UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK ex rel. ERIC RASMUSEN, Plaintiff, - against - CITIGROUP INC., Defendant.	x	No. 1:15-cv-07826-LAK

MEMORANDUM OF LAW OF CITIGROUP INC. IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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Defendant Citigroup Inc. ("Citigroup") respectfully submits this memorandum of law in support of its motion to dismiss pursuant to Rules 8(a), 9(b), and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

In this putative qui tam action, relator Eric Rasmusen ("Plaintiff") contends that Citigroup defrauded the state of New York by taking tax deductions that were expressly permitted by official Internal Revenue Service ("IRS") guidance. To support his claim, Plaintiff asserts his personal opinion that the IRS guidance was ill-advised and "improperly promulgated" and, on the basis of his opinion, presents himself as a purported whistleblower, seeking to recover billions of dollars under the New York False Claims Act.

Plaintiff offers no non-public facts in support of his claims. He identifies no statement from any federal or New York taxing authority to support his views. He even acknowledges that Citigroup relied on authoritative guidance from the IRS which permitted the very deductions he now contests. Plaintiff neither suggests nor claims that New York has ever offered a different interpretation from the one set forth in the IRS guidance on the applicable deductions.[1] In effect, Plaintiff asks that Citigroup be subjected to treble damages for complying with the IRS's authoritative interpretation of tax law, rather than Plaintiff's own idiosyncratic view.

The Complaint is subject to dismissal in its entirety for three independent reasons:

First, the New York False Claims Act requires dismissal of any suit based on allegations that were publicly disclosed before the suit's filing, unless the plaintiff is the original source of the public disclosure. The facts and allegations underlying the Complaint were widely broadcast in scholarly publications, a government report, and the press by authors other than Plaintiff well

[1] Not surprisingly, the New York State Attorney General has declined to intervene in this matter.

before Plaintiff brought suit. There are no allegations in the Complaint for which Plaintiff is the original source, and Plaintiff does not claim any independent knowledge of facts relevant to his claims.[2] The law does not permit qui tam actions by "parasitic . . . opportunists who attempt to capitalize on public information without seriously contributing to the disclosure" of any fraud; this is precisely the reason for the "original source" requirement. United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992). As a result, the Complaint must be dismissed, without regard to whether Plaintiff has stated any element of a claim under the New York False Claims Act.

Second, Plaintiff has not pled—much less with the requisite particularity—that Citigroup failed to comply with New York tax law, or any other law. In fact, it is clear on the face of the Complaint that Citigroup complied with all pertinent law in taking the at-issue deductions. As such, Citigroup's certification that its tax returns complied with applicable law was objectively accurate, not false.

Third, even if Plaintiff could plausibly plead that Citigroup's statements were in any sense false (which he cannot), he cannot sufficiently plead scienter. In fact, Plaintiff's own allegations confirm that Citigroup lacked the requisite scienter and appropriately relied on authoritative IRS guidance. The New York False Claims Act imposes liability only where statements are "knowingly" false, meaning that the maker of the statement has actual knowledge of its falsity at the time the statement is made or acts in deliberate ignorance or reckless disregard thereof. Plaintiff does not allege that Citigroup did not honestly believe that its deductions were proper. To the contrary, the Complaint itself acknowledges that Citigroup relied upon explicit

[2] Although subject-matter expertise would not be sufficient to rescue Plaintiff's claim, it bears noting that Plaintiff does not assert that he has any special knowledge or understanding of New York or any other tax law.

guidance from the IRS in calculating the deductions. Plaintiff does not—and cannot—allege that the deductions actually taken were inconsistent with the guidance provided by the IRS. Likewise, Plaintiff does not—and cannot—allege that the deductions taken were inconsistent with any New York State guidance. The New York False Claims Act and its federal counterpart are anti-fraud statutes; they do not impose liability for good-faith submissions to the government, even in cases where those submissions are arguably improper or defective (and they are not here). See, e.g., United States ex rel. Kirk v. Schindler Elevator Corp., No. 05-CV-2917(SHS), 2015 WL 5296714, at *7 (S.D.N.Y. Sept. 10, 2015).

Put simply, Plaintiff's grievance is that he does not agree with the IRS's guidance. But a qui tam suit is not a vehicle for challenging regulatory actions or the government's legal interpretations. See, e.g., United States ex rel. Finney v. Nextwave Telecom, Inc., 337 B.R. 479, 487–88 (S.D.N.Y. 2006). And it is certainly not a source of windfall recoveries—at the expense of private parties relying in good faith on government guidance—for opportunistic individuals who challenge government guidance years after the fact.

STATEMENT OF FACTS

A. The Relevant Tax Provisions: Deduction of Net Operating Losses

Plaintiff's allegations concern Citigroup's treatment of net operating loss ("NOL") deductions. See Compl. ¶¶ 30–31. A net operating loss arises when a taxpayer's expenses exceed its revenues for a taxable year. Federal law permits a corporation that sustains an NOL to carry back the loss to prior taxable years or to carry it forward to subsequent taxable years, in either case to be deducted from the corporation's taxable income for those years. See 26 U.S.C. § 172. Allowing taxpayers to carry NOLs back or forward to offset income from profitable years puts taxpayers that have uneven profits from year to year in a similar position to those that have regular profits. If a taxpayer were required to pay tax in profitable years without a deduction for NOLs from other years, it would end up paying more tax overall than a taxpayer that had the same aggregate profit spread evenly over the same years.

Special rules restrict the use of NOL deductions in the context of corporate reorganizations. In particular, Section 382 of the Internal Revenue Code limits the ability of a "loss corporation" (generally, a corporation with NOL carryforwards or net unrealized "built-in" loss in its assets) to use its losses after a significant ownership stake changes hands. Id. § 382. This provision was enacted to prevent corporate raiders from avoiding taxes by acquiring loss corporations solely to make use of their NOLs or built-in losses. See S. Rep. No. 83-1622, at 4684 (1954).

Section 382 operates by limiting the amount of a loss corporation's taxable income for post-change years that can be offset by losses attributable to pre-change years. See 26 U.S.C. § 382(a), (d). Application of the Section 382 limitation is triggered by the occurrence of an "ownership change." Id. § 382(g). An ownership change occurs if, immediately after any change in the ownership stake held by a 5% shareholder, the percentage of stock owned by one or more 5% shareholders increases by more than 50 percentage points over the lowest percentage of stock owned by such shareholders during a specified period. Id. If a corporation does not undergo an ownership change, Section 382 does not apply to restrict the deduction of its NOL carryforwards.

New York law generally conforms to federal law with respect to allowable NOL deductions. Prior to 2015, New York imposed a franchise tax—its equivalent of a corporate tax—on the "entire net income" of banking corporations under then-Article 32 of the New York Tax Law. See N.Y. Tax Law §§ 1451(a), 1453 (Consol. 2010) (repealed eff. Jan. 1, 2015). New

York expressly defined entire net income by reference to federal taxable income: "the entire taxable income . . . which the taxpayer is required to *report to the United States treasury department*," id. § 1453(a) (emphasis added).[3] In calculating entire taxable income, New York law also expressly provided for the allowance of NOL deductions, which would "be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code," subject to a few enumerated exceptions not relevant here.[4] Id. § 1453(k-1). New York courts have held similar presumptions as to the incorporation by reference of federal tax law to be conclusive, "except and to the extent that" the federal regime has been departed from "by express provision of the State statute." Pierce-Arrow Motor Corp. v. Mealey, 270 A.D. 286, 291 (3d Dep't 1946). Plaintiff has identified no such relevant provision here.

Citigroup is a global diversified financial services holding company that provides a range of financial services to consumers, institutions, corporations, and governments. See Compl. ¶ 7. It had net operating losses for certain of the relevant tax years and allegedly took NOL deductions from 2010–12. See id. ¶ 37.

[3] While the bank franchise tax was in effect, the general business corporation franchise tax applicable to non-banks under Article 9-A included similar provisions defining "entire net income" by reference to federal taxable income, N.Y. Tax Law § 208(9) (Consol. 2010) (amended eff. Jan. 1, 2015), and allowing an NOL deduction presumably the same as the NOL deduction allowed under federal law, id. § 208(9)(f). Legislation enacted in 2014 eliminated the Article 32 bank franchise tax and subjected banks and other financial institutions to a revised corporate franchise tax under Article 9-A. Laws of New York, 2014, ch. 59, part A, §§ 1, 5 (2014). The provisions concerning entire net income in the revised post-2014 corporate franchise tax (which is not at issue in this case in any event) continue to provide that a taxpayer's New York entire net income is "presumably the same" as the taxpayer's income for federal income tax purposes.

[4] The exceptions were (1) the adjustment of NOLs to reflect other adjustments to entire net income required by N.Y. Tax Law § 1453, (2) the exclusion of NOLs sustained prior to January 1, 2001 or during any taxable year in which the taxpayer was not subject to tax under then-Article 32, (3) the limitation of the NOL deduction allowable under New York law to the NOL deduction allowable for the taxable year under federal law, and (4) the disallowance of NOL carrybacks. N.Y. Tax Law § 1453(k-1) (Consol. 2010) (repealed eff. Jan. 1, 2015). Plaintiff does not—and cannot—claim that any of these exceptions is relevant here.

B. The Financial Crisis, TARP, and the U.S. Treasury Department's Transactions in Citigroup Preferred Shares

During September 2008, U.S. policymakers saw Fannie Mae and Freddie Mac ushered into conservatorship, witnessed the collapse of Lehman Brothers and Washington Mutual, and saw the hasty sale of Merrill Lynch and a distressed Wachovia. Congress responded to the U.S. financial crisis by passing the Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, 122 Stat. 3766 (codified at 12 U.S.C. § 5201 et seq. (2012)), which implemented the Troubled Asset Relief Program ("TARP"), see id. § 5211. Under TARP, the United States Department of the Treasury ("Treasury") was authorized to purchase any financial instrument whose purchase was necessary to promote stability in the financial markets, see id. §§ 5202, 5211, and the Secretary of the Treasury was further authorized "to take such actions as the Secretary deems necessary to carry out the authorities in this chapter," id. 5211(c).

Pursuant to that authority, Treasury purchased an accumulated $45 billion in Citigroup preferred shares in late 2008. See Compl. ¶ 21. After the worst of the financial crisis had passed and Citigroup was in a position to repay the government, Citigroup began to repurchase those shares, acquiring $20 billion of the preferred shares in December 2009. See id. ¶ 27. Treasury converted its remaining $25 billion in Citigroup preferred stock to common stock, and by December 2010 had sold its entire stake in Citigroup. See id. ¶¶ 27–28.

C. Authoritative IRS Guidance on the Treatment of NOLs in the Context of Treasury's Transactions in Citigroup Preferred Shares

The IRS provided contemporaneous, clear and unambiguous guidance on the impact of Treasury's transactions in the shares of U.S. banks on their ability to take NOL deductions under Section 382. In particular, the IRS unequivocally concluded on more than one occasion that the

U.S. Treasury's purchases and sales in connection with TARP would not cause an ownership change under Section 382.

Beginning in October 2008, Treasury issued a series of four guidance notices (the "IRS Notices") regarding the treatment of its investments in Citigroup and other banks under Section 382 of the Internal Revenue Code. The first of these notices was issued on October 14, 2008, shortly after the enactment of EESA and prior to Treasury's first purchase of Citigroup stock under its Capital Purchase Program. See I.R.S. Notice 2008-100, 2008-2 C.B. 1081 ("Notice 2008-100"), Declaration of Edmund Polubinski III ("Polubinski Decl.") Ex. A. Notice 2008-100 announced that the IRS intended to issue regulations providing that purchases of stock and warrants by Treasury pursuant to the Capital Purchase Program, and the later redemption of such stock, would not be treated as causing an ownership change for purposes of Section 382.[5] In addition, the notice provided that, pending the issuance of such regulations, "taxpayers may rely on the rules set forth in this notice." Id.

Notice 2008-100 was amplified and superseded on January 30, 2009 by IRS Notice 2009-14, 2009-7 I.R.B. 516 ("Notice 2009-14"), Polubinski Decl. Ex. B, which was in turn amplified and superseded on April 30, 2009 by IRS Notice 2009-38, 2009-18 I.R.B. 901 ("Notice 2009-38"), Polubinski Decl. Ex. C.[6] Finally, Notice 2009-38 was amplified and superseded on

[5] Notice 2008-100 provided that purchases by Treasury of preferred stock and warrants under the Capital Purchase Program would be treated as purchases of stock described in Section 1504(a)(4) and of options not deemed exercised under Treas. Reg. § 1.382-4(d)(2), respectively, and therefore would not cause ownership changes for purposes of Section 382. I.R.S. Notice 2008-100, 2008-2 C.B. 1081; see 26 U.S.C. § 382(k)(6)(A), (l)(3)(A)(iv). Moreover, for purposes of testing whether a Section 382 ownership change has occurred, stock purchased by Treasury would not be treated as causing Treasury's ownership in the corporation to have increased.

[6] Notice 2009-14 extended the guidance contained in Notice 2008-100 to Treasury purchases made pursuant to four additional programs established under EESA. I.R.S. Notice 2009-14, 2009-7 I.R.B. 516. Notice 2009-38 expanded the treatment to include three more programs and to cover securities acquired by Treasury in exchange for securities originally issued to Treasury under TARP. I.R.S. Notice 2009-38, 2009-18 I.R.B. 901.

December 11, 2009 by IRS Notice 2010-2, 2010-2 I.R.B. 251 ("Notice 2010-2"), Polubinski Decl. Ex. D, which expanded upon the previous three notices by providing that a sale by Treasury to the public of stock purchased under TARP would not trigger a Section 382 ownership change.

Separately, prior to the enactment of EESA, on October 1, 2008, Treasury issued IRS Notice 2008-83, 2008-2 C.B. 905 ("Notice 2008-83"), Polubinski Decl. Ex. E, pursuant to its authority to issue regulations under Section 382, 26 U.S.C. § 382(m). The Complaint incorrectly implies that Notice 2008-83 is relevant for Treasury's purchases or sales of shares in U.S. Banks. See Compl. ¶ 23. Notice 2008-83 did not address Treasury's purchases or sales of shares in U.S. banks at all. Rather, it addressed the application of Section 382 to *different* changes in control, by providing that losses and deductions attributable to loans or bad debts of a bank that would otherwise be allowable following a Section 382 ownership change would not be subject to Section 382 limitations. The notice attracted intense criticism, in part due to the perception that it had been issued to facilitate Wells Fargo's acquisition of Wachovia.[7]

On February 17, 2009, Congress revoked the application of ***only*** Notice 2008-83 to ownership changes occurring after January 16, 2009, with an express finding that the notice was inconsistent with congressional intent in enacting Section 382(m). American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1261(a)(1)–(3), 123 Stat. 115, 342-43 (2009) ("ARRA") (codified in scattered sections of the U.S. Code). Although Notices 2008-100 and 2009-14 had been issued prior to ARRA's enactment, ARRA did not in any way question or

[7] See, e.g., Press Release, Sen. Chuck Grassley, Grassley Seeks Inspector General Review of Treasury Bank Merger Move (Nov. 14, 2008), http://www.finance.senate.gov/newsroom/ranking/release/?id=f9403cb2-0f9e-47f1-9c3e-f1f36c26e6aa; Amit R. Paley, A Quiet Windfall for U.S. Banks, Wash. Post (Nov. 10, 2008), at A1, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/09/AR2008110902155_pf.html.

undermine the guidance contained therein.[8] To the contrary, ARRA implicitly reaffirmed the reliability of those notices, stating that "taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury." Id. § 1261(a)(4). Thus, nothing about ARRA undermined Treasury's prior or future guidance on the applicability of Section 382 to TARP purchases.

New York State has not issued any guidance on Section 382, much less any guidance contrary to that proffered by the IRS. The Complaint identifies no authoritative source that would support a different tax treatment for NOLs in New York than that contemplated by federal tax law.

As set forth in detail in Section III.A below, Citigroup relied on the IRS Notices in carrying forward its NOLs during certain years for federal tax purposes. See Compl. ¶¶ 33–35.[9] Because New York State tax law incorporates the federal regime for calculating NOLs, Citigroup took the same approach for its NOLs on its corresponding state tax returns. See id. ¶ 35.

D. Professor Rasmusen and This Action

Plaintiff began this action in 2013 by filing the Complaint under seal in New York state court pursuant to the New York False Claims Act, N.Y. Fin. Law § 187 et seq. (the "NYFCA").

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[8] The Conference Committee Report on ARRA makes clear that Congress was aware of the existence of the IRS Notices. In describing the provision of ARRA that would repeal Notice 2008-83, the report explicitly cited, without negative comment, Notices 2008-100 and 2009-14 in its explanation of present law under Section 382. H.R. Rep. No. 111-16, at 555, n.55 (2009) (Conf. Rep.).

[9] Although Plaintiff's Complaint does not cite to all four of the IRS Notices, as explained above it is clear on the face of the IRS Notices that each of them supports Citigroup's carrying forward its net operating losses. The Complaint also alleges generally that Citigroup relied in calculating its federal NOL deduction on Notice 2008-83, Compl. ¶¶ 23, 33–35 , but as explained in the text, Notice 2008-83 does not address Treasury's purchases under TARP and has no application to Citigroup's decisions under Section 382 in connection with Treasury's transactions in Citigroup securities.

The complaint asserts a single claim, alleging that Citigroup violated the NYFCA by taking NOL deductions for the 2010 through 2012 tax years. See Compl. ¶¶ 36–39.

Plaintiff is a professor of "business economics and public policy" at Indiana University. Id. ¶ 5. The Complaint does not suggest, nor is there any reason to believe, that Plaintiff possesses or has ever possessed nonpublic information about Citigroup. The Complaint does not allege that Professor Rasmusen ever worked for Citigroup or has ever even spoken with any individual at Citigroup, much less anyone who was familiar with Citigroup's NOL deductions or its participation in TARP. The Complaint does not allege that Professor Rasmusen has ever worked for the IRS or the New York State Department of Taxation and Finance or any other taxing authority and does not, and cannot, allege that he has ever reviewed any non-public documents concerning Citigroup's NOL or tax liability. Indeed, the Complaint does not even allege that Plaintiff has so much as seen Citigroup's federal or state tax returns for the relevant years. To the contrary, Plaintiff appears to have filed this lawsuit based only on information he collected from public sources.

The NYFCA requires that New York's Attorney General be given an opportunity to participate in any action before it is served on the defendant, see NYFCA § 190(2)(b), and further requires that the Attorney General consult with the Commissioner of the Department of Taxation and Finance before intervening in any action based on tax filings (like the case at bar), see id. § 189(4)(b). The Attorney General was notified about this action and declined to participate, in a notice signed by the chief of his office's Taxpayer Protection Bureau. See Notice of Election to Decline Intervention filed by New York State, Polubinski Decl. Ex. F.

The Complaint was unsealed on September 2, 2015, and Plaintiff served the Complaint on the New York Secretary of State on September 3, 2015. Citigroup received a copy of the

Complaint through its agent on September 11, 2015. Citigroup removed the action to this Court on October 2, 2015, see Notice of Removal, ECF No. 1, and now moves to dismiss the Complaint in its entirety.

ARGUMENT

I. The New York State False Claims Act and the Motion to Dismiss Standard

The NYFCA was passed on April 1, 2007, and was amended in 2010 and 2013. Like its federal analogue, it is intended "to create an incentive for civic-minded whistle-blowers, that is, insiders who put their personal employment or other interests at risk in order to vindicate the pecuniary rights" of the government. United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc., 186 F. Supp. 2d 458, 464 (S.D.N.Y.), aff'd, 53 F. App'x 153 (2d Cir. 2002) (internal citations omitted). Thus, the statute provides (as relevant here) that a plaintiff who (1) possesses facts that are publicly undisclosed (or that originated with him) may recover against a defendant who (2) knowingly makes (3) a false claim to the New York State government or a local government. See NYFCA §§ 188, 190(9).

The NYFCA was modeled on the federal False Claims Act, see 31 U.S.C. § 3729 et seq. (the "FCA"), and so closely mirrors the federal statute that New York courts look to federal law when interpreting the NYFCA. See State ex rel. Seiden v. Utica First Ins. Co., 96 A.D.3d 67, 71 (1st Dep't 2012) ("[I]t is appropriate to look toward federal law when interpreting the New York act."); People ex rel. Schneiderman v. Bank of New York Mellon Corp., No. 114735/09(MSF), 2013 WL 4516209, at *26–29 (Sup. Ct. N.Y. Cty. Aug. 5, 2013) (citing FCA precedents from numerous United States courts of appeals to interpret the NYFCA).[10]

[10] In particular, the FCA and the NYFCA:

"To survive a motion to dismiss, a complaint must be 'plausible on its face,' such that the court can 'draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Chapman v. Office of Children & Family Servs. of New York, 423 F. App'x 104, 105 (2d Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009)) (affirming dismissal of FCA suit where complaint was facially implausible). And because the FCA is "self-evident[ly] . . . an antifraud statute," courts "routinely require FCA claims to comply with Rule 9(b)." Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476–77 (2d Cir. 1995). The same is true of suits in federal court under the NYFCA.[11] See, e.g., United States v. N.Y. Soc'y for the Relief of the Ruptured & Crippled, Maintaining the Hosp. for Special Surgery, No. 07-Civ-292(PKC), 2014 WL 3905742, at *8–11 (S.D.N.Y. Aug. 7, 2014) (dismissing claims under NYFCA pursuant to Rule 9(b)); United States ex rel. Pervez v. Beth Israel Med. Ctr., 736 F. Supp. 2d 804, 816 (S.D.N.Y. 2010) (Kaplan, J.) (same). Thus, the plaintiff must "state with particularity the circumstances constituting fraud or mistake," Fed R. Civ. P. 9(b), including "facts as to time, place, and substance of the defendant's alleged fraud, specifically the details of the defendant['s] allegedly fraudulent acts, when they occurred, and who engaged in them," United States v.

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(1) contain nearly identical scienter standards, compare FCA 3729(a)(1), with NYFCA 188(3), with the difference that the NYFCA *expressly excludes* "acts occurring by mistake or as a result of mere negligence," NYFCA § 188(3)(b);

(2) define "claim" nearly identically, compare FCA § 3729(b)(2), with NYFCA § 188(1) (the only material difference is that "federal government" is replaced with "state or local government"); and

(3) contain nearly identical bars on publicly disclosed claims, compare FCA § 3730(e)(4) (for statements in the news media, federal hearings, and federal reports), with NYFCA §§ 190(9)(b) and 188(7) (same but applying to local and state governments).

[11] Pleading standards in this federal action are controlled by the Federal Rules of Civil Procedure, despite the origins of the action in state court. See Burlington N. R.R. v. Woods, 480 U.S. 1, 4–5, 107 S. Ct. 967, 969–70 (1987); Hanna v. Plumer, 380 U.S. 460, 471–74, 85 S. Ct. 1136, 1144–45 (1965).

Empire Educ. Corp., 959 F. Supp. 2d 248, 254 (N.D.N.Y. 2013) (alteration in original) (citations and internal quotation marks omitted).[12]

As explained below, Plaintiff's claim here fails for three independent reasons: all of the facts in Plaintiff's Complaint have already been publicly disclosed; Citigroup complied with tax law and therefore made no claim that was false or fraudulent; and Citigroup had neither actual knowledge nor reckless disregard of any such supposed falsity.

II. Plaintiff's Suit Is Barred by the Public Disclosure Rule

Plaintiff's suit is barred because all of the material in the Complaint has already been publicly disclosed.

The NYFCA provides that the court "shall" dismiss an action "if substantially the same allegations or transactions as alleged in the action were publicly disclosed" in one of three places:

> (i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party;
>
> (ii) in a federal, New York state, or New York local government report, audit, or investigation that is made on the public record or disseminated broadly to the general public . . .; [or]
>
> (iii) in the news media . . . ."

N.Y. Fin. Law § 190(9)(b). The federal FCA contains an analogous provision. See 31 U.S.C. § 3730(e)(4).

This jurisdictional bar was created because "[w]hen the material elements of a fraud are already in the public domain, the government has no need for a relator to bring the matter to its

[12] Insofar as any aspect of the NYFCA's pleading standard is different in state court, cf. NYFCA § 192(1-a) (discussing the specificity with which a plaintiff need identify specific false statements under CPLR 3016), Rule 9(b) controls. Where state law offers pleading standards or other procedural rules that are in conflict with federal provisions, the federal rule controls. See Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 116 S.Ct. 2211, 2219 n.7 (1996).

attention." State ex rel. Jamaica Hosp. Med. Ctr., Inc. v. UnitedHealth Group, Inc., 84 A.D. 3d 442, 443 (1st Dep't 2011). As the Second Circuit has observed, "[b]ecause *qui tam* plaintiffs [ ] are entitled to a portion of the proceeds of successful suits, there is the potential for parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud. To discourage such chicanery, Congress carefully crafted a jurisdictional bar to *qui tam* claims that are based on publicly disclosed information." Doe, 960 F.2d at 319. Plaintiff's suit is "a classic example of the opportunistic litigation that the public disclosure bar is designed to discourage." Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 413, 131 S. Ct. 1885, 1894 (2011) (internal quotation marks omitted). Because the Complaint contains no novel material, it must be dismissed.

A. All of the Matters at Issue in Plaintiff's Complaint Were the Subject of Extensive Public Disclosure and Discussion by Others Before He Filed Suit

Plaintiff has not alleged that he has any unique knowledge relating to Citigroup's tax filings, and does not allege any facts from which one could plausibly conclude that he possesses information not "equally available to strangers to the [alleged] fraud transaction had they chosen to look for it." United States ex rel. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (internal quotation marks omitted). Nor could he so allege. Plaintiff filed suit on January 24, 2013. By 2010—three years prior to Plaintiff's suit—persons other than Plaintiff had already exhaustively discussed each of the Complaint's allegations in public fora, including articles in the general and scholarly[13] press, the report of a Congressional oversight panel, and a federal statute.[14]

First, it was well known that the IRS Notices provided that Treasury's transactions in Citigroup stock would not trigger Section 382's restriction on carrying forward NOLs. See Compl. ¶¶ 23, 25–29. That fact had already been reported in two prior sources (among many others): the January 2010 report of a congressional oversight panel, and Citigroup's own Form 10-K for 2010, filed in February 2011. In its report, the Congressional Oversight Panel charged with overseeing TARP extensively discussed the mechanics of the IRS Notices, describing in detail their sequence, operation, and likely application, and specifically addressing their likely effect on the tax treatment of Treasury's planned sale of Citigroup shares. Specifically, the panel reported, in relevant part, that:

> The Internal Revenue Service (IRS) issued several notices (the EESA Notices) containing guidance about the application of section 382 to institutions engaged in transactions with the Treasury Department under EESA. . . . The first three EESA Notices . . . allowed Treasury to take, and the institutions to redeem eventually, stock and warrants without causing a change in ownership under section 382. . . . The fourth EESA Notice . . . expands the prior guidance by stating that a sale by the Treasury Department of stock it had received under any of the EESA programs to a 'public group,' that is, to a group of less than five percent shareholders, would not trigger an ownership change. . . . ***Its most immediate***

[13] "[T]he ordinary meaning of the statutory term 'news media,' encompasses the publication of information in scholarly or scientific periodicals" for purposes of the FCA's public-disclosure bar. See Alcohol Found., 186 F. Supp. 2d at 461.

[14] The court may take judicial notice pursuant to Federal Rule of Evidence 201(b) of the fact that newspaper and scholarly articles have been published. *See* In re Bank of Am. Corp. Sec., Derivative, & Empl. Ret. Income Sec. Act (ERISA) Litig., 757 F. Supp. 2d 260, 302 (S.D.N.Y. 2010) ("On a motion to dismiss, a court may take judicial notice of the publication of a newspaper article . . . provided that consideration is limited to the fact of publication and not the truth of the article's content"); see also Bais Yaakov of Spring Valley v. Alloy, Inc., 936 F. Supp. 2d 272, 278 (S.D.N.Y. 2013) (taking judicial notice of a "journal article… for the fact of its publication, but not for the truth of the statements contained therein"). The court may also take judicial notice of government reports. See B.T. Produce Co. v. Robert A. Johnson Sales, Inc., 354 F. Supp. 2d 284, 285 n.2 (S.D.N.Y. 2004) ("Courts have frequently taken judicial notice of official government reports as being 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'" under Fed. R. Evid. 201(b)).

> ***application and likely most significant application [] is to the planned sale of the shares of Citigroup that Treasury holds.***

Congressional Oversight Panel, 111th Cong., January Oversight Report, Exiting Tarp and Unwinding its Impact on the Financial Markets, 12–14 (2010) ("Oversight Report") (emphasis added), Polubinski Decl. Ex. G. In its Form 10-K, Citigroup expressly reported its reliance on Notice 2010-2, indicating that "[u]nder IRS Notice 2010-2, Citigroup did not experience an ownership change within the meaning of Section 382 as a result of the sales of its common stock held by the U.S. Treasury." See Citigroup Inc. Annual Report (2010 Form 10-K) (Feb. 25, 2011) p. 77, Polubinski Decl. Ex. H.[15]

Second, Plaintiff's allegation that U.S. taxpayers "will" suffer a net loss as a result of the IRS Notices, see Compl. ¶ 30, was previously asserted in at least three publicly available sources. A December 2009 article in the Washington Post, considering the impact of Notice 2010-2, noted that "[w]hile the Obama administration has said taxpayers are likely to profit from the sale of the Citigroup shares, accounting experts said the lost tax revenue could easily outstrip those profits." Binyamin Appelbaum, U.S. Gave Up Billions in Tax Money in Deal for Citigroup's Bailout Repayment, Wash. Post (Dec. 16, 2009), at A1, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121504534.html. The TARP oversight panel, referred to above, cited this article and observed that "[t]he December Notice has attracted criticism as an additional subsidy to Citigroup and a loss to the taxpayers." Oversight Report at 15. And a law student contended in a 2010 student note that "although Congress battled over the decision to spend $700 billion to bail out troubled banks, the

[15] "[A] district court may take judicial notice of the contents of relevant public disclosure documents required to be filed with the SEC as facts 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991).

true bailout cost was $700 billion plus corporate taxes lost by Notice 2008-83." Sunil Shenoi, Undoing Undue Favors: Providing Competitors with Standing to Challenge Favorable IRS Actions, 43 U. Mich. J. L. Reform 531, 537 (2010).

Third, Plaintiff's allegation that Citigroup's stock price in 2010 was higher as a result of the IRS Notices than it would have otherwise been, see Compl. ¶ 31, was first made no later than December 2009 in the Washington Post. The Post quoted a congressional aide to the effect that the IRS Notices were "'manipulating tax rules so that the market value of the stock is higher than it would be under current law. . . . It inflates the returns that they're showing from TARP and that looks good for them.'" Binyamin Appelbaum, U.S. Gave Up Billions in Tax Money in Deal for Citigroup's Bailout Repayment, Wash. Post (Dec. 16, 2009), at A1. Moreover, the congressional oversight panel observed in its January 2010 report that "[b]y eliminating the section 382 limitations, the Treasury Department avoided . . . reducing the value of its shares (and the capital held by Citigroup)." Oversight Report at 15.

Fourth, Plaintiff's assertion that the IRS Notice 2008-83 was contrary to the "language and purpose" of Internal Revenue Code § 382 and constituted "arbitrary and capricious action by Treasury," see Compl. ¶ 32, is no more original than his other allegations. At least three publicly available sources predating the Complaint have made similar allegations regarding Notice 2008-83 (upon which Citigroup did not, in fact, rely).[16] The earliest of these was a November 2008 Washington Post article quoting a tax professor, George K. Yin: "'Did the Treasury Department have the authority to do this? I think almost every tax expert would agree that the answer is no.'" Amit R. Paley, A Quiet Windfall for U.S. Banks, Wash. Post (Nov. 10, 2008), at A1.

[16] As set forth above, Citigroup did not rely on Notice 2008-83, the earliest of the IRS Notices challenged in Plaintiff's Complaint, see Compl. ¶¶ 23 & 35, because it did not address Treasury's TARP-related transactions in the securities of U.S. banks.

Congress also said as much when it abrogated Notice 2008-83 through ARRA in February 2009, calling Treasury's authority to issue the notice "doubtful." See ARRA § 1261(a)(1)–(4). The same accusation appeared in the student note cited above, which argued that Notice 2008-83 "departed from the history and legislative intent" of Section 382, contravened the statute, and exceeded Treasury's congressional grant of authority. Shenoi, Undoing Undue Favors at 542–43.

Fifth and finally, Plaintiff alleges that the IRS Notices were not "adopted or incorporated into the New York Tax Law." Compl. ¶ 34. Before the Complaint was filed, the student note cited above had argued that Treasury's use of the notice mechanism denied state governments "notice and time to decouple their own laws [from the federal tax code] before losing corporate tax revenue." Shenoi, Undoing Undue Favors at 540.

B. Plaintiff Is Not an "Original Source" of the Allegations

The NYFCA's bar on publicly disclosed allegations contains an exception where the plaintiff is the "original source" of the allegation. See NYFCA § 190(9)(b). Plaintiff is not an original source and does not fit within this exception.

The NYFCA defines an "original source" as one who:

> (a) prior to public disclosure . . . voluntarily disclosed to the state or a local government the information on which allegations or transactions in the cause of action are based; or
>
> (b) . . . has *knowledge* that is *independent of* and *materially adds* to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state or a local government before or simultaneous with filing an action under this article.

NYFCA § 188(7) (emphasis added).

This exception was created for "the most deserving *qui tam* plaintiffs: those whistle-blowers who qualify as original sources," Graham Cty. Soil & Water Conservation Dist. v.

United States ex rel. Wilson, 559 U.S. 280, 301, 130 S. Ct. 1396, 1410 (2010), because they are "actually involved in the process of unearthing important information about a false or fraudulent claim," United States ex rel Ping Chen v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 300 (S.D.N.Y. 2013) (internal quotations marks omitted). This does not describe Plaintiff, whose assemblage of publicly recorded information makes him the opposite of an "original source" under the law.

Plaintiff satisfies neither of the statutory tests for "original source" status. First, Plaintiff has not alleged that he disclosed the factual basis for this action to any government official prior to the public disclosures discussed above—nor could he have done so, for he had no access to it and only learned of it through public sources. "This basis for original source status is simply not met. There are no allegations in the Complaint that Plaintiff acted to alert government officials as to the alleged fraud" prior to public disclosure. Ping Chen, 966 F. Supp. 2d at 300.

Second, Plaintiff has not alleged that he has knowledge "independent of and materially add[ing] to the publicly disclosed allegations or transactions." NYFCA § 188(7). Nor could he. Plaintiff's Complaint contains no information that is either independent of or materially additive to the public record, much less both at once (as required under the NYFCA). The Complaint fails to meet the independent-knowledge requirement because it neither claims nor demonstrates any knowledge of the underlying facts that is independent of public disclosures, examples of which are discussed above. And Plaintiff's allegations do nothing to materially add to the "already robust universe of publicly-available information" about the underlying events. Ping Chen, 966 F. Supp. 2d at 300. Instead, "the Complaint's rather bare bones allegations add little, and certainly add nothing material, to the previously-disclosed allegations or transactions. Indeed, the Complaint contains very little factual content at all." Id.

Nor could Plaintiff cure this fatal deficiency even if afforded an opportunity to amend his defective complaint. In his own recently published discussion of the Complaint in the form of an "op-ed" on TaxProf Blog, Plaintiff concedes that his allegations are "based on" what he refers to as "specialized legal analysis *rather than private facts*." Rasmusen: How I Came to Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower, TaxProf Blog (Oct. 21, 2015), http://taxprof.typepad.com/taxprof_blog/2015/10/rasmusen-.html (emphasis added) (last visited Dec. 7, 2015), Polubinski Decl. Ex. I. Of course, "private facts" are precisely what the NYFCA demands, in the form of information that is publicly undisclosed or that originates with Plaintiff. Because Plaintiff admits that his Complaint lacks any such information, it must be dismissed.[17]

To the extent Plaintiff's claim is founded on his belief that his "specialized legal analysis" amounts to independent and materially additive knowledge, the argument fails for multiple reasons. Most importantly, courts have routinely dismissed cases brought by parties who can offer no undisclosed facts about an alleged fraud but claim expert insight into facts that were publicly known. For example, in Woods v. Empire Blue Cross & Blue Shield, the court rejected such an argument offered by a supposed expert on the ambulance industry who brought a qui tam suit based on facts in the public domain. The court held in Woods that "[e]ven assuming that Woods is some kind of expert on the ambulance industry and that his expertise somehow enabled him to understand and explain the alleged fraud, he is simply not an 'original source' within the plain meaning of the statute." No. 99 Civ. 4968(OC), 2002 WL 1905899, at

[17] This Court may take judicial notice of Plaintiff's admission pursuant to Fed. R. Evid. 201(b). See Doron Precision Sys., Inc. v. FAAC, Inc., 423 F. Supp. 2d 173, 178–79 & n.8 (S.D.N.Y. 2006) (taking judicial notice of information on plaintiff's website that contradicted allegation in complaint); Biro v. Conde Nast, 963 F. Supp. 2d 255, 269 (S.D.N.Y. 2013) (consulting publication dates on blog posts to determine that claim was untimely); Arista Records LLC v. Lime Grp. LLC, 532 F. Supp. 2d 556, 571 & n.20 (S.D.N.Y. 2007) (discounting plaintiff's claim to have approached Recording Industry Association of America ("RIAA") for music licenses, in light of judicially noticed statement on RIAA's website that licenses "'are granted by *individual* copyright owners,' not the RIAA" (emphasis in original)).

*8 (S.D.N.Y. Aug. 19, 2002); see also Kreindler, 985 F.2d at 1159 (rejecting plaintiff's claim that he was an "original source" where the investigation was predicated on publicly available material because if "[plaintiff's] background knowledge were enough to qualify the relator as an 'original source,' then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase") (internal quotation marks omitted); Feldman v. Van Gorp, 674 F. Supp. 2d 475, 482 (S.D.N.Y. 2009) ("Although a relator need not possess all relevant information in order to have 'independent' knowledge, he or she must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.") (internal citations and quotation marks omitted).

Moreover, even if legal theories could be treated as "knowledge" for purposes of the NYFCA, Plaintiff's theories would still be neither independent of nor materially additive to what is already in the public domain. As discussed supra in Section II.A, each of the unsubstantiated conclusions of law in the Complaint was fleshed out by others in detail prior to Plaintiff's filing. Indeed, as noted above, the very theory underlying Plaintiff's suit—the misguided notion that tax obligations explicitly waived by Treasury might be revived through a qui tam suit—was raised by a law student in a note published in 2010. See Shenoi, Undoing Undue Favors, 43 U. Mich. J. L. Reform at 548 n.103.

As such, Plaintiff cannot be considered an "original source" within the meaning of Section 188(7)(b) and his claim is barred.

III. Plaintiff Fails To Plausibly Allege the Making of a False Or Fraudulent Claim

Under the NYFCA and its federal analogue, Plaintiff must allege that Citigroup made a "false or fraudulent" claim. NYFCA § 188(2). But Plaintiff's allegations do not suggest that any claim by Citigroup was false or fraudulent, much less with the specificity required by Rule 9(b), and in fact demonstrate just the opposite.

Courts have recognized two varieties of false statements under the NYFCA and FCA: (i) a factually false certification, in which the defendant provides "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided," and (ii) a legally false certification, meaning "a false representation of compliance"—whether express or implicit—"with a federal statute or regulation or a prescribed contractual term." Mikes v. Straus, 274 F.3d 687, 696–97 (2d Cir. 2001); see Pervez, 736 F. Supp. 2d at 816 (applying same standard to NYFCA claim under §189(1)(g)). Plaintiff alleges neither here.

Plaintiff does not claim that Citigroup made a factually false certification because the Complaint does not allege that Citigroup provided goods or services to the State of New York or that Citigroup claimed to have done so or sought reimbursement. Plaintiff apparently seeks to allege a legally false certification, but his allegations in that respect fail because, as set forth below, the Complaint itself establishes the accuracy of Citigroup's representation that its tax returns complied with the law and fails to identify any other representation—much less a false and fraudulent representation—made by Citigroup to the State of New York.

A. Citigroup Complied with New York State Tax Law

Plaintiff's own allegations establish that Citigroup complied with all applicable provisions of law. See Compl. ¶¶ 16–35.

First, as Plaintiff concedes, see id. ¶¶ 17–18, and as discussed above, see supra p. 4-5, New York's tax law at the time of the events in question incorporated the definition of income and the calculation of net operating loss specified by federal law.

Second, as Plaintiff further concedes, see Compl. ¶¶ 23–26 & 35, Citigroup's federal NOL was calculated accurately under federal tax law. Section 172 of the Internal Revenue Code, incorporated explicitly in the New York Tax Law as discussed supra, provides a cross-reference to the rules in Section 382 that limit the NOL deduction in the event that the taxpayer experiences an "ownership change." See 26 U.S.C. § 172(i); 26 U.S.C. § 382.

As discussed above, the IRS Notices provided that Treasury's acquisition and sale of Citigroup stock did not cause an ownership change within the meaning of Section 382. See Notice 2009-38 § III; Notice 2010-2 § III. As Plaintiff concedes, Citigroup's tax filings reflected its reliance on this guidance. See Compl. ¶ 35; see also Citigroup Inc., Annual Report at 57 (Form 10-K) (Feb. 25, 2011) ("Under IRS Notice 2010-2, Citigroup did not experience an ownership change within the meaning of Section 382 as a result of the sales of its common stock held by the U.S. Treasury.").

In complying with the IRS Notices, Citigroup adhered to authoritative interpretations of the Internal Revenue Code, which explicitly invited taxpayer reliance. See Notice 2008-100 § IV (providing that "[t]axpayers may rely" on notice); Notice 2009-38 § IV ("Taxpayers may rely on the rules described in Section III of this notice."); Notice 2010-2 § IV (same). Indeed, Citigroup was not only permitted to follow such guidance in calculating its federal NOL—and thus, under New York law, its state NOL—it was expected to do so.

Other IRS and Treasury materials make clear that the IRS treats notices as authoritative statements of law. The IRS's Internal Revenue Manual provides that notices may "contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law," and "can be used to relate what regulations will say in situations in which the regulations may not be published in the immediate future." IRM 32.2.2.3.3 (Aug. 11, 2004).

Under Treasury regulations, notices constitute "substantial authority" under Section 6662(a) of the Internal Revenue Code, meaning that reliance on notices is a defense against penalties for substantial underpayment of taxes. See Treas. Reg. § 1.6662-4(d)(3)(iii). Conversely, taxpayers may under some circumstances incur penalties if they underpay taxes in disregard of an applicable notice. See Treas. Reg. §§ 1.6662-3(a), (b)(2) (imposing 20% penalty for underpayment in disregard of notice, unless taxpayer's position has reasonable possibility of being sustained on merits, among other exceptions).

Moreover, such notices are published in the Internal Revenue Bulletin, which is "the authoritative instrument of the Commissioner of Internal Revenue" for publishing "all substantive rulings necessary to promote a uniform application of the tax laws." 2010-2 I.R.B., Introduction. As the then-Chief Counsel of the IRS wrote in 2008, taxpayers may generally rely on notices "to the same extent as revenue rulings and revenue procedures. If on point, these pronouncements bind the Service in its administrative actions and represent statements of position on which taxpayers may rely. . . . [N]otices can provide substantial authority sufficient to relieve taxpayers from the negligence and substantial understatement penalties and, consequently, may be relevant to whether certain penalty provisions apply." Donald L. Korb, The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within, 46 Duq. L. Rev. 323, 341 (2008).[18]

Plaintiff effectively concedes that Citigroup calculated its NOL for New York State purposes in compliance with duly incorporated federal tax law, including applicable guidance.

[18] Indeed, had Citigroup failed to take the NOL deductions that the IRS Notices made possible, it might well have drawn a shareholder derivative suit. See Hawkins v. MedApproach Holdings, Inc., No. 13 Civ. 05434(ALC), 2014 WL 3926811, at *10 (S.D.N.Y. Aug. 11, 2014) ("[A] failure to minimize taxes could be a breach of fiduciary duty under certain circumstances." (internal quotation marks omitted)).

His sole allegation in this respect is a conclusory assertion that New York's tax law did not "adopt[] or incorporate[]" the IRS Notices. Compl. ¶ 34. But Plaintiff presents no authority or facts in support of this position—because there are none. In fact, New York has not enacted any statute providing—or issued any guidance indicating—that IRS notices are not incorporated into New York state law. Nor has any court so found. To the contrary, courts and tax authorities in New York have long endorsed the proposition that New York tax law looks to the federal tax regime for the computation of entire net income and net operating losses. See People ex rel. Conway Co. v. Lynch, 258 N.Y. 245, 251 (1932) ("Gains reflected in the gross income must be calculated in the manner authorized by the United States statutes, and losses reflected in the 'net income' must be similarly calculated."); accord Pierce-Arrow, 270 A.D. at 291; see also Office of Tax Policy Analysis Technical Servs. Div., New York State Dep't of Taxation & Fin., Advisory Op. No. TSB-A-07(2)C (2007), http://www.tax.ny.gov/pdf/advisory_opinions/corporation/a07_2c.pdf (applying Treasury regulations and Section 382 in determining the petitioner's NOL deduction for purposes of New York state corporate franchise tax).

B. Plaintiff's Attack on the Validity of the Revenue Notices Is Irrelevant

Having conceded that Citigroup fully complied with existing law, Plaintiff focuses his attack on the validity of that law itself, asserting that the IRS Notices were "improperly promulgated," see Compl. ¶¶ 32–33, and that Citigroup was therefore not "entitled to rely" on them, id.

These allegations are entirely unsupported in the Complaint and would fail if considered on their merits. However, this Court need not reach the merits of Plaintiff's allegations regarding the promulgation of the IRS Notices, because they have no relevance to the claim at issue here. In order to survive a motion to dismiss his claim under the NYFCA, Plaintiff must plausibly allege that Citigroup falsely asserted its compliance with existing law as enacted and promulgated. Cf. Visiting Nurse Ass'n of Brooklyn v. Thompson, 378 F. Supp. 2d 75, 95–96 (E.D.N.Y. 2004). Plaintiff's argument that existing law is somehow improper or invalidly promulgated has no bearing on the question of whether Citigroup knowingly flouted that law. Under the NYFCA—as under the FCA—this Court is asked to determine whether Citigroup engaged in *fraud*, not to evaluate the correctness of the government's interpretation of the law. See Nextwave Telecom, 337 B.R. at 487–88. Accordingly, this Court should reject Plaintiff's misguided attempt to use a meritless fraud suit as a vehicle for his collateral attack on government policymaking.

Both New York and federal courts have made clear that the truth or falsity of a claim for purposes of the NYFCA and the FCA is to be judged against the law as promulgated, not a party's idiosyncratic interpretation of the law. Indeed, the New York Court of Appeals recently confirmed the primacy of agency guidance over individual interpretations of law under the NYFCA. In People v. Sprint Nextel Corp., No. 127, 2015 WL 6128709 (N.Y. Oct. 20, 2015),[19] the Court affirmed the denial of Sprint's motion to dismiss a NYFCA suit alleging that Sprint had knowingly under-collected New York State sales taxes on certain of its services. The Court observed that Sprint's practices were contrary to a Tax Department guidance memorandum, see id. at 6, and that Sprint had also allegedly "disregarded the statements of a Tax Department field auditor and enforcement official" who advised Sprint that its practices were illegal, id. at 6–7. The Court rejected Sprint's argument that its tax treatment was supported by a "reasonable

[19] Because Westlaw has not yet introduced page numbers into the electronic version of this opinion, cites herein are to the page numbers in the slip opinion.

interpretation of the tax law," holding that in light of the "agency guidance" that was inconsistent with Sprint's position, among other factors, New York had stated a claim under the NYFCA. Id. at 13–14.

The holding of the Court of Appeals in Sprint directly negates Plaintiff's primary contention in this suit. Plaintiff concededly asks this Court to disregard official agency interpretations of the tax laws; to make Plaintiff's own interpretation—unsanctioned by any agency—the standard for judging whether Citigroup broke those laws; and to hold Citigroup liable for *fraud* because it did not follow Plaintiff's preferred approach. Sprint rejects Plaintiff's position, demonstrating that taxpayers depart from agency guidance at their peril and are to be penalized—not rewarded—under the NYFCA for pursuing unsanctioned interpretations of law in defiance of official guidance.

Other courts have been equally clear in rejecting the attempts of qui tam plaintiffs to hold defendants liable on the basis of the plaintiffs' own legal interpretations, particularly where the government has already rejected those interpretations. For example, in Nextwave Telecom, the plaintiff asserted that the defendant (which had been involved in separate litigation against the United States government) had defrauded the government by failing to inform the government of a statute which the plaintiff believed helpful to the government's case. The court rejected this assertion as "patently absurd," pointing out that (1) the government is assumed to be familiar with the laws that it enforces, and (2) the government had, in any event, been advised of the statute and chosen not to invoke it as a defense. See Nextwave Telecom, 337 B.R. at 487–88.

Similarly, Plaintiff here seeks to hold Citigroup liable under the NYFCA for failing to pursue, in its dealings with the government, an interpretation of law that the government itself was aware of and had explicitly rejected, both in published guidance (in the case of the federal government) and when it declined Plaintiff's invitation to join this action (in the case of the state government).[20] Plaintiff's claim, like that in Nextwave, fails to vindicate the government's interests and is therefore "wholly inconsistent with the purpose of the FCA, namely to deter fraud and recover treasury funds lost to fraud." Id. at 487; see New York Sponsors Mem. re A-11568, 2010 A.B. 11568 (N.Y. Assembly Oct. 29, 2010) (discussing purpose of NYFCA), Polubinski Decl. Ex. H.

Other cases decided under the FCA have similarly made clear that promulgated law must prevail over idiosyncratic theories about a provision's validity. See Visiting Nurse Ass'n, 378 F. Supp. 2d at 95–96 (granting summary judgment for government under the FCA and dismissing as "chutzpah of the highest order" cross-defendants' argument that they disregarded regulation in the belief that it was invalidly promulgated under the Administrative Procedure Act); United States ex rel Grupp. v. DHL Express (USA) Inc., 47 F. Supp. 3d 171, 178 (W.D.N.Y. 2014), aff'd sub nom. U.S. ex rel. Grupp v. DHL Worldwide Exp., Inc., 604 F. App'x 40 (2d Cir. 2015) ("Imprecise statements or differences in interpretation growing out of a disputed legal question are [] not false under the FCA" (internal citations and quotation marks omitted)); Lamers v. City of Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999) ("[Plaintiff], it seems, wants to use the FCA to preempt the [Federal Transit Administration's] decision not to pursue regulatory penalties against the City. But the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."); cf. United States v. McCombs, 30 F.3d 310, 318 (2d Cir. 1994) ("In general, a government tax assessment is entitled to a presumption of correctness."). The same principle should govern here.

[20] See Notice 2010-2 § III.

C. Citigroup Did Not Falsely Certify Its Compliance with Applicable Law

Because Plaintiff does not plausibly allege that Citigroup failed to comply with the law, it follows that Citigroup did not falsely *certify* compliance with the law. As a court in this district recently noted, "it is not appropriate to hold [the defendant] liable for submitting a 'false claim' when it complied with all applicable regulations and therefore did absolutely nothing wrong." United States ex rel Doe v. Taconic Hills Cent. Sch. Dist., 8 F. Supp. 3d 339, 347 (S.D.N.Y. 2014); see also United States ex rel. Nguyen v. City of Cleveland, Ohio, No. 01-Civ-208(KO), 2005 WL 2416925, at *12 (N.D. Ohio Sept. 30, 2005) ("[Defendants] simply cannot be deemed to have committed fraud when their compliance is measured under emission factors published by the very federal agency they are accused of deceiving."); United States v. Southland Mgmt. Corp., 326 F.3d 669, 672 (5th Cir. 2003) (affirming grant of summary judgment for defendants because their claims sought "money to which [defendants] are entitled" and therefore were not false). Plaintiff's concession that Citigroup complied with applicable law in preparing its tax returns is therefore fatal to his claim that Citigroup falsely certified compliance with New York State tax law.

IV. Plaintiff Fails to Plausibly Allege Scienter

Even if Plaintiff had alleged that Citigroup made a false statement in connection with its New York taxes, the Complaint would nonetheless fail to state a claim for fraud under the NYFCA due to Plaintiff's failure to allege that Citigroup had the requisite state of mind. As the New York Court of Appeals recently noted: "The FCA is certainly not to be applied in every case where taxes were not paid." Sprint, 2015 WL 6128709, at 14. In order to state a claim under either the FCA or the NYFCA, Plaintiff must plausibly allege that Citigroup "knowingly" made a false claim. The New York and federal statutes each define "knowingly" to require actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information. See NYFCA § 188(3)(a); FCA § 3729(b)(1). Moreover, the NYFCA—pursuant to which Plaintiff brings its claim—expressly excludes any "acts occurring by mistake or as a result of mere negligence." NYFCA § 188(3)(b).

Under Rule 9(b), in order to establish this element a plaintiff must "plead the factual basis which gives rise to a strong inference of fraudulent intent." Wood ex rel. United States v. Applied Research Assocs., 328 F. App'x 744, 747 (2d Cir. 2009) (internal quotation marks omitted); see Grupp, 47 F. Supp. 3d at 177. "Facts that are merely as consistent with fraudulent intent as they are with its absence are insufficient." Id. While both the FCA and the NYFCA provide that "no proof of specific intent to defraud" is required in order to allege knowledge on the part of a defendant, see FCA § 3729(b)(1)(B); NYFCA § 188(3)(b), this provision does not relieve Plaintiff of Rule 9(b)'s pleading requirements as to scienter. See Wood, 328 F. App'x at 747; Grupp, 47 F. Supp. 3d at 177.

Plaintiff's Complaint here falls far short of the requisite showing. As discussed above, the Complaint's core allegations are that Citigroup prepared its taxes in compliance with authoritative federal tax guidance, see Compl. ¶ 25–26 & 35, as incorporated in New York statutory law, see id. ¶¶ 17–18. Plaintiff fails to allege any fact that suggests, or even raises the possibility, that any knowledge of falsehood accompanied Citigroup's certification of compliance on its tax returns. Rather, the Complaint's own allegations demonstrate that Citigroup proceeded in well-justified good faith, believing (correctly) that it had complied with applicable law.

In this respect, Plaintiff's allegations resemble those rejected by this Court in its dismissal of claims under the state and federal False Claims Acts. See Pervez, 736 F. Supp. 2d 804

(Kaplan, J.). In Pervez, the plaintiff asserted that the accounting firm Ernst & Young ("E & Y") had knowingly assisted a client, Beth Israel Medical Center ("BIMC") in committing Medicaid fraud by auditing, certifying, and providing opinion letters in connection with Medicaid cost reports, known as ICRs, that BIMC submitted to the government. In an attempt to plead scienter, the plaintiff alleged that "E & Y either must have intentionally assisted BIMC in its fraudulent concealment or it must not have done the audits as claimed because if it had done the audits it necessarily would have detected the falsity of the ICRs." Id. at 814. This Court rejected that "sweeping allegation" as "entirely unfounded," id., and dismissed the complaint because the plaintiff had not alleged any facts giving rise to an inference of scienter. Dismissal was proper, this Court explained, because the plaintiff did:

> not identify any auditing procedures that E & Y should have employed but did not employ. Nor d[id] he provide any reason for inferring that E & Y deliberately chose not to perform the audits as certified or to perform them inadequately. . . . He d[id] not [] point to any facts indicating how or why an audit performed in conformity with professional guidelines necessarily would have uncovered the falsehoods allegedly contained in the ICRs. Hence, the facts alleged in the complaint simply d[id] not make out a plausible allegation of knowledge on any theory—actual, reckless, or deliberate ignorance.

Id.

Plaintiff's Complaint here suffers the same infirmities as that in Pervez, but more acutely. The plaintiff in Pervez had plausibly alleged that BIMC's ICRs themselves were false, see id. at 812, but he failed to raise the inference that E & Y therefore had the necessary scienter. By contrast, Plaintiff here cannot even identify a claim that was false, much less allege facts making it more likely than not that Citigroup knew and acted in disregard of any supposed falsity.

As noted above, Plaintiff's allegation that the IRS Notices were improperly promulgated does nothing to rescue his claim. As numerous courts have recognized, a plaintiff does not plausibly allege scienter merely by alleging that defendants violated the law as that plaintiff construes it. Indeed, the Second Circuit has held that even where a defendants' compliance "may be debatable on the face of [its] submissions to the federal government," a plaintiff cannot survive a motion to dismiss without additional allegations to establish a "plausible allegation of scienter." Chapman, 423 F. App'x at 105; see also Kirk, 2015 WL 5296714, at *7 ("[A]s the FCA is a fraud prevention statute, violations of agency regulations are not fraud unless the violator knowingly lies to the government about them" (alterations and internal quotation marks omitted)); Nextwave, 337 B.R. at 487 ("[U]nresolved disputes about the proper interpretation of a statute or regulation should not lead to suits under the FCA" (internal quotation marks omitted)); Lamers, 168 F.3d at 1020 ("[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations.").

Nor can Plaintiff buttress his inadequate factual allegations with the conclusory statement that Citigroup "knowingly prepared false State tax returns." Compl. ¶ 37. Such "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," are entitled to no weight. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949; see also Pervez, 736 F. Supp. 2d at 810–11 (emphasizing that "speculation and conclusory allegations" do not give rise to required inference of scienter).

The Complaint's failure to allege that Citigroup acted with the requisite scienter is fatal to Plaintiff's claim here and independently requires dismissal.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed in its entirety.

Dated: New York, New York
December 7, 2015

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