SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE STATE OF NEW YORK ex rel. ERIC RASMUSEN,

Plaintiff,

- against -

CITIGROUP INC.,

Defendant.

Index No. 100175/2013

Hon. Charles E. Ramos
IAS Part 53

Mot. Seq. No. 002

MEMORANDUM OF LAW IN SUPPORT OF CITIGROUP INC.'S MOTION TO DISMISS

Mario J. Verdolini
Edmund Polubinski III
Jessica L. Turner
Alan J. Tabak

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4695

Attorneys for Defendant Citigroup Inc.

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Defendant Citigroup Inc. ("Citigroup") respectfully submits this memorandum of law in support of its motion to dismiss pursuant to CPLR 3211(a)(1), (3), and (7).

PRELIMINARY STATEMENT

In this putative qui tam action, relator Eric Rasmusen contends that Citigroup defrauded the State of New York by taking tax deductions that were expressly permitted by authoritative guidance promulgated by the U.S. Department of Treasury ("Treasury") and the Internal Revenue Service ("IRS"). Relator asserts his personal opinion that the Treasury and IRS guidance was ill-advised and "improperly promulgated" and, on the basis of his opinion, seeks to recover billions of dollars under the New York False Claims Act. N.Y. State Fin. Law § 187 et seq. (the "NYFCA").

Relator offers no nonpublic facts in support of his cause of action. In fact, relator—a professor of business economics and public policy at Indiana University, who has no claimed connection either to Citigroup or the State of New York—has admitted in a blog post that his complaint is *not* based on any "private facts" at all, but instead only on what he describes as his "specialized legal analysis." How I Came To Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower, TaxProf (Oct. 21, 2015) (Ex. 1).[1] He identifies no statement from any New York or federal taxing authority to support his views. He even acknowledges that Citigroup relied on authoritative guidance that permitted the very deductions he now contests. Relator neither suggests nor claims that New York has ever offered a different interpretation from the one set forth in the Treasury and IRS guidance on the applicable deductions that Citigroup followed.[2] In effect, relator asks that Citigroup be subjected to treble damages for complying with the

[1] "Ex." refers to an exhibit to the Affirmation of Edmund Polubinski III, filed herewith.

[2] The New York State Attorney General has declined to intervene in this matter. See Notice of Election to Decline Intervention (Ex. 2).

government's authoritative interpretation of tax law, rather than relator's own idiosyncratic view.

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

First, the NYFCA requires dismissal of any suit based on alleged facts that were publicly disclosed before the suit's filing, unless the relator qualifies as an "original source" of factual allegations previously unknown to the State. The allegations underlying relator's complaint were widely broadcast in scholarly publications, a government report, and the press well before relator brought suit. Indeed, relator has acknowledged that this action is based on a policy paper he coauthored, which was based entirely on public facts and published before he even contemplated filing this lawsuit. The complaint contains no factual allegations for which relator is the original source, and relator does not claim any independent knowledge of facts relevant to his claims. As succinctly stated by a federal court applying the equivalent federal public disclosure bar, 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. U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992).

Second, relator has failed to plead that Citigroup submitted a false record or statement in connection with its New York tax returns. In fact, it is clear on the face of the complaint that Citigroup complied with all pertinent law in taking the at-issue tax deductions. The New York State tax provisions at issue expressly refer to and borrow the applicable federal provisions, and Citigroup followed all available government guidance on those provisions. Because Citigroup did not make any false submission in connection with its state tax returns, relator's claim under the NYFCA fails.

Third, even if relator could plausibly plead that Citigroup's statements were in any sense false (which he cannot), he certainly cannot plead that Citigroup *knew* that they were false. The

NYFCA imposes liability only where statements are "knowingly" false. N.Y. State Fin. Law § 189(1). Relator 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 guidance from Treasury and the IRS in calculating the deductions it took. Relator does not allege that there is any contrary guidance from New York taxing authorities. The NYFCA is an antifraud statute; it does 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).

Put simply, relator's grievance is that he does not agree with Treasury and the IRS's guidance. But a qui tam suit is not a vehicle for challenging regulatory actions or the government's legal interpretations. 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. For these reasons, and the reasons discussed below, relator's complaint should be dismissed with prejudice.

STATEMENT OF FACTS

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

Relator's allegations concern Citigroup's treatment of net operating loss ("NOL") deductions. See Compl. ¶¶ 30–31 (Ex. 3). An NOL arises when a taxpayer's expenses exceed its revenues for a taxable year. Both New York and federal law permit a corporation that sustains an NOL to carry back the loss to prior taxable years or to carry it forward to future taxable years, in either case to be deducted from the corporation's taxable income for those years. See N.Y. Tax Law § 1453(k-1) (Consol. 2010) (repealed eff. Jan. 1, 2015) (citing 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.

New York tax law expressly refers to and borrows from federal law with respect to allowable NOL deductions. Prior to 2015, New York imposed a franchise tax—the 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, 1455(a) (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). As to NOL deductions, New York provided that allowable NOL deductions 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.[3] 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).

Special rules may limit the use of NOL deductions in the context of some 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" losses in its assets) to use its losses after a significant ownership stake changes hands. 26 U.S.C. § 382.[4] This provision was enacted to prevent corporate raiders from avoiding taxes by

[3] 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). Relator does not claim that any of these exceptions is relevant here.

[4] Section 382 limits 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). The Section 382 limitation is triggered by an "ownership change," which occurs when an entity that owns at least five percent of the equity of the

acquiring loss corporations solely to make use of their NOLs. See S. Rep. No. 83-1622, at 53 (1954) (Ex. 4).

B. The Financial Crisis, TARP, and Authoritative IRS Guidance on the Treatment of NOLs in Connection with TARP

In October 2008, at the height of the U.S. financial crisis, Congress enacted 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, 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).

Treasury and the IRS provided clear guidance on the impact of Treasury's purchases of equity in connection with TARP on recipients' abilities to take NOL deductions under Section 382.[5] In particular, Treasury and the IRS repeatedly and unequivocally stated that Treasury's transactions in connection with TARP would *not* cause an ownership change under Section 382.

Beginning in October 2008, the IRS issued a series of four guidance notices on behalf of itself and Treasury (the "IRS Notices") regarding the treatment of Treasury's TARP investments under Section 382. The first of these notices was issued on October 14, 2008, shortly after the enactment of EESA. See IRS Notice 2008-100, 2008-2 C.B. 1081 ("Notice 2008-100") (Ex. 5).

"loss corporation" after it is acquired has increased its ownership stake by more than 50 percentage points over the lowest percentage of stock owned by that entity in a statutorily defined period. Id. § 382(g). If a corporation does not undergo an ownership change, Section 382 does not restrict the deduction of its NOL carryforwards.

[5] See 12 U.S.C. § 5211(c)(5) (noting Secretary's authority to issue "such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of [TARP]"); 5 U.S.C § 553(b)(3)(A) (exempting "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice-and-comment rulemaking); Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983) (noting "very broad authority" of "those administering the tax laws . . . to interpret those laws," and the Supreme Court's long-standing recognition of the IRS's "primary authority" to construe the Internal Revenue Code).

Notice 2008-100 announced that Treasury and 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. See id. 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") (Ex. 6), 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") (Ex. 7).[6] Finally, Notice 2009-38 was amplified and superseded on December 11, 2009 by IRS Notice 2010-2, 2010-2 I.R.B. 251 ("Notice 2010-2") (Ex. 8), 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, on October 1, 2008, prior to the enactment of EESA, Treasury and the IRS issued IRS Notice 2008-83, 2008-2 C.B. 905 ("Notice 2008-83") (Ex. 9). Notice 2008-83 did *not* relate to Treasury's TARP investments. Instead, it provided that losses and deductions attributable to loans or bad debts of a bank that would otherwise not be allowable following a Section 382 ownership change would not be subject to Section 382 limitations. The notice attracted intense criticism.[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

[6] Notice 2009-14 extended the guidance contained in Notice 2008-100 to Treasury purchases made pursuant to four additional programs established under EESA. Notice 2009-14 (Ex. 6). 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. Notice 2009-38 (Ex. 7).

[7] This was in part due to the perception that it had been issued to facilitate Wells Fargo's acquisition of Wachovia. See, e.g., Press Release, Sen. Chuck Grassley, Grassley Seeks Inspector General Review of Treasury Bank Merger Move (Nov. 14, 2008) (Ex. 10); A Quiet Windfall for U.S. Banks, Wash. Post (Nov. 10, 2008) (Ex. 11).

that the notice was inconsistent with congressional intent. 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).

The ARRA did *not*, however, question or undermine any of the IRS Notices—two of which (Notice 2008-100 and Notice 2009-14) were issued prior to the ARRA's enactment. The Conference Committee Report on the ARRA makes clear that Congress was aware of the existence of the IRS Notices. In describing the provision of the ARRA that would repeal Notice 2008-83, the report explicitly cited, without negative comment, Notice 2008-100 and Notice 2009-14 in its explanation of present law under Section 382.[8] The ARRA implicitly affirmed 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).

New York has never issued any guidance on Section 382, much less any guidance contrary to that proffered by Treasury and the IRS.

C. Citigroup's Reliance on Authoritative Tax Guidance

Treasury purchased an accumulated $45 billion in Citigroup preferred shares in late 2008 pursuant to its authority under TARP. See Compl. ¶ 21 (Ex. 3). After the worst of the financial crisis passed, Citigroup was in a position to repay the government. In February 2009, Treasury converted $25 billion in Citigroup preferred stock, out of $45 billion, to common stock. See id. ¶ 27. In December 2009, Citigroup acquired the remaining $20 billion of Treasury's preferred stock. See id. By December 2010, Treasury had sold its entire stake in Citigroup. See id. ¶ 28.

In reliance on Treasury and IRS guidance expressly exempting these kinds of events from Section 382, Citigroup carried forward its NOLs during certain years for federal tax purposes.

[8] See H.R. Rep. No. 111-16, at 555 n.55 (2009) (Conf. Rep.) (Ex. 12).

See id. ¶¶ 33-35. Because New York incorporates the federal regime for calculating NOLs, Citigroup took the same approach for its NOLs on its state tax returns. See id. ¶ 35. Citigroup's 10-Ks described Citigroup's approach to NOLs (the future benefits of which are recorded as deferred tax assets ("DTAs") on financial statements) at the federal, state, and local levels.[9]

D. Publicity of Citigroup's Reliance on the IRS Notices

Citigroup's reliance on the IRS Notices was widely reported. Several sources from December 2009 questioning Notice 2010-2 are linked to relator's website. See http://www.rasmusen.org/citigroup/ (Ex. 16).

For example, relator's website links to a December 2009 Washington Post article that relator calls "very influential." Id. at 5. The Washington Post reported: "The Internal Revenue Service . . . issued an exception to long-standing tax rules for the benefit of Citigroup and a few other companies partially owned by the government. As a result, Citigroup will be allowed to retain billions of dollars['] worth of tax breaks that otherwise would decline in value when the government sells its stake to private investors." U.S. Gave Up Billions in Tax Money in Deal for Citigroup's Bailout Repayment, Wash. Post (Dec. 16, 2009) (Ex. 17).

Relator's website also links to blog posts from December 2009 questioning the authority of Treasury and the IRS to issue the IRS Notices. See http://www.rasmusen.org/citigroup/ (Ex. 16). For example, a Credit Writedowns post by Edward Harrison stated: "Treasury is

[9] See, e.g., Citigroup Inc. Annual Report (2010 Form 10-K) (Feb. 25, 2011) ("2010 10-K") at 77 (Ex. 13) ("Under IRS Notice 2010-2, Citi 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."). 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) at 168-69 (disclosing $0.9 billion in DTAs attributable to New York State NOLs) (Ex. 14); 2010 10-K at 201-02 (disclosing $1.1 billion) (Ex. 13). Likewise, Citigroup's 2010 10-K disclosed that the lack of ownership change preserved its ability to use "net DTAs of approximately $52.1 billion," which included all DTAs attributable to federal, *state*, and local NOLs. See id. at 77, 140. As relator concedes, Citigroup's annual reports disclosed that Citigroup took the same approach to NOLs in its federal and 2010 10-K state tax filings. Why Citigroup's Motion to Dismiss Is Wrong, http://www.rasmusen.org/citigroup/ (Dec. 14, 2015) (Ex. 15).

defending this decision [to issue Notice 2010-2] by saying this is not a 'new' exemption, but one that applies to the aid guidelines that financial institutions received when TARP was first formulated. I thought those provisions were repealed in the stimulus bill." U.S. Forfeiting Billions in Future Taxes to Let Citi Repay TARP, Credit Writedowns (Dec. 16, 2009) (Ex. 18). Another post, by Justin Elliott in TPM Muckraker, concluded: "There's also the question of whether the IRS has authority to make a decision with such far-ranging effects – one that applies to companies other than Citi in which the government has ownership stakes. Says [Barry] Ritholtz[, the chief market strategist for Fusion IQ]: 'What they're doing looks awfully a lot like legislation and much less like administrative decision making.'" Obama Admin Grants Mega Tax Break to Citi in Bailout Deal, TPM Muckraker (Dec. 16, 2009) (Ex. 19).

Other sources also extensively reported on the IRS Notices and Citigroup's reliance on them. For example, 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. Congressional Oversight Panel, 111th Cong., January Oversight Report, Exiting TARP and Unwinding Its Impact on the Financial Markets, 12-14 (2010) ("Oversight Report") (Ex. 20). Specifically, the panel reported that the "most immediate application" of Notice 2010-2 was "to the planned sale of the shares of Citigroup that Treasury holds." Id. at 14. The TARP oversight panel observed that "[t]he December Notice has attracted criticism as an additional subsidy to Citigroup and a loss to the taxpayers." Id. 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 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) (Ex. 21). The student note further 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." Id. at 540.

E. Professor Rasmusen and This Suit

1. Relator and the Events Leading to the Filing of the Complaint

Relator Eric Rasmusen is a professor of business economics and public policy at Indiana University. Compl. ¶ 5 (Ex. 3). Relator has expressly conceded that he does not have any relevant nonpublic information about Citigroup. See How I Came To Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower, TaxProf (Oct. 21, 2015) (conceding that complaint "is based on specialized legal analysis rather than private facts") (Ex. 1). The complaint does not allege that relator ever worked for Citigroup, has ever even spoken with any individual at Citigroup, or has ever seen Citigroup's federal or state tax returns for the relevant years. Nor does the complaint allege that relator has ever worked for the New York Department of Taxation and Finance or that he has any other connection to New York.

Instead, relator brought this case because he "came across the New York State False Claims Act," which "allow[s] qui tam suits for treble damages by private citizens against delinquent large New York State taxpayers." Id. In particular, relator's theory in this litigation is a repackaged version of a policy paper that he published with a coauthor more than a year earlier, based on public information about Citigroup's NOL deductions. J. Mark Ramseyer & Eric B. Rasmusen, Can the Treasury Exempt Its Own Companies from Tax? The $45 Billion GM NOL Carryforward, Cato Papers on Pub. Pol'y (2011) ("Relator's Policy Paper") (Ex. 22); see also http://www.rasmusen.org/citigroup/, at 2 (describing the paper as "the article that led to the suit") (Ex. 16). The allegations in relator's complaint track contentions in his policy paper:

- Both suggest that Citigroup avoided paying taxes by carrying forward NOLs in reliance on the IRS Notices. Compare Compl. ¶ 1 (Ex. 3), with Relator's Policy Paper at 12, 19 (Ex. 22).

- Both suggest that Congress deprived Treasury and the IRS of authority to issue the IRS Notices when it overrode Notice 2008-83 in the ARRA. Compare Compl. ¶¶ 24, 32-33 (Ex. 3), with Relator's Policy Paper at 20-24 (Ex. 22).

- Both suggest that the IRS Notices are not entitled to judicial deference. Compare Compl. ¶ 32 (Ex. 3), with Relator's Policy Paper at 26-29 (Ex. 22).

- Both assert that taxpayers cannot rely on the IRS Notices. Compare Compl. ¶ 33 (Ex. 3), with Relator's Policy Paper at 29-31 (Ex. 22).

2. The New York Attorney General's Decision Not to Participate

Relator filed his complaint under seal on January 24, 2013. 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 N.Y. State Fin. Law § 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 (Ex. 2).

3. The Federal Court Decision Remanding the Case to this Court

After the complaint was unsealed on September 2, 2015 and Citigroup was served, Citigroup removed the action to the United States District Court for the Southern District of New York. See Notice of Removal, Rasmusen v. Citigroup Inc., No. 15 Civ. 7826 (S.D.N.Y. Oct. 2, 2015), ECF No. 1. Relator did not move to remand, and Citigroup moved to dismiss the complaint in its entirety. After the motion was fully briefed, the district court concluded sua sponte that it lacked subject matter jurisdiction and remanded the case to this Court. See N.Y. ex rel. Rasmusen v. Citigroup Inc., 2016 WL 7031054 (S.D.N.Y. Dec. 2, 2016). In particular, the federal court concluded that relator's complaint "does not *necessarily* raise a federal issue," as is required for federal question jurisdiction on a state law claim. Id. at *4.

In reaching its decision, the federal court expressly noted the "dubious merit" of relator's cause of action. Id. at *4 n.33. The federal court considered both of relator's legal theories.

As to the first—i.e., relator's claim "that the IRS Notices were invalid and that Citigroup's reliance on them led it to claim improper deductions"—the court explained that "Rasmusen concedes, and in any case the Court holds, that he lacks standing to challenge the validity of the IRS Notices." Id. at *3. Because of relator's conceded lack of standing even to challenge the IRS Notices, no court would need to pass on their validity to dispatch with relator's first theory. See id. at *3 & n.28 (quoting, inter alia, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (permitting dismissal on jurisdictional grounds where plaintiff's claim was "wholly insubstantial and frivolous") (internal quotation marks omitted)).

The district court expressed a similarly dim view of relator's "alternative theory": that New York law might theoretically differ from federal law concerning NOLs. Citing the many ways in which New York tracks and incorporates federal law, including on NOLs, the court explained that a conclusion that New York and federal law on NOLs were materially identical "seems almost the inevitable construction." Id. at *4. But the federal court concluded that it lacked jurisdiction to decide the question because "the proper construction of Section 1453(k-1) in the end presents a question purely of state law." Id. As the district court explained:

> The Court does not rule on the merits of this argument. However likely it may be that a New York court would disagree with Rasmusen and find that there is no daylight between the federal and state law regarding Citigroup's eligibility for the NOL deduction, that is not inevitable. But that is the claim that Rasmusen has brought and the one with respect to which the Court must assess its jurisdiction, no matter its dubious merit.

Id. at *4 n.33.

On remand, the matter was assigned to Part 11 and, following Citigroup's unopposed request, was transferred to the Commercial Division and assigned to this Part.

ARGUMENT

I. Relator Lacks Standing Under the Public Disclosure Bar

A. The Underlying Facts Were Publicly Disclosed Before Relator Filed Suit

The NYFCA, like all false claims acts, 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. See U.S. 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).[10] But the same financial incentives for true whistleblowers to bring qui tam actions based on unique knowledge also encourage opportunists seeking windfalls to repackage publicly known information into qui tam complaints. See State ex rel. Jamaica Hosp. Med. Ctr., Inc. v. UnitedHealth Grp., Inc., 84 A.D.3d 442, 443 (1st Dep't 2011); see also Doe, 960 F.2d at 319 ("Because 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" in the FCA, Doe, 960 F.2d at 319, which the NYFCA mirrors. As the First Department has explained, "[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 attention." Jamaica Hosp., 84 A.D.3d at 443 (internal

[10] The NYFCA is 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. Willcox v. Credit Suisse Secs., 140 A.D.3d 622, 623 n.2 (1st Dep't 2016); State ex rel. Seiden v. Utica First Ins. Co., 96 A.D.3d 67, 71 (1st Dep't 2012).

quotation marks omitted).

The NYFCA's public disclosure bar applies where "substantially the same allegations or transactions as alleged in the action were publicly disclosed":

> (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. State Fin. Law § 190(9)(b). Courts have liberally construed the possible sources of such public disclosures to include complaints, indictments, SEC filings, and websites.[11]

There is no question that the public disclosure bar applies here: relator's complaint is admittedly based entirely upon "allegations or transactions" that were disclosed in public sources published years prior to the filing of his complaint.

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 (Ex. 3). 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. See Oversight Report at 14-16 (Ex. 20); 2010 10-K at 77 (Ex. 13). Likewise, it was well known that the IRS Notices would have the same impact on NOLs under state tax laws. In fact, before the complaint was filed, a student note had argued that Treasury's use of the notice mechanism denied state governments "notice and time to

[11] See, e.g., U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc., 713 F.3d 662, 670 (1st Cir. 2013) (complaints); U.S. ex rel. Poteet v. Bahler Med., Inc., 619 F.3d 104, 113-14 (1st Cir. 2010) (complaints); U.S. ex rel. Chen v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 297 (S.D.N.Y. 2013) (indictments); U.S. ex rel. Jones v. Collegiate Funding Servs., Inc., 469 F. App'x 244, 257 (4th Cir. 2012) (SEC filings); U.S. ex rel. Rosner v. WB/Stellar IP Owner, L.L.C., 739 F. Supp. 2d 396, 406-07 (S.D.N.Y. 2010) (websites).

decouple their own laws [from the federal tax code] before losing corporate tax revenue." Shenoi, Undoing Undue Favors at 540 (Ex. 21).[12]

Second, relator's allegation that Treasury and the IRS lacked authority to issue the IRS Notices, Compl. ¶¶ 32-33 (Ex. 3), also was previously made in the national press and online as far back as December 2009. See U.S. Gave Up Billions in Tax Money in Deal for Citigroup's Bailout Repayment, Wash. Post (Dec. 16, 2009) (Ex. 17); U.S. Forfeiting Billions in Future Taxes to Let Citi Repay TARP, Credit Writedowns (Dec. 16, 2009) (Ex. 18); Obama Admin Grants Mega Tax Break to Citi in Bailout Deal, TPM Muckraker (Dec. 16, 2009) (Ex. 19).

Third, relator's allegation that U.S. taxpayers "will" suffer a net loss as a result of the IRS Notices, see Compl. ¶ 30 (Ex. 3), was previously asserted in at least three publicly available sources. See U.S. Gave Up Billions in Tax Money in Deal for Citigroup's Bailout Repayment, Wash. Post (Dec. 16, 2009) (Ex. 17); Oversight Report at 15 (Ex. 20); Shenoi, 43 U. Mich. J.L. Reform at 537 (Ex. 21).

In fact, Citigroup's 10-Ks described Citigroup's approach to NOLs (DTAs) at the federal, state, and local level. Thus, anyone reviewing Citigroup's 10-Ks could have determined—as relator did—that Citigroup viewed the IRS Notices as preventing Treasury's purchases and sale of equity pursuant to TARP from causing an "ownership change" under Section 382 for purposes of New York State tax law.[13] In fact, relator states in notes posted to his website, "Rasmusen

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[12] Relator cannot dispute that the article was publicly disclosed for purposes of the NYFCA. See Alcohol Found., 186 F. Supp. 2d at 463 (noting that "the statutory term 'news media' . . . encompass[es] the publication of information in scholarly or scientific periodicals"). And there is no doubt that the theory described in the article was "substantially the same" as the complaint's allegations. N.Y. State Fin. Law § 190(9)(b).

[13] Courts regularly hold that SEC filings are publicly disclosed government reports under the FCA, and no court has reached a contrary conclusion under the FCA or the NYFCA. See Jones, 469 F. App'x at 257 (SEC filings fall under the FCA's public disclosure bar because the relevant consideration is "the likelihood that a disclosure will put the Government on notice of a potential fraud") (internal quotation marks omitted); U.S. ex rel. Barber v. Paychex Inc., 2010 WL 2836333, at *8 (S.D. Fla. July 15, 2010), aff'd, 439 F. App'x 841 (11th Cir. 2011) (applying public disclosure bar where facts in complaint appeared in defendant's SEC filings); U.S. ex rel. Szymoniak v. Am. Home Mortg. Servicing, Inc., 2014 WL 1910845, at *4 (D.S.C. May 12, 2014) (same, observing that relator's

derives his factual knowledge of [Citigroup's deduction of NOLs from its New York taxes] from Citigroup's annual reports." Why Citigroup's Motion to Dismiss Is Wrong, http://www.rasmusen.org/citigroup/ (Dec. 14, 2015) (Ex. 15).

In any event, even if these prior public disclosures did not alone trigger the public disclosure bar (which they do), relator's own policy paper—published more than a year before relator filed his complaint—would. There is no "exception to the public disclosure bar where the relator's qui tam action is based on prior, public disclosures made by the relator herself." Poteet, 619 F.3d at 112.[14] This is because "[t]he qui tam mechanism is intended to encourage people to blow the whistle on fraud. If they have already done so, whether to take advantage of a qui tam reward or for other reasons, there seems to be little need to encourage them to give the whistle a second toot." Id. at 113. In a blog post, relator identified this policy paper as "the article that led to the suit," http://www.rasmusen.org/citigroup/ (Ex. 16), and the substance of relator's allegations are all contained in the earlier article, see Relator's Policy Paper at 12, 19, 20-24, 26-31 (Ex. 22). For that reason alone, the public disclosure bar has been triggered here.[15]

B. Relator Is Not an Original Source

Relator cannot survive dismissal by claiming that he is an "original source" of the

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knowledge was "best described as indirect and dependent on" public information); U.S. ex rel. Paulos v. Stryker Corp., 2013 WL 2666346, at *7-8 (W.D. Mo. June 12, 2013), aff'd, 762 F.3d 688 (8th Cir. 2014) (same); U.S. ex rel. Calilung v. Ormat Indus., Ltd., 2015 WL 1321029, at *17 n.16 (D. Nev. Mar. 24, 2015) (same).

[14] See also In re Nat. Gas Royalties Qui Tam Litig., 467 F. Supp. 2d 1117, 1163-64 (D. Wyo. 2006), aff'd, 562 F.3d 1032 (10th Cir. 2009) ("prior private suit by the relator himself qualifies as a public disclosure" (citing U.S. ex rel. King v. Hillcrest Health Ctr., Inc., 264 F.3d 1271, 1279 (10th Cir. 2001))); U.S. ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ., 161 F.3d 533, 536 (9th Cir. 1998) (allegations were publicly disclosed where relator was "responsible for the story reaching the public in that he disclosed the alleged fraud to the media").

[15] Because all the factual allegations in relator's complaint were publicly disclosed, whether his unsupportable fraud theory was publicly disclosed is not relevant. See, e.g., U.S. ex rel. Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995) ("[T]he public disclosure of the material elements of the fraudulent transaction bars qui tam actions even if the disclosure itself does not allege any wrongdoing."); U.S. ex rel. Found. Aiding the Elderly v. Horizon W., 265 F.3d 1011, 1015 (9th Cir. 2001) ("The substance of the disclosure . . . need not contain an explicit 'allegation' of fraud, so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain.").

allegations in his complaint and therefore exempt from the public disclosure bar. See Jamaica Hosp., 84 A.D.3d at 443. Relator is admittedly not an original source.

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.

N.Y. State Fin. Law § 188(7). The "original source" exception was created for only "the most deserving qui tam plaintiffs: those whistle-blowers who qualify as original sources," Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 301 (2010), because they are "actually involved in the process of unearthing important information about a false or fraudulent claim," Chen, 966 F. Supp. 2d at 299 (internal quotation marks omitted).

It is blackletter law that a relator cannot invoke the "original source" exception by claiming to apply specialized knowledge to publicly disclosed facts. See, e.g., U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1159 (2d Cir. 1993) (rejecting "original source" claim predicated on public information 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) (holding that a relator "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 quotation marks omitted).

But as noted above, this is precisely what relator concedes he has done here. In his TaxProf Blog "op-ed," relator admits that his allegations are "based on" what he refers to as "specialized legal analysis rather than private facts." How I Came To Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower, TaxProf (Oct. 21, 2015) (Ex. 1). In other words, relator perceives his contribution to be his legal conclusion that all of the publicly known information about Citigroup's reliance on the IRS Notices adds up to a violation of the NYFCA.

Such "specialized legal analysis" is precisely what courts have ruled, time and again, does *not* qualify a relator as an original source. For example, in U.S. ex rel. Woods v. Empire Blue Cross & Blue Shield, 2002 WL 1905899 (S.D.N.Y. Aug. 19, 2002), the court rejected an argument offered by a supposed ambulance industry expert 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." Id. at *8.

In sum, relator's suit is "a classic example of the opportunistic litigation that the public disclosure bar is designed to discourage." See Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 413 (2011) (internal quotation marks omitted). It should be dismissed.

II. Relator Fails to State a Claim Because He Does Not Allege Use of a False Record or Statement

Even if relator could survive the public disclosure bar (and he cannot), his complaint fails to state a claim.[16] Relator must allege that Citigroup "used[] a false record or statement material

[16] Relator's cause of action fails under any pleading standard. But it is particularly deficient in that it is subject in most respects to the heightened pleading requirements of CPLR 3016(b), which requires "the circumstances constituting the wrong" in a fraud claim to be "stated in detail." Although Section 192(1-a) of the NYFCA provides that "the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used," it confirms that CPLR 3016 otherwise applies to qui tam complaints. N.Y. State Fin. Law § 192(1-a).

to an obligation to pay or transmit money or property to the state . . . government." N.Y. State Fin. Law § 189(1)(g). Relator has failed to allege that Citigroup submitted any "false record or statement" under the NYFCA. In particular, relator has failed to allege that Citigroup took "excessive and improper NOL deductions" on its New York taxes, Compl. ¶ 37 (Ex. 3), because relator has failed to plead that Citigroup's tax reporting or its NOL deductions were inaccurate or inconsistent with New York law.

Relator does not contest that (i) Citigroup followed the IRS Notices, and (ii) if the IRS Notices were properly promulgated, Citigroup was permitted to carry over NOLs on its federal returns. See id. ¶¶ 32-35. Instead, relator's complaint advances two alternate theories of falsity. The first is "that the IRS Notices were invalid and that Citigroup's reliance on them led it to claim improper deductions on its federal and, by extension, state tax filings." See Rasmusen, 2016 WL 7031054, at *3; see also Compl. ¶ 33 (Ex. 3). The second theory is that "even if the IRS Notices were sound as a matter of federal law, New York law incorporates only the [Internal Revenue Code]'s definitions of net income and NOLs deductions and not the IRS's interpretation of them." See Rasmusen, 2016 WL 7031054, at *3; see also Compl. ¶ 34 (Ex. 3). Both theories fail as a matter of law.

As to the first theory, relator lacks standing to challenge the validity of the IRS Notices, particularly years after the fact in a qui tam action. Relator's misgivings about the IRS Notices, however strongly felt, are not properly lodged in an action brought under the NYFCA. Under the NYFCA, this Court is asked to determine whether Citigroup engaged in fraud, not to evaluate the correctness of the federal government's interpretation of the law, which Citigroup indisputably followed. See Rasmusen, 2016 WL 7031054, at *3 ("Rasmusen concedes, and in any case the Court holds, that he lacks standing to challenge the validity of the IRS Notices. In consequence, this Court would not pass on whether the IRS's interpretation of Section 382 was arbitrary and capricious in ruling on Rasmusen's New York False Claims Act claim."); see also id. at *3 & n.28 (citing Steel Co., 523 U.S. at 89 (permitting dismissal on jurisdictional grounds when the ostensible federal claim was "wholly insubstantial and frivolous") (internal quotation marks omitted)). Courts have made clear that the truth or falsity of a claim for purposes of the NYFCA is to be judged against the law as promulgated, not against a relator's idiosyncratic interpretation of the law.[17] The same principle governs here.

The New York Court of Appeals has confirmed the primacy of agency guidance over individual interpretations of law under the NYFCA. In People v. Sprint Nextel Corp., 26 N.Y.3d 98 (2015), the Court affirmed the denial of a motion to dismiss a NYFCA suit alleging that Sprint had knowingly under-collected New York State sales taxes on certain services. The Court observed that Sprint's practices were contrary to Tax Department guidance, 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 108. The Court rejected Sprint's argument that its tax treatment was supported by a "reasonable 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 113.

Sprint illustrates that the NYFCA applies to taxpayers who knowingly disregard regulations to evade the tax laws, not to taxpayers who follow regulations to comply with the tax

[17] See U.S. ex rel. Finney v. NextWave Telecom, Inc., 337 B.R. 479, 487-88 (S.D.N.Y. 2006) (dismissing an FCA complaint alleging the defendant defrauded the government by not notifying it of a statute the plaintiff believed would have been helpful to the government's case against the defendant in a separate legal matter as "patently absurd" because the government is assumed to be familiar with its own laws and chose not to invoke the statute); Visiting Nurse Ass'n v. Thompson, 378 F. Supp. 2d 75, 95-96 (E.D.N.Y. 2004) (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); U.S. 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 quotation marks omitted).

laws. Relator concededly asks this Court to disregard official agency interpretations of the tax laws; to make relator's own interpretation—unsanctioned by any agency and contrary to authoritative guidance—the standard for judging whether Citigroup broke those laws; and to hold Citigroup liable for fraud because it did not follow relator's preferred approach. Sprint demonstrates that taxpayers depart from agency guidance at their peril.

Relator's second theory of falsity asserts that, even accepting that Citigroup was eligible for the NOL deduction on its federal tax filings, New York tax law somehow diverges from federal law. It does not. For all the reasons given by the federal court in observing that this is "almost the inevitable construction," "the New York NOL deduction is identical to the federal deduction except where Section 1453 [of the New York Tax Law] explicitly modifies it." Rasmusen, 2016 WL 7031054, at *4. Because Section 1453 provides no relevant modification here, the federal interpretation controls in New York, too. As the federal court anticipated, there is, in fact, "no daylight between the federal and state law regarding Citigroup's eligibility for the NOL deduction." Id. at *4 n.33.

There is no dispute that the relevant New York tax laws expressly borrow the analogous federal provisions effectively wholesale. Under then-applicable New York law, a taxpayer's New York taxable income was identical to that which "the taxpayer is required to report to the United States treasury department," N.Y. Tax Law § 1453, and state NOL deductions are "presumably the same" as federal deductions, id. § 1453(k-1), subject to exceptions not relevant here.

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 ("The Federal law and rules and regulations determine the amount of entire net income for State tax purposes, except and to the extent that they have been changed by express provision of the State statute . . . ."). And New York has a long-standing policy of interpreting its tax laws in accordance with federal law whenever possible. Michaelsen v. N.Y.S. 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, 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") (internal quotation marks omitted); 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) (Ex. 23) (applying Treasury regulations to interpret Section 382 for purposes of New York tax calculations); accord Rasmusen, 2016 WL 7031054, at *4 & n.30.[18]

Nor is there any contrary guidance from the New York taxing authority. Under all these circumstances, the federal interpretation that Citigroup followed controls. Thus, relator cannot allege that Citigroup submitted a false record or statement in connection with its state tax returns.

[18] Consistent with this long-standing policy, New York courts have made clear that the phrase "*presumably* the same" in other parts of the New York Tax Law was not meant to alter the referenced federal definition, but instead only to "afford[] a taxpayer to have a hearing if there was a claimed inaccuracy in the figure reported to the Federal Government." Dreyfus Special Income Fund v. N.Y.S. Tax Comm'n, 126 A.D.2d 368, 372 (3d Dep't 1987), aff'd 72 N.Y.2d 874 (1988); see also People ex rel. Standard Oil Co. of N.Y. v. Law, 237 N.Y. 142, 146-47 (1923); People ex rel. Barcalo Mfg. Co. v. Knapp, 227 N.Y. 64, 70-71 (1919); Rasmusen, 2016 WL 7031054, at *4 n.31.

III. Relator Fails to State a Claim Because He Does Not Allege Intent

Even if relator could allege that Citigroup submitted a false record or statement in connection with its taxes (which he cannot), relator fails to state a claim for a second, independent reason: relator must allege that Citigroup acted "knowingly." N.Y. State Fin. Law § 189(1)(g). Relator does not and cannot 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, 26 N.Y.3d at 113. Rather, the NYFCA's requirement that a defendant act "knowingly" requires allegations that a defendant acted with actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information. See N.Y. State Fin. Law § 188(3)(a). Indeed, the NYFCA expressly excludes from its ambit any "acts occurring by mistake or as a result of mere negligence." Id. § 188(3)(b). Conclusory allegations of intent do not satisfy this pleading burden. See, e.g., Seiden, 96 A.D.3d at 72 (dismissing NYFCA claim where the plaintiff did not provide any factual support for his "conclusory" allegation that the defendant had "knowingly" acted to defraud a local government).

Relator's complaint falls far short of this pleading standard. The complaint alleges that Citigroup prepared its tax returns in compliance with authoritative federal tax guidance, see Compl. ¶¶ 25-26, 35 (Ex. 3), as incorporated in New York statutory law, see id. ¶¶ 17-18. Relator fails to allege any fact that suggests, or even raises the possibility, that any knowledge of falsehood accompanied Citigroup's 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.

The only allegations of Citigroup's supposed intent are boilerplate assertions that it acted "knowingly" or "intentionally" in preparing its tax returns and claiming NOL deductions. Id.

¶¶ 36-39. These conclusory allegations do not establish intent under any pleading standard, let alone the heightened pleading standard for fraud claims. See, e.g., Seiden, 96 A.D.3d at 72 ("Plaintiff must state a reverse false claim with particularity."); Gall v. Summit, Rovins and Feldesman, 222 A.D.2d 225, 225 (1st Dep't 1995) (dismissing claims under CPLR 3013 where plaintiff "fail[ed] to allege specific facts to show that defendants acted negligently in the provision of legal representation" and complaint instead "contain[ed] only repetitive conclusory allegations"); U.S. ex rel. Pervez v. Beth Israel Med. Ctr., 736 F. Supp. 2d 804, 814 (S.D.N.Y. 2010) (rejecting relator's "sweeping . . . assertion" that defendant must have acted intentionally as "entirely unfounded").

Nor can relator's allegation that the IRS Notices were improperly promulgated—which, as the federal court ruled, relator lacks standing to bring, Rasmusen, 2016 WL 7031054, at *3—rescue his claim. A plaintiff does not plausibly allege intent merely by alleging that defendants violated the law as that plaintiff construes it. Indeed, in the context of an FCA claim, the Second Circuit held that even where a defendant's 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 establishing a "plausible allegation of scienter." Chapman v. Office of Children & Family Servs., 423 F. App'x 104, 105 (2d Cir. 2011); see also U.S. ex rel. Kirk v. Schindler Elevator Corp., 130 F. Supp. 3d 866, 874 (S.D.N.Y. 2015) ("[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); Finney, 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); U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999) ("[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations.").

The complaint's failure to allege that Citigroup acted with the requisite state of mind is fatal to relator's claim here and independently requires dismissal.

CONCLUSION

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

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DAVIS POLK & WARDWELL LLP

By: ______________________

Mario J. Verdolini
Edmund Polubinski III
Jessica L. Turner
Alan J. Tabak

450 Lexington Avenue
New York, New York 10017
(212) 450-4695

mario.verdolini@davispolk.com
edmund.polubinski@davispolk.com
jessica.turner@davispolk.com
alan.tabak@davispolk.com

Attorneys for Defendant Citigroup Inc.