

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARMINE A. LoPRESTI, etc.

CV-02-6492
(SJ)(RLM)

Plaintiff,

AFFIDAVIT IN
SUPPORT

-against-

CITIGROUP, Inc., et. al.,

Defendants.
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HENRY GRUBEL, declares and says as follows:

1. I am the attorney for the plaintiff herein and submit this affidavit in support of plaintiff's motion for an order for the entry of a final judgment under Fed.R.Civ.P.54 against the defendant CITISTREET; to include applicable equitable relief; together with submission of this matter to a jury for the sole purpose of assessing damages; and for entry of a default judgment against the defendant COPELAND ASSOCIATES, Inc. (COPELAND) under Rule 55(b)(2).

2. This action arises out of the ERISA violations committed by the defendants in the furtherance of their scheme to wrongfully impose themselves and certain retirement products upon the employees of the defendant LUTHERAN MEDICAL CENTER, all to plaintiff's damage. In addition, RICO, anti-trust, supplemental New York State, and common law claims are interposed.

3. The defendants CITISTREET and COPELAND have each willfully failed to appear, answer or otherwise defend against the summonses and complaints that were served upon them.

4. The original returns of service on CITISTREET and COPELAND were filed with the Court on March 11, 2003.

5. On March 13, 2003 plaintiff filed with the Court, a request that the clerk of the Court note the defaults of the defendants CITISTREET and COPELAND pursuant to Rule 55(a). A copy was also sent to the three law firms that had appeared on behalf of the other defendants.

6. One of said law firms, Weil, Gotshal & Manges LLP, (Weil Gotshal), attorneys for the defendants CITIGROUP, Inc. and STATE STREET CORP., while not representing CITISTREET or COPELAND, intervened to prevent the clerk of the Court from noting the default of the defendants CITISTREET and COPELAND.

7. Weil Gotshal sent a letter to Mr. Giokas, the assistant clerk of this Court dated March 17, 2003 stating that "COPELAND ASSOCIATES, Inc... no longer exists" and that "...there is **not** a cognizable legal entity entitled 'Citistreet'". Your affiant's response thereto was sent to the clerk in a letter dated March 19, 2003. See both letters in Exhibit 'A' annexed hereto. On information and belief, to date the defaults have not been noted on the Court record.

8. Previously, Weil Gotshal had sent me letters dated January 3, 2003 and January 29, 2003 stating that they wanted CITISTREET and COPELAND removed from the caption because they did not exist. In a February 4, 2003 letter from Weil Gotshal they stated, in pertinent part: "This is to verify that the following legal entities do not exist: Copeland Associates, Inc. and Citistreet". They again requested plaintiff to "..eliminate

those non-existent companies" from the caption. Plaintiff refused to do so per a letter to Weil Gotshal dated February 5, 2003. See all these letters in Exhibit 'B'.

9. Clearly, if the defaulted defendants, CITISTREET and COPELAND "do not exist", their names should not be in the caption.

10. However, CITISTREET definitely does exist. It operates as a joint venture. Its name belongs in the caption, and entry of a final judgment against CITISTREET, due to its default is appropriate.

11. Further, COPELAND exists as a de-facto corporation. Its name belongs in the caption, and entry of a default judgment against COPELAND is appropriate.

12. CITISTREET has a website at www.citistreetonline.com . There are about 30 press releases posted on the CITISTREET website. In 28 of their press releases CITISTREET describes itself as being "a 50/50 joint venture between CITIGROUP, Inc. and STATE STREET CORP" The releases dated December 4, 2002 and June 10, 2002 are annexed hereto as Exhibit 'C'

13. The latest press release on CITISTREET's website is dated March 27, 2003. It states that CITISTREET is one of the world's largest providers of benefit and retirement services; that it has 3,500 employees; more than 8 million plan participants; and that it administers about \$170 billion in assets in the United States. It also states that "CITISTREET is a 50/50 joint venture between STATE STREET CORP. and CITIGROUP". See Exhibit 'C'.

14. The fact that CITISTREET is a 50/50 joint venture between STATE STREET CORP. and CITIGROUP, Inc. is also repeated and restated on the CITISTREET website in 28 of its press releases. Those dated April 2, 2002, January 29, 2001 and April 2, 2001 are attached. See Exhibit 'C'.

15. The earliest CITISTREET press release on its website is dated October 30, 2000. It states that CITISTREET was formed earlier in the year 2000 and that CITISTREET is a 50/50 joint venture between STATE STREET CORP. and CITIGROUP. Accordingly, from its formation until now CITISTREET has been operating continuously as a joint venture. See Exhibit 'C'.

16. The defendant STATE STREET CORP., 'with more than \$6.2 trillion in assets under custody' has a page on its own website with a link to the CITISTREET website. STATE STREET also confirms that CITISTREET is jointly owned by STATE STREET and CITIGROUP. See Exhibit 'C'.

17. The copies of the foregoing press releases and web pages that are attached hereto as Exhibit 'C', were downloaded on a best efforts basis from their websites.

18. According to the affidavits of service by the process server, the defendant CITISTREET was duly served with the amended complaint on February 5, 2003 and with the second amended complaint on February 24, 2003. Both complaints were served on and accepted by someone in the CITISTREET legal department who was authorized to accept service on behalf of CITISTREET at their headquarters at 3 Battery March Plaza in Quincy, Mass.

19. The original returns and affidavits of service were filed with the clerk of the Court on February 20, 2003 and March 11, 2003 respectively. Copies thereof were attached to the request dated March 13, 2003 to have the default noted by the clerk of the Court.

20. The defendant CITISTREET has willfully and deliberately defaulted by failing to answer, appear or otherwise defend against the complaint. This was done in apparent reliance, as stated by Weil Gotshal in their letter to the Court dated March 17, 2003, on the fact that they as counsel for the defendants STATE STREET CORP. and CITIGROUP, Inc. could convince this Court that "...there is **not** a cognizable entity entitled CITISTREET."

21. Another posting on the CITISTREET website was authored by Gary Jenkins, the general counsel for CITISTREET. It is dated May 1, 2001, and advises employers, as ERISA fiduciaries, on how to avoid liability to their employees for the losses their employees suffer, from the employers' choice of 401 (k) plans. See Exhibit "D". This advice appears to have been taken by the defendant LUTHERAN MEDICAL CENTER. It has required its employee plan participants to sign an agreement which shifts the burden and liability of losses from the employer to the employee.

22. According to the CITISTREET press release dated June 10, 2002, CITISTREET also advises employers about the terms of the Department of Labor Advisory Opinion 2001-09A issued on December 14, 2001, which allows for reliance on the use of computer driven investment advisory programs to exempt a plan provider from certain liabilities under ERISA. See Exhibit 'C'.

23. CITISTREET clearly is the lead player at LUTHERAN MEDICAL CENTER.

24. Said June 10 2002 release also states that James S. Phalen is the chairman and CEO of CITISTREET.

25. Another CITISTREET press release dated January 29, 2001 announces that Philip J. Lussieris was hired as president of the CITISTREET institutional business division. See Exhibit 'C'.

26. CITISTREET'S April 2, 2001 press release states that Mr. Robert Dughi is the president of CITISTREET and a member of its board. See Exhibit 'C'.

27. When Plaintiff mailed out his complaints in this action under Rule 4 of the FRCP, the acceptance of service on behalf of CITISTREET was signed by Mr. Robert Dughi in his capacity as the president of another defendant herein, CITISTREET, LLC, but not in his capacity as the president of CITISTREET. This rendered the acceptance of service meaningless.

28. Annexed hereto as Exhibit 'E' are pictures of the CITISTREET office complex in Massachusetts and its tower in New Jersey. These are not the offices of a 'non-existent' business entity. The offices and the website clearly contradict the statements made to plaintiff's counsel and to the Court by Weil Gotshal about CITISTREET not being a 'cognizable' legal entity.

29. The Weil Gotshal demand to have CITISTREET removed as a defendant is motivated by their need to shield the other defendants that they represent in this matter, CITIGROUP, Inc. and STATE STREET CORP., from liability or responsibility for the ERISA and other violations set forth in the complaint as against

CITISTREET. For as CITISTREET is a joint venture between the defendants CITIGROUP, Inc. and STATE STREET CORP., the wrongful acts, and liabilities of CITISTREET become those of its joint venture owners CITIGROUP, Inc. and STATE STREET Corp.

30. Nothing submitted to this Court by Weil Gotshal was competent or in evidentiary format, to challenge or contradict the statements by CITISTREET, that it is a 50/50 joint venture co-owned by the Weil Gotshal clients STATE STREET CORP. and CITIGROUP, Inc., or its distinctive logo which always reads "CITISTREET™ A State Street and Citigroup Company".

31. On information and belief, the Weil Gotshal allegations that the defendant CITISTREET is non existent were not made in good faith. Their unsupported statements appear to have been made in order to deceive the plaintiff (which it did for a while); deceive the Court; prevent the clerk of this Court from noting the default of CITISTREET; or to forestall the Court from entering a final judgment against CITISTREET for its default.

32. Weil Gotshal was on notice about the CITISTREET website, because it was cited and paraphrased in paragraph 18 of the plaintiff's second amended complaint. All they had to do was click onto the NEWS button and then click on PRESS RELEASES.

33. Weil Gotshal did not make a motion to delete CITISTREET as a defendant; nor did they reveal to the Court that CITISTREET is a joint venture between two of its own clients herein, CITIGROUP, Inc. and STATE STREET CORP.; nor did they set forth the factual basis for their statements. Are they now witnesses

concerning a major material fact in this matter, suggesting the need for their disqualification as counsel herein?

34. On information and belief, it serves the defendant CITISTREET well, to be considered a non existent entity. This allows CITISTREET to fly under the radar and to function, apparently free of scrutiny, enforcement, oversight or compliance with the Federal laws, and the Rules and Regulations established by the IRS, the SEC, the NASD, the Department of Labor, the Department of the Treasury, and the New York State Departments of State and Insurance, or the Attorney General of the State of New York, all of whom seem to have been deceived by CITISTREET. Is it yet another 'off the books' company?

35. CITISTREET's liabilities to the plaintiff under ERISA, RICO, the antitrust laws, and the supplemental New York State, and common law claims, are not contingent or dependent upon the liability of any co-defendants in this matter.

36. The many ERISA violations herein committed by the defendant CITISTREET, were done without regard to any rule of law, all to plaintiff's damages.

37. CITISTREET is not exempt from process in this Court, based on the fictional assertions that it is not a cognizable legal entity, as stated by Weil Gotshal, for if so, then over 8 million retirement plan participants in the United States, with over \$170 billion in retirement plan assets could be without a remedy if things went wrong with CITISTREET.

38. Parenthetically, it should be noted that Weil Gotshal has not appeared in this action on behalf of either CITISTREET or

COPELAND. As such, plaintiff questions what standing or authority they or any other firm that has appeared in this matter has to intervene and interfere with plaintiff's request to have the defaults noted by the clerk of this Court, or to oppose the instant motions.

39. When Weil Gotshal told me that the defendant COPELAND did not exist, I sent them copies of two large checks that were written by COPELAND. I have since obtained a copy of a third check. They are dated 9/19/02, 10/7/02 and 1/8/03. The checks are for \$107,586.48, \$108,717.63 and \$107,826.13 respectively. Non-existent companies do not routinely send out checks drawn on their own bank accounts in these amounts. A copy of these checks is annexed hereto as Exhibit 'F'.

40. COPELAND is still operating under its old name after having been dissolved, it now a de-facto corporation and the requested default judgment should be entered against it.

41. It is respectfully submitted that non-existent entities do not have a board, officers, offices, bank accounts, employees, websites, a general counsel, \$ billions, and millions of customers.

42. CITISTREET and COPELAND are bona fide defaulted defendants in this matter, and judgments should be entered against them accordingly.

43. I declare on the penalty of perjury that the foregoing statement is true and accurate to the best of my knowledge, information and belief.

WHEREFORE it is respectfully requested that that a final judgment be entered against the defendant CITISTREET, and that the Court order that this matter be submitted to a jury solely on the issue of damages as against the defendant CITISTREET, and that the Court grant plaintiff such equitable relief as is requested in paragraph 314 of the second amended complaint as is applicable to the defendant CITISTREET, and that a default judgment be entered against the defendant COPELAND ASSOCIATES, Inc., together with such other and further relief as the Court deems just and proper.

Dated: Freeport, N.Y.
April 21, 2003

Henry M. Grubel (3211)
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