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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

Defendant Citigroup[1] respectfully submits this reply in further support of its motion to dismiss pursuant to Rules 8(a), 9(b), and 12(b)(6) of the Federal Rules of Civil Procedure.

Citigroup's opening brief set forth three independent, dispositive bases for dismissal of Plaintiff's claim: (1) Plaintiff identifies no source for his allegations other than the public record; (2) he fails to adequately plead that Citigroup made a false claim in connection with its payment of taxes; and (3) he fails to plausibly allege scienter. As explained below, Plaintiff's Opposition[2] does not meaningfully refute any of these grounds. The Complaint should be dismissed.

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

Plaintiff does not dispute that his claim must be dismissed if substantially the same allegations or transactions were publicly disclosed, unless he is the "original source." (Def.'s Br. 13.) As Plaintiff himself confirms (Opp. 29), all of the facts upon which he bases his allegations were drawn from public documents, and he concedes that he does not offer a single new purported fact in support of his claim. Likewise, Plaintiff does not challenge the basic principle that a relator relying only on public facts (as Plaintiff does) is not an original source. (See Def.'s Br. 20–21.) Instead, Plaintiff seeks to avoid dismissal principally by contending that his allegations relate only to Citigroup's state, rather than its federal, taxes and therefore that they were somehow not publicly disclosed. Plaintiff's contention does not accurately reflect either the public disclosures or the allegations in the Complaint, and in any event does not save his Complaint from dismissal.

The extensive public disclosures in the press, congressional reports, and other undisputed

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[1] Capitalized terms not defined herein have the meanings set forth in the Memorandum of Law of Citigroup Inc. in Support of its Motion to Dismiss the Complaint, dated December 7, 2015 ("Opening Brief" or "Def.'s Br.").

[2] Plaintiff's Memorandum in Opposition to Citigroup's Motion to Dismiss, dated February 4, 2016, will be referred to as the Opposition and cited as "Opp."

sources are "*substantially* the same allegations or transactions *as alleged in the action*." NYFCA § 190(9)(b) (emphasis added). Both the public media and congressional reports reported that Citigroup followed well-documented, authoritative IRS guidance, pursuant to which Treasury's transactions in Citigroup's stock effected no "ownership change," and therefore preserved Citigroup's NOLs. (Def.'s Br. 15–17.) And Plaintiff does not deny that the core allegation in his Complaint—his opinion that the IRS guidance Citigroup relied upon was inappropriate—was also articulated repeatedly in the press, in Congress, and in a published student note well before Plaintiff filed his claim. (Id. at 16–18.)

These public sources described precisely the "transactions" and "allegations" that were actually pled in Plaintiff's Complaint. Consistent with the fact that New York imports federal law on NOLs virtually wholesale (see infra at 5–7), the Complaint's allegations regarding Citigroup's New York tax treatment of the Treasury transactions are minimal, conclusory, and derived entirely from the public record.[3] The Complaint, like the public sources, addresses the wisdom and effect of the *IRS* guidance, and contains little discussion of Citigroup's New York tax filing at all, and none rising to the level of a new or unique factual allegation or anything attributed to a nonpublic source.

Nor can Plaintiff clear the public disclosure bar by claiming to have analyzed publicly disclosed facts and reached some undisclosed conclusion about Citigroup's New York State taxes. Plaintiff does not dispute the blackletter law that a relator cannot avoid dismissal by claiming to apply specialized knowledge to publicly disclosed facts. (See Def.'s Br. 20–21.) And, in any event, any specialized knowledge he would purport to apply here has already been

[3] See, e.g., Compl. ¶ 33 (alleging that the Notices were improperly promulgated and Citigroup was not entitled to rely on them "to reduce its taxable income for purposes of the IRC *or, for that matter, the New York Tax Law*" (emphasis added)).

applied by a law student in a published note, years before Plaintiff filed his claim.[4]

Although the public disclosures in the media and congressional reports are alone sufficient to trigger the public disclosure bar because they are "substantially the same" as the transactions and allegations in the Complaint, additional publicly disclosed information in Citigroup's 10-Ks only provides further support for dismissal. Citigroup's treatment of NOLs for New York tax purposes was publicly disclosed in its 10-Ks. As Plaintiff concedes (see Opp. 29), Citigroup's 10-Ks described in multiple places Citigroup's approach to NOLs (the future tax benefits of which are recorded as deferred tax assets ("DTAs") on financial statements), at the federal, state, and local level.[5] Thus, anyone reviewing Citigroup's 10-Ks (which were undisputedly public) could have determined—as Plaintiff did—that Citigroup viewed the IRS Notices as preventing an "ownership change" under Section 382 for purposes of New York State tax law. Though Plaintiff protests that the information can only be learned through "careful reading" of Citigroup's 10-Ks (Opp. 29), he does not dispute that the relevant information was disclosed in those public sources.

Plaintiff is wrong to contend (Opp. 32–33) that facts in a company's 10-K are not

[4] Although Plaintiff seeks to belittle the student note as "obscur[e]" (Opp. 32), he does not and cannot dispute that the published article was publicly disclosed for purposes of the NYFCA. And there is no doubt that the theory described in the published note was "substantially the same" as the allegation in the Complaint, even though the student did not expressly name New York as an affected state; a *qui tam* relator cannot be entitled to windfall recoveries for doing nothing more than reaching the obvious and publicly disclosed conclusion that Citigroup paid taxes in New York.

[5] For example, Citigroup's 10-Ks reflected the amount of DTAs attributable to New York State NOLs that Citigroup owned in each year, disclosing that Citigroup *gained* such DTAs between 2009 and 2010, rather than losing them. See Citigroup Inc. Annual Report (2009 Form 10-K) (Feb. 26, 2010) pp. 168–69, Reply Declaration of Edmund Polubinski III ("Polubinski Reply Decl.") Ex. L (disclosing $0.9 billion in DTAs attributable to New York State NOLs); Citigroup Inc. Annual Report (2010 Form 10-K) (Feb. 25, 2011) pp. 201–02, Polubinski Reply Decl. Ex. M (disclosing $1.1 billion). Likewise, Citigroup's 2010 10-K disclosed that Citigroup did not experience an ownership change for tax purposes in connection with Treasury's sale of stock, thereby preserving its ability to use "net DTAs of approximately $52.1 billion," a sum that included all DTAs attributable to federal, *state*, and local NOLs, see id. at 77, 140.

"publicly disclosed" for purposes of the NYFCA's public disclosure bar. The statute provides that a court "shall dismiss" an action based on allegations that were disclosed "in a federal . . . government report . . . that is . . . disseminated broadly to the general public." NYFCA § 190(9)(b)(ii). Courts have repeatedly held that SEC filings are publicly disclosed government reports under the FCA, and no state or federal court has reached a contrary conclusion under either the FCA or the NYFCA.[6] Plaintiff misconstrues New York law in arguing that the NYFCA differs from the FCA in this respect. (Opp. 32–33.) The provision of the NYFCA relied on by Plaintiff exempts from the statutory bar certain documents obtained through New York's Freedom of Information Law ("FOIL") and other programs (presumably FOIA and other states' open records laws)[7] enabling the public to "request, receive or view" documents in the government's possession. NYFCA § 190(9)(b)(ii). Plaintiff cites no case law or other authority for the proposition that the New York Legislature chose—through this general reference to FOIL and other programs—to depart from the many federal courts that have spoken on this issue and adopt the radical position that purported whistleblowers should be rewarded for uncovering so-called "secrets" that were, in fact, deliberately disclosed through the United States government's

[6] See United States ex rel. Jones v. Collegiate Funding Servs., Inc., 469 F. App'x 244, 257 (4th Cir. 2012) (holding that SEC filings fall under the FCA's public disclosure bar because, as the Supreme Court has noted, the relevant consideration is "the likelihood that a disclosure will put the Government on notice of a potential fraud" (internal quotation marks omitted)); United States ex rel. Barber v. Paychex Inc., No. 09-20990-Civ., 2010 WL 2836333, at *8 (S.D. Fla. July 15, 2010), aff'd, 439 F. App'x 841 (11 Cir. 2011) (applying public disclosure bar where facts in complaint appeared in defendant's SEC filings); United States ex rel. Szymoniak v. Am. Home Mortg. Servicing, Inc., No. 10-cv-01465-JFA, 2014 WL 1910845, at *4 (D.S.C. May 12, 2014) (same, observing that the relator's knowledge "is best described as indirect and dependent on publicly available information"); United States ex rel. Paulos v. Stryker Corp., 11-0041-CV-W-ODS, 2013 WL 2666346, at *7–8 (W.D. Mo. June 12, 2013), aff'd, 762 F.3d 688 (8th Cir. 2014) (same); United States ex rel. Calilung v. Ormat Indus., Ltd., No. 3:14-cv-00325-RCJ-VPC, 2015 WL 1321029, at *17 n.16 (D. Nev. Mar. 24, 2015) (same).

[7] This understanding is supported by the legislative history of the provision, which mentions only FOIL and makes no reference to SEC filings. See NY Spons. Memo., 2010 A.B. 11568 (Oct. 29, 2010), Polubinski Decl. Ex. J (purpose of amendment is to "clarify that . . . information received in response to a FOIL request is not 'publicly disclosed' for purposes of defeating a False Claims Act action").

officially sanctioned mechanism for disseminating information on publicly traded companies.[8]

Finally Plaintiff's arguments regarding the Attorney General (Opp. 34) are inapposite. The regulation Plaintiff cites concerns the Attorney General's own exercise of his statutorily granted discretion. The Attorney General has made his own decision not to intervene in this suit.

II. Plaintiff Has Failed to Plead a False or Fraudulent Claim

The Complaint also fails to plead that Citigroup submitted a false tax return. Plaintiff does not dispute that Treasury's guidance expressly dictates Citigroup's NOL treatment for purposes of determining its taxable income under federal law. Nor does he dispute that Citigroup relied on and accurately applied that guidance in calculating its taxable income. Instead, Plaintiff insists (Opp. 11–24) that the IRS guidance is at odds with federal statutes or was improperly promulgated, and that as a result, Citigroup should have crafted its own contrary interpretation of the statute to arrive at an inconsistent NOL determination for purposes of its New York tax return. Plaintiff is wrong for several reasons.

First, Plaintiff cannot dispute that Citigroup accurately reported precisely what it was instructed to report to New York State under state law. Under New York law, a taxpayer's New York taxable income is identical to that which "*the taxpayer is required to report to the United States treasury department*," N.Y. Tax Law § 1453 (Consol. 2010) (repealed eff. Jan. 1, 2015) (emphasis added), and state NOL deductions are "presumably the same" as federal deductions,

[8] Indeed, if Plaintiff's reading of the FOIL exception were correct, any information derived from documents distributed by government agencies would be available to relators under the NYFCA, an absurd result rejected by other courts considering this issue. See, e.g., United States v. Dialysis Clinic, Inc., No. 5:09-CV-00710 (NAM/DEP), 2011 WL 167246, at *6 (N.D.N.Y. Jan. 19, 2011) (finding that an audit report posted online by New York's Office of the Medicaid Inspector General was a public disclosure under NYFCA (as amended to include § 190(9)(b)(ii))).

id. § 1453(k-1), subject to exceptions not relevant here.[9] (See Def.'s Br. 5, n.4; see also N.Y. State Dep't of Taxation & Fin., CT-32-I, Instructions for Form CT-32 (2010), p. 7 ln. 56, Polubinski Reply Decl. Ex. N (setting forth ways in which "IRC section 172 federal losses" are to be adjusted for New York tax purposes); N.Y. State Dep't of Taxation & Fin., CT-3/4-I, Instructions for Form CT-3 (2010), p. 13 ln. 13, Polubinski Reply Decl. Ex. O (same).) Given that Plaintiff does not and cannot take issue with the propriety of Citigroup's *federal* tax reporting, which expressly followed authoritative IRS guidance (Def.'s Br. 23–24), Plaintiff cannot claim that the taxable income Citigroup reported to New York State was false.[10]

Second, Citigroup's use of definitive IRS guidance to calculate its NOLs was correct. Each of the IRS Notices was issued under Treasury's express statutory mandate to "carry out the authorities and purposes" of EESA, 12 U.S.C. § 5211(c)(5), and is indisputably authoritative guidance on the interpretation of the Internal Revenue Code (Def.'s Br. 23–24). Moreover, the Notices are wholly consistent with Section 382, which Plaintiff acknowledges is intended to prevent "loss trafficking," Compl. ¶ 15, a concern not relevant to transactions with Treasury.[11] There is likewise no support for Plaintiff's contention that Citigroup should have ignored definitive Treasury guidance because of Plaintiff's personal belief that the IRS's guidance was

[9] The Opposition misquotes Section 1453 of the New York Tax Law (Opp. 11). The statute never uses the term "ownership change" or even cites Section 382 of the Internal Revenue Code. Rather, as described herein, it requires incorporation of the taxpayer's reportable federal income and says that NOL deductions are to be "presumably the same" as those under federal law.

[10] In fact, Plaintiff does not even attempt to identify which tax return contained the alleged, false statements, what those statements were, or the date Citigroup purportedly filed it. This alone provides a basis for dismissal, particularly given Rule 9(b)'s heightened pleading requirement, which Plaintiff does not dispute applies to his claims. (See Def.'s Br. 12.)

[11] Section 382 does not—as Plaintiff claims—invariably create a bright-line rule for when an ownership change occurs. Rather, it explicitly authorizes Treasury to prescribe regulations "to treat stock as not stock," necessarily affecting the determination of whether an ownership change has occurred. 26 U.S.C. § 382(k)(6)(B); see also Treas. Reg. § 1.382-2(3)(i) (treating certain stock interests as non-stock); Temp. Treas. Reg. § 1.382-2T(f)(18) (same). Treasury is likewise authorized to prescribe "all needful" rules to enforce the code, 26 U.S.C. § 7805(a).

inconsistent with general principles set forth in ARRA and EESA. (Opp. 14–17.) Both statutes are wholly consistent with the IRS notices. As explained in Citigroup's Opening Brief (and not addressed or disputed by Plaintiff), ARRA effectively *reaffirmed* the two IRS Notices that had already been issued (Notices 2008-100 and 2009-14), repealing a *different* notice interpreting Section 382 that is irrelevant here, while expressly stating that "taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury." (Def.'s Br. 7–9.) As to EESA, Plaintiff offers no support for his speculation that the "cost to the U.S. taxpayers" "exceeds the incremental gains realized" on Treasury's sale of Citigroup stock in 2010. (Opp. 16–17.) And even if he could do so (which he cannot), his suggestion that Citigroup should have second-guessed the IRS and rejected authoritative Treasury guidance in favor of Plaintiff's ill-supported intuition about EESA's general policy goals is absurd.

Third, the Notices are authoritative for New York tax purposes. Plaintiff does not dispute that New York's treatment of NOLs is presumptively the same as that under federal law and cites no New York authority of any kind to suggest that New York would apply a different interpretation of U.S. tax law than the IRS. (See Def.'s Br. 4–5, 24–25.) As Plaintiff concedes (Opp. 12), New York courts regularly defer to federal authority in interpreting similar provisions of New York tax law.[12] And Plaintiff, of course, does not dispute that the New York Attorney General has opted *against* intervening in this matter.

[12] See, e.g., Office of Tax Policy Analysis Tech. Servs. Div., New York State Dep't of Taxation & Fin., Advisory Op. No. TSB-A-07(2)C (2007) (applying Treasury regulations to interpret Section 382 for purposes of New York tax calculations); Michaelsen v. New York State Tax Comm'n, 67 N.Y.2d 579, 583 (1986) (noting that "New York income tax law evinces a strong intent to conform to Federal authority wherever possible" and considering federal regulations in determining proper New York tax treatment); Delese v. Tax Appeals Tribunal of N.Y., 3 A.D.3d 612, 613 (3d Dep't 2004) (holding that state agency properly "utilized federal regulations" in interpreting a "federal statute which was expressly incorporated into [state] Tax Law," and noting the state's long-held policy to "adopt, whenever reasonable and practical, the Federal construction of substantially similar tax provisions").

Finally, Plaintiff cites no authority for his suggestion that this Court should abandon New York's strong policy of deference to federal tax interpretations. Plaintiff's citations to *Chevron* and the APA (Opp. 17–23) are inapposite because this Court is tasked, not with reviewing the wisdom of an agency's interpretation, but instead with determining whether Citigroup defrauded the state of New York when it relied on Treasury's guidance in calculating its taxable income. Plaintiff does not address or otherwise dispute the authorities cited in the Opening Brief (Def.'s. Br. 25–28) that make clear that a *qui tam* suit is not a vehicle for bringing direct challenges to statutes or guidance, but rather serves "to deter fraud and recover treasury funds lost to fraud," United States ex rel. Finney v. Nextwave Telecom, Inc., 337 B.R. 479, 487 (S.D.N.Y. 2006). Indeed, Plaintiff concedes (Opp. 12) that he lacks standing to bring a direct challenge to the IRS's guidance. Likewise, Plaintiff's citation to Bosh v. Fahey, 53 N.Y.2d 896 (1981) (Opp. 12–14) is inapposite. In Bosh, the Court of Appeals weighed a federal agency's interpretation of a federal statute against *a state agency's contrary interpretation of the same statute*. See Bosh, 53 N.Y.2d at 901. By contrast, there was no conflicting state interpretation of Section 382; the state has never taken a position contrary to the definitive Treasury guidance that Citigroup followed. [13]

III. Plaintiff Has Failed to Plead Scienter

Finally, even if Plaintiff could overcome the public disclosure bar and even if Plaintiff could plead a false statement under the NYFCA, he cannot plausibly plead a strong inference of fraudulent intent—i.e., that Citigroup "knowingly" made a false claim. (Def.'s Br. 29–32 (citing Fed. R. Civ. P. 9(b)).)

In his Opposition, Plaintiff does not point to any specific allegations concerning

[13] Plaintiff's citation to Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451 (1980) (Opp. 12) is likewise inapposite as that case concerned the deference that state courts owe to state agencies' interpretations of state law.

Citigroup's scienter. Indeed, there are no factual allegations whatsoever in the Complaint about the knowledge or belief of *any* individual at Citigroup. This is not surprising given that Plaintiff is alleging that Citigroup somehow committed fraud by *following* authoritative IRS guidance.

Instead, Plaintiff seeks to meet his pleading burden with the generalized assertion that, in light of its size and sophistication, Citigroup *should have* arrived at and applied Plaintiff's own idiosyncratic interpretation of the tax code, in defiance of the official IRS guidance. Even if there were merit to Plaintiff's view as to the proper tax treatment (which there is not, as explained above), his assertion would not remotely meet the NYFCA's scienter standard, which requires Plaintiff to allege knowledge or a reckless disregard for the truth. NYFCA § 188(3)(a); see also United States ex rel. Grupp v. DHL Exp. (USA), Inc., 47 F. Supp. 3d 171, 177 (W.D.N.Y. 2014) (where defendant's submission was reasonable and consistent with the governing contract, fraud allegation "based solely on a disputed interpretation of the contract documents" was insufficient to raise inference of scienter), aff'd sub nom. United States ex rel. Grupp v. DHL Worldwide Exp., Inc., 604 F. App'x 40 (2d Cir. 2015).[14]

In this respect, Plaintiff does not even mention—much less distinguish—this Court's dismissal of a complaint under the FCA and the NYFCA for, among other things, failure to plausibly allege scienter. United States ex rel. Pervez v. Beth Israel Med. Ctr., 736 F. Supp. 2d 804, 814–16 (S.D.N.Y. 2010) (Kaplan, J.) (discussed in Def.'s Br. 30–31). In Pervez, this Court rejected similarly conclusory allegations of scienter in a similar case. The Court's reasoning in Pervez applies squarely here, and Plaintiff has not suggested otherwise.

Unable to meet his burden, Plaintiff argues that a dismissal based on failure to allege

[14] Even if Plaintiff were correct (and the IRS was wrong) about the appropriate tax treatment of Citigroup's NOLs, Plaintiff would have pled, at most, that Citigroup made a mistake, and the NYFCA explicitly precludes liability for "acts occurring by mistake or as a result of mere negligence." NYFCA § 188(3)(b).

"[s]cienter is premature" at the pleading stage, pointing to a supposed "policy of leniency on scienter issues." (Opp. 27–28.) This is not an accurate statement of law.[15] Courts in this Circuit regularly dismiss *qui tam* complaints that—like Plaintiff's—fail to raise a strong inference of scienter. See, e.g., Grupp, 604 F. App'x at 43 (affirming dismissal of FCA claim for failure to allege scienter); Chapman v. Office of Children & Family Servs. of New York, 423 F. App'x 104, 105 (2d Cir. 2011) (same). Indeed, this Court did so in Pervez. See 736 F. Supp. 2d at 816.

Finally there is no relevance to the out-of-circuit cases cited by Plaintiff for the proposition that the reasonableness of a legal interpretation is not dispositive as to the defendant's scienter (see Opp. 25–27). All of those cases decided in favor of relators,[16] including Sprint,[17] concerned a defendant's interpretation of the law that was at odds with government guidance. By contrast, here *Plaintiff* challenges the reasonableness of the government's interpretation and seeks to hold Citigroup liable for *complying* with definitive government guidance. Plaintiff's assertion is inconsistent with any inference of scienter.

CONCLUSION

For these reasons, Citigroup respectfully requests the relief sought in its Opening Brief.

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[15] Among other things, Plaintiff misstates the holding of Meijer, Inc. v. Ferring V.B., 585 F.3d 677 (2d Cir. 2009). (See Opp. 28.) Meijier did not, as Plaintiff asserts, defer consideration of scienter. To the contrary, it held that scienter was sufficiently pled through specific allegations of protracted misconduct that had already been judged in another litigation to be "clear and convincing evidence" of fraudulent intent. Meijer, 585 F.3d at 692–93.

[16] One of Plaintiff's own cases demonstrates that a relator cannot show recklessness where the government has effectively acquiesced in the defendant's interpretation. (See Opp. 26 (citing United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency, 530 F.3d 980, 984 (D.C. Cir. 2008) (affirming grant of summary judgment in favor of defendant for lack of scienter where defendant had "made no secret" of its position and holding that where a defendant has told the government the facts which allegedly made a claim fraudulent, "the claimant has not 'knowingly' presented a false claim")).)

[17] The court in Sprint permitted discovery into a defendant's scienter where the defendant disregarded explicit official tax guidance in favor of its own unsupported interpretation. People v. Sprint Nextel Corp., 26 N.Y.3d 98, 111–12 (2015). Here, by contrast, Citigroup *complied* with the only available guidance, and it is Plaintiff who claims that Citigroup should have arrived at his unsupported view in contravention of that guidance.

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