorney for  
Calvin Grielsamer  
61 Miller Road  
Morristown, New Jersey 07960  
973-539-6170

Arthur D. Felsenfeld, Esq.  
Andrews & Kurth L.L.P.  
Attorneys for the Amex Defendants  
450 Lexington Avenue  
New York, NY 10017  
212-850-2800

Lawrence R. Gelber, Esq.  
Attorney for Yankee Financial Group  
34 Plaza Street - Suite 1107  
Brooklyn, NY 11238  
718-638-2383

David N. Hoffman, Esq  
V.P Legal Affairs  
Wyckoff Heights Medical Center  
374 Stockholm Street  
Brooklyn, New York 11237  
718-963-6117

Alan I. Raylesberg  
Chadbourn & Parke L.L.P.  
Attorneys for  
Mass Mutual Defendants  
30 Rockefeller Plaza  
New York, NY 10112  
212-408-5100

  
Henry M. Grubel  
Attorney for Plaintiff  
37 Prospect Street  
Freeport, NY 11520  
516-623-4100