STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

THE STATE OF NEW YORK *ex rel.*
ERIC RASMUSEN,

Plaintiff,

- against -

Index No.: 100175/2013
Hon. Charles E. Ramos
Motion Seq. No. 002

CITIGROUP, INC.,

Defendant.

ERIC RASMUSEN'S MEMORANDUM OF LAW IN OPPOSITION TO CITIGROUP'S MOTION TO DISMISS

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REGULATIONS AND OTHER AUTHORITIES

INTRODUCTION[1]

Citigroup improperly gave itself a New York State tax break of almost a billion dollars without first checking with the State. Instead, Citigroup took this massive tax deduction relying on a facially bogus free-pass from the IRS that was applicable only to Citigroup's *federal* taxes, in violation of federal statute and, thus, New York tax law. This false deduction cannot stand.

This kind of case is exactly what the New York False Claims Act's ("NYFCA's") tax whistleblower provisions were designed to remedy — the culpable failure to pay a significant tax liability. Without Professor Rasmusen's initiation of this case, Citigroup's New York scheme would have gone unnoticed, unchallenged, and unremedied. It is now up to this Court to determine that Citigroup indeed has connived to underpay its New York taxes.

Citigroup's motion must be denied. Citigroup's scheme is based on IRS "Notices" — policy announcements issued by the U.S. Treasury at a time when it owned one-third of the company's shares — which allowed the company to carry over tens of billions of dollars in net operating losses ("NOLs") in express contravention of the Internal Revenue Code. While Citigroup's reliance on the Notices may or may not leave Citigroup in a safe place *vis a vis* its *federal* tax returns (which are not at issue here), the same is not true for its *New York State* tax liability. New York tax law expressly incorporates the *Internal Revenue Code*, the plain and unambiguous text of which directly contradicts the IRS Notices. It is black letter law in New York that federal administrative interpretations of statutes that contradict unambiguous statutory language must be rejected. Citigroup disregarded this prohibition, and filed tax returns with New York State that included a forbidden deduction based on facially bogus federal NOL deductions.

[1] On March 10, 2017, the Court granted Professor Rasmusen's request to extend the page limit of this brief to 30 pages. *See* Affirmation of John L. Sinatra, Jr., dated March 17, 2017 ("Sinatra Aff."), ¶ 5, Ex. D.

Similarly deficient is Citigroup's claim that, even if the deductions were illegal under New York tax law, it did not knowingly underpay. New York law is settled that such a scienter argument is premature on a CPLR 3211 motion to dismiss. At this juncture, as pleaded (and as explained below), Citigroup's actions are sufficiently culpable. Discovery into whether Citigroup "knowingly" claimed false deductions on its New York tax filings, in a "deliberately ignorant" fashion or with "reckless disregard," should proceed. Indeed, it is unfathomable that a company of Citigroup's size, with its array of tax advisors, did not know that IRS permission to disregard a federal statute would not suffice to allow it to disregard New York law too.

Finally, Citigroup's claim that it is immune from liability here because its *federal* tax scheme was publicly disclosed fails for a simple reason: no allegation concerning Citigroup's New York *State* tax liability was disclosed in public before the filing of this action. Citigroup conflates public disclosure of its *federal* tax liability with its *State* tax liability. They are distinct and, under well-established precedent, that distinction precludes Citigroup's invocation of the public disclosure bar. Further, even if the Court were to hold that Citigroup itself identified underpayment of its New York taxes in documents it filed with the SEC, dismissal is not warranted. The law under the NYFCA is clear that the State of New York "shall oppose the dismissal" of an action "solely because of an alleged public disclosure in a federal report." 13 N.Y.C.R.R. § 400.5. And SEC filings do not trigger New York's public disclosure bar, in any event. A decision on the merits of Citigroup's New York tax dodge is required, and its motion to dismiss should be denied.

FACTUAL BACKGROUND

A. New York's False Claims Act.

The NYFCA was adopted to facilitate the recovery of funds from those who have defrauded the State of New York. It encourages private persons — "relators" — to blow the whistle on fraudulent tax filings by bringing *qui tam* lawsuits like this one on behalf of the State. *See* N.Y. State Fin. Law § 190(2)(a). NYFCA cases can be initiated by the Attorney General (or a local government), *id.* § 190(1), or by a relator who initiates the case in the hopes of a share in the recovery, *id.*, § 190(2), (6).[2]

While similar to the federal False Claims Act, the NYFCA has at least two critical differences relevant to this action. First, in 2010, New York amended its False Claims Act to cover tax fraud. *See* § 189(4).[3] For tax cases, the NYFCA covers "claims, records, or statements made under the tax law" if three conditions are satisfied: (1) the defendant's net income or sales exceeds $1 million per year, (2) damages, as pleaded, exceed $350,000, and (3) the defendant "is alleged to have violated paragraphs (a), (b), (c), (d), (e), (f) or (g) of subdivision one of this section [189]." *Id.* § 189(4)(a). Paragraph (g) covers the case here, where Citigroup, through the filing of its New York tax returns, is alleged to have knowingly made or used "a false record or statement material to" its obligation to pay its State taxes. *See id.* § 189(1)(g). The NYFCA's

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[2] Contrary to the implication in Citigroup's footnote 2, the Attorney General's decision not to intervene in an FCA case has no bearing on the merits. *See, e.g.*, *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78 (2d Cir. 2012). The NYFCA anticipates this, and provides a higher share of recovery to successful relators who proceed alone, as is their right. The NYFCA also permits the Attorney General to keep abreast of proceedings and *intervene later* for good cause. *See* N.Y. State Fin. Law §§ 190(2), 190(5)(a). In fact, for fiscal year 2016, $1.04 billion was recovered in federal whistleblower suits in which the Justice Department declined to intervene, compared to $2.8 billion recovered in intervened FCA cases. *See* DOJ Fraud Statistics, https://www.justice.gov/opa/press-release/file/918361/download, last visited Mar. 16, 2017.

[3] Tax fraud is excluded from the federal False Claims Act, and a federal action analogous to this state action would be dismissed regardless of merit.

tax provisions were designed to provide an additional enforcement tool and to deter false tax returns, while increasing recoveries to the State. *See, e.g.*, *People v. Sprint Nextel Corp*, 26 N.Y.3d 98, 42 N.E.3d 655 (2015). Actionable conduct must be "knowing," defined as: "actual knowledge," "deliberate ignorance," or "reckless disregard." *See id*. § 188(3)(a).

Second, while both the NYFCA and federal FCA bar suits based on certain categories of publicly disclosed information, the NYFCA's bar is narrower. *See* § 190(9); 13 N.Y.C.R.R. § 400.5. The NYFCA permits whistleblower claims based on either private or publicly disclosed information, with three exceptions. In these cases, the court "shall dismiss" an action "unless opposed by the state . . . or unless the qui tam plaintiff is an original source of the information," if the same "allegations or transactions" were "publicly disclosed" in hearings to which the government is a party, in a "federal, New York state or New York local government report," or in "the news media." *See id*. § 190 (9)(b)(i)-(iii). The NYFCA differs from its federal counterpart because it *permits* whistleblower claims to proceed in the face of allegations of a previous public disclosure of the issue. In particular, the State of New York "shall oppose the dismissal" of an action "*solely because of an alleged public disclosure in a federal report*." 13 N.Y.C.R.R. § 400.5 (emphasis added). New York public policy thus disfavors dismissal if allegations are disclosed in federal reports. Moreover, the NYFCA does not categorize certain publicly available documents, such as SEC reports, as "publicly disclosed." *See* N.Y. State Finance Law § 190(9)(b)(ii). The NYFCA also excludes internet postings from the definition of "news media." *Id.* § 190(9)(b)(iii).

B. <u>The Parties.</u>

Eric Rasmusen is the Dan R. and Catherine M. Dalton Professor of Business Economics and Public Policy at Indiana University's Kelley School of Business. Sinatra Aff., Ex. A, Compl. ¶ 5. Citigroup is a global diversified financial services holding company with its principal executive offices in New York City. *Id*. ¶ 7. Citigroup incurred losses during the recession years of 2008-2009. It then failed to pay the State of New York approximately $800 million in taxes by improperly deducting those losses from its taxable income after undergoing ownership changes resulting from the federal government's purchase and sale of Citigroup stock. *Id*. ¶¶ 1-2.

C. <u>The Tax Treatment of Net Operating Losses.</u>

1. Background.

As alleged in paragraphs 13-15 of the complaint, the Internal Revenue Code ("IRC") sets forth numerous deductions that can be taken when computing taxable income. *See* 26 U.S.C. § 161. One is the deduction for net operating losses ("NOLs"), the excess of deductible expenses over gross income. *Id*. at § 172(c). The theory is that a company experiencing losses in one year and profits the next should be able to use the losses to offset the profits. NOLs not used up because of insufficient profits to offset them can be carried forward to subsequent tax years.

Section 382 of the IRC severely limits a corporation's ability to carry forward NOLs if the corporation experiences an "ownership change" between the time it incurs the NOLs and the time it uses them as deductions. *Id*. at § 382(a), (c). Section 382 is intended to prevent loss trafficking, based on the notion that new owners, who did not own shares when the corporation experienced losses, should not be able to offset profits using those losses. This prevents anyone from acquiring ownership just for the tax deductions. Section 172 of the IRC incorporates the loss trafficking restrictions of Section 382 by reference. *See* IRC § 172(i) (formerly (k)(2)).

The prevention of loss trafficking is at the core of both the IRC's plain language and legislative history. Since 1943, the IRC has included some sort of provision to combat loss trafficking. *See* H. Rep. No. 871, 78th Cong., 1st Sess. (1943) (regarding the addition to the IRC of former Section 129, the predecessor of the present Section 269). After experimentation with more subjective rules involving share buyer intent, the present Section 382 was written as a set of *bright-line rules* to determine whether a corporation with net operating loss carryforwards experienced an "ownership change," intent being irrelevant. If such a corporation (the "Loss Corporation") experiences an "ownership change," Section 382 limits future use of its NOLs.[4]

Here, *bright-line rule* "ownership changes" of Citigroup occurred under the Section 382 test because of purchases and sales by Treasury combined with a large issuance of new shares to the general public. Citigroup's motion to dismiss does not argue to the contrary. Rather, it argues that Treasury was allowed to make an exception to the usual definition of "ownership change." *See* Citigroup's Br., Point II.

During all times relevant to this action, New York State imposed a franchise tax on banking corporations like Citigroup based on their net income. *See* N.Y. Tax Law §§ 1451, 1455 (repealed 2015).[5] Unless the alternative minimum tax applied, the tax was calculated as 7 $^{1}/_{10}$% of entire net income or the portion thereof allocated to New York State. *Id*. at 1455. Like federal law, New York allowed NOL deductions, and the New York NOL was the same as under Section 172 of the IRC, with certain modifications. *See* N.Y. Tax Law § 1453(k-1). Thus, the

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4 Although Section 382 provides a strictly arithmetical test for "ownership change," the arithmetic is complex because it must deal with purchases by multiple shareholders of existing and newly issued stock. *See* IRC § 382(a). The annual limit is determined by multiplying the value of the corporation on the date of the ownership change (very low for Citigroup in 2009) by the "long term tax exempt rate" at the time of the ownership change. *See* IRC § 382(b). When a corporation experiences successive ownership changes, special rules apply that can restrict NOLs even more. *See* U.S. Treasury Regulations, 26 C.F.R. § 1.382-5(a), (d).

5 N.Y. Tax Law § 1450, *et seq.* (Article 32) was repealed in 2015; however, its provisions were effective at all times relevant to this action. A copy of Article 32 is attached as Exhibit E to the Sinatra Aff.

franchise tax directly incorporates the NOL deduction under Section 172 of the IRC, and also incorporates the NOL limitation on carryovers in Section 382.

2. The TARP Program and Citigroup.

On October 3, 2008, President Bush signed into law P.L. 110-343 — the Emergency Economic Stabilization Act of 2008 ("EESA"). A response to the financial crisis, EESA gave Treasury authority to take steps to restore liquidity to the financial system. One program established by EESA, the Troubled Asset Relief Program ("TARP"), allowed Treasury to pursue this goal by purchasing equitable interests in publicly traded companies. In exercising this authority, EESA required that Treasury prevent the unjust enrichment of financial institutions, and generally required Treasury to maximize overall returns to taxpayers. *See* Compl. ¶ 19; EESA §§ 2(2)(C), 101(e), 113(b). Upon passage of EESA, Treasury invested about $125 billion in the country's eight largest banks in return for preferred stock. Citigroup received $25 billion of this amount. Treasury invested an additional $20 billion in Citigroup in December 2008.

Citigroup, however, needed more. To help, Treasury's $25 billion worth of Citigroup preferred stock was converted to common stock, and in December 2009, Citigroup made a large issue of new shares to the general public. These two transactions together constitute the *first* "ownership change" under IRC § 382's computation, since over 50% of ownership changed hands. In April 2010, Treasury began to sell its Citigroup common stock, and by December, it no longer owned any. Compl. ¶ 28. Treasury's stock sale, together with the earlier public issue, constitute a *second* "ownership change." *Id.* ¶ 29.

3. The IRS Notices.

Treasury also aided Citigroup by issuing special "revenue notices" that granted waivers of corporate income tax under the guise of interpreting EESA and IRC § 382.

In October 2008, Citigroup, with the support of Treasury, made an offer to buy Wachovia, another troubled bank. Wachovia held valuable NOLs that would be forfeited by the ownership change. The IRS issued Revenue Notice 2008-83, 2008-42 I.R.B. 905, which interpreted Section 382 and EESA as authorizing preferential tax treatment for banks that underwent a Section 382 ownership change. Compl. ¶ 23. In the end, Wells Fargo outbid Citigroup and acquired Wachovia without government assistance (except for Notice 2008-83), commonly called "the Wells-Fargo Notice." Congress disagreed strongly with the Wells-Fargo Notice, and repudiated it in the American Recovery and Reinvestment Act of 2009 ("ARRA"), P.L. No. 111-5. In fact, Section 1261(a)(1) says that the "delegation of authority to the Secretary of the Treasury under Section 382(m) of the Internal Revenue Code of 1986 does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers."

Similar notices, "the IRS Notices," are at the heart of this action. On April 14, 2009, the IRS issued Revenue Notice 2009-38, 2009-18 I.R.B. 901, which stated that no "ownership change" would be triggered by Treasury's purchases of stock. Thus, when Treasury bought Citigroup stock, the purchase would not count towards an "ownership change," allowing Citigroup to carry over its NOLs. Next, Revenue Notice 2010-2, 2010-2 I.R.B. 251 was issued on December 11, 2009, at the same time as Citigroup's new stock issue to the public. This Notice, although it superseded Revenue Notice 2009-38, reiterated Treasury's favorable treatment under IRC § 382. It also extended that treatment to Treasury's *sale* of shares, which also would not count as an "ownership change" under the Notice. These Notices raised the price the public was willing to pay for the new Citigroup stock because the company, by carrying over its NOLs, would be effectively exempt from federal income tax for some years. A significant motivation for these private persons to buy Citigroup stock was to get the tax benefit — just what IRC § 382 is written to prevent. Naturally, this helped Citigroup's recovery, which was the goal of Treasury, both as federal policymaker and as interested shareholder.

Treasury realized $6.85 billion in profit from buying the stock in 2009 and selling it in 2010. Compl. ¶ 30. (The federal government as a whole lost or will lose significantly more despite this paper gain because of the loss in tax revenue from the illegal NOL deductions.) New York State held no Citigroup stock and gained nothing from non-application of IRC § 382. However, New York State did lose tax revenue — an estimated $800 million. New York State was not consulted about the issuance of the IRS Notices.

D. <u>Citigroup Violated New York Tax Law.</u>

The IRS Notices are irrelevant to Citigroup's New York tax returns. The Notices were not approved by Congress; they are contrary to the language and purpose of IRC § 382, which New York Tax Law expressly follows; they defy ARRA's prohibition on preferential treatment of classes of taxpayers; they conflict with the requirements of EESA; and they constitute arbitrary and capricious action by the IRS. Compl. ¶ 32. Indeed, New York law is settled that federal administrative interpretations of statutes that contradict unambiguous statutory language must be rejected. Because the Notices are neither statutes of regulations (as explained below), they are irrelevant for New York taxes. *Id.* ¶ 33. The Notices were not incorporated into New York State tax law, and Citigroup could not rely on them to reduce its New York State tax liability. *Id.* ¶ 34. Nevertheless, Citigroup did just that. *Id.* ¶ 35.

Thus, as alleged in the complaint, between 2010 and 2012 Citigroup knowingly made, used, or caused to be made, or used false records or statements material to an obligation to pay money to the State. *Id.* ¶ 36. Citigroup knowingly prepared false New York State tax returns with excessive NOL deductions to avoid the payment of state franchise tax. *Id.* ¶ 37. As a result, New York State did not receive approximately $800 million in tax revenues to which it was entitled. *Id.* ¶ 38. The complaint concludes that, as a result of Citigroup's knowingly fraudulent conduct, Citigroup is liable to the State for taxes owed to the State, trebled, plus penalties, interest, and attorneys' fees under NYFCA. *Id.* ¶ 39.

E. <u>The Southern District Confirms This Is a *State* Tax Issue.</u>

Professor Rasmusen filed this action in this Court, and Citigroup removed it to the Southern District of New York. *See New York ex rel Rasmusen v. Citigroup Inc.*, No. 15-CV-07826 (S.D.N.Y. Oct. 2, 2015), Dkt. No. 1. The District Court *sua sponte* remanded the action, holding that it lacked subject matter jurisdiction because Professor Rasmusen's claim pertains to *New York State* tax law and does not raise a federal question. It wrote:

> . . . [T]he issue whether that is the proper construction of [N.Y. Tax Law] Section 1453(k-1) in the end presents a question purely of state law. And if the proper construction of this New York statute is that the New York Tax Law did not permit Citigroup to take the NOL deductions that it took on its state returns, regardless of whether such deductions were proper on its federal returns, then the case could be decided without reference to the propriety of those deductions under IRC Section 382 for purposes of its federal returns.

New York ex rel. Rasmusen v. Citigroup Inc., No. 15-CV-07826, 2016 WL 7031054, at *4 (S.D.N.Y. Dec. 2, 2016). Although the court, in dicta, hinted at what it thought of Citigroup's motion, it declined explanation and did not rule on the merits. No part of that decision is binding on the merits here.

ARGUMENT

I. CITIGROUP VIOLATED NEW YORK STATE TAX LAW BY APPLYING NOLS ON ITS NEW YORK STATE TAX RETURNS

Professor Rasmusen has stated a claim that Citigroup violated New York State tax law. The IRS Notices directly contravene the Internal Revenue Code. Although the IRS improperly decided not to enforce Section 382 of the Internal Revenue Code for federal public policy reasons, New York State made no such decision. New York is required to disregard a federal administrative edict that directly contradicts a federal statute. The Notices are entitled to no effect with regard to Citigroup's New York State tax obligations, meaning the company violated New York law.

A. New York Law Does Not Incorporate the IRS Notices.

1. The Notices conflict with IRC § 382 and the Treasury Regulations.

Citigroup erroneously claims that its New York State taxable income must be identical to the amount it reported to the IRS because, under N.Y. Tax Law § 1453(k-1), its State NOLs are "presumably the same" as its federal deductions. *See* Citigroup's Brf. Point II at 21. But this is ***not*** what the statute says. Rather, NOLs are "presumably the same as the net operating loss deduction ***allowed under section one hundred seventy-two of the internal revenue code***." N.Y. Tax Law § 1453(k-1) (repealed effective Jan. 1, 2015) (emphasis added); *see also* Point I(B), *infra*, at 18-19.

In other words, New York Tax Law incorporates the federal statute (IRC § 172)[6] and the IRC's express "ownership change" controls — *not* the IRS Notices. *See* N.Y. Tax Law § 1453(k-1). Thus, Citigroup experienced "ownership changes" as a matter of New York tax law.

[6] IRC § 172(i)(2) expressly incorporates the "special limitation on net operating loss carryovers in case of a corporate change of ownership" under IRC § 382, meaning N.Y. Tax Law incorporates both provisions.

As a matter of U.S. Treasury tax collection policy, to be sure, the Notices bypass IRC §§ 172 and 382 with regard to Citigroup's "ownership changes." They do this by fiat, without a reasoned explanation, declaring that, "[f]or purposes of section 382, with respect to any stock . . . acquired by Treasury . . . the ownership represented by such stock . . . shall not be considered to have caused Treasury's ownership in the issuing corporation to have increased." *See* Revenue Notice 2009-38, III D; Revenue Notice 2010-2, III D and E.[7]

New York does not — and cannot — disregard IRC § 382 simply because Treasury elected to do so. It is true that New York law references provisions of the Internal Revenue Code into its own law, as with the incorporation of IRC § 172 (and with it, § 382) into N.Y. Tax Law § 1453, and New York law does look to federal authority to help interpret these provisions. *See Matter of Marx v. Bragalini*, 6 N.Y.2d 322, 189 N.Y.S.2d 846 (1959); *Matter of Dreyfus Special Income Fund v. New York State Tax Comm.,* 126 A.D.2d 368, 371-72, 514 N.Y.S.2d 130, 133-4 (3d Dep't 1987). But it is black letter law that New York ***will disregard*** a federal administrative interpretation that directly contradicts a federal statute. *See Bosh v. Fahey*, 53 N.Y.2d 896, 440 N.Y.S.2d 626 (1981); *see also Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 458 (1980) (no weight to agency regulation that contradicts statute).

In *Bosh*, the New York Court of Appeals upheld the state agency's refusal to rely upon an "Action Transmittal — Interpretation" issued by the federal Department of Health and Welfare. *See* 53 N.Y.2d at 901. The case involved the Social Security Act, which requires state agencies to administer benefits in accordance with federal law. The Court determined that the federal

[7] Although it was nonsensical for the IRS to declare that Treasury buying shares does not lead to increased Treasury ownership, no one other than Treasury or Citigroup has standing to challenge this as a matter of federal tax liability. *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917 (1976); *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315 (1984). When Treasury wrote the Notices, it knew it would not have to defend them before a court, because no one would have standing to challenge them.

statute was clear that state agencies must take into consideration any income or resource of eligible family members in determining a family's need, and thus, the Court *rejected* the federal agency's directive to disregard certain benefits received by family members. The Court noted that "[w]e cannot . . . agree with petitioner's contentions that the 'scheme of cooperative federalism' implicit in the public assistance system requires States to adhere blindly to all Federal directives, no matter how irrational or inconsistent with applicable Federal law." *Id.* at 900. Further, the New York Court of Appeals actually applied its conclusion to agency regulations, not mere pronouncements. *Id.* at 898 n.1. Agency deference has no place in the face of clear statutory law to the contrary. *See Belmonte v. Snashall*, 2 N.Y.3d 560, 565-66, 780 N.Y.S.2d 541, 543-44 (2004) (no deference if question is merely one of statutory interpretation).

Bosh controls here because the IRS Notices directly contradict the applicable *federal statute* (IRC § 382) that New York law incorporates. The federal statute — and federal regulations — both *unambiguously* require Citigroup to compute 5% shareholders' ownership percentage increases. *See* IRC § 382(g)(1); Treasury Regulations, 26 C.F.R. § 1.382-2T(c)(1). Yet Revenue Notice 2009-38 and Revenue Notice 2010-2 declare that the purchases and sales by Treasury *do not* cause increases in ownership percentages. *The Notices directly contradict the very federal law that New York incorporates by statute.* Thus, they cannot stand in New York. As the Supreme Court has held, "Congress, not the (IRS) Commissioner, prescribes the tax laws . . . ." *Dixon v. United States*, 381 U.S. 68, 73, 85 S. Ct. 1301, 1304 (1965) (treasury rulings have no power to alter a statute enacted by Congress); *see also Samonds v. Commissioner*, No. 3954-91, T.C. Memo 1993-329 (Tax Ct. 1993) (rejecting an IRS notice because it was inconsistent with the Internal Revenue Code).

Because New York law incorporates IRC § 382 (which is unambiguous), New York gives no effect to the contradictory Notices. In New York, Citigroup's NOLs are subject to statutory limitation after the "ownership changes" it experienced in 2008 and 2010. For this reason — and for the additional reasons explained below — Citigroup's New York tax position is plain wrong.

2. The Notices violate other federal statutes.

To the extent Citigroup (incorrectly) claims New York must blindly adhere to the federal tax regime, the Notices still cannot be incorporated by New York Tax Law because *they are not legal under several other federal statutes*. First, the Notices violate ARRA. Revenue Notice 2008-83 was issued by the IRS on October 1, 2008, providing preferential treatment under IRC § 382 for banks that had experienced an "ownership change." In 2009, after considerable outcry, Congress enacted ARRA and repealed Revenue Notice 2008-83. Congress reviewed the degree to which it has delegated authority to the IRS. It found that ***IRC § 382(m) did not authorize*** the IRS to provide exemptions restricted to particular industries or classes of taxpayers. In ARRA, Congress declared that Revenue Notice 2008-83 was inconsistent with its intent in enacting IRC § 382(m). *See* The American Recovery and Reinvestment Act of 2009, P.L. 111-5, § 1261. The Notices at issue here provide the same type of forbidden exemption — and purport to trump IRC § 382 — but only for corporations whose stock has been purchased by Treasury under TARP (*i.e.*, companies "bailed out" by the federal government) rather than for banks generally. *See* Revenue Notice 2009-38, III D; Revenue Notice 2010-2, III D and E.

Second, the Notices conflict with the EESA. Section 101(e) of EESA requires Treasury to "take such steps as may be necessary to prevent unjust enrichments of financial institutions participating in a program established [under TARP]." The Notices manifestly result in unjust enrichment of Citigroup at the expense of other taxpayers. More generally, EESA §§ 2(2)(C), 103(1) and 113(a)(1) require Treasury, in exercising its authority under EESA, *to maximize overall returns* to the U.S. taxpayers, minimize the impact on the national debt, and minimize the long-term negative impact on taxpayers. The Notices run afoul of these EESA requirements.

And third, the Notices violate the Administrative Procedure Act (the "APA"), P. L. No. 79-404. *See Cohen v. United States*, 650 F.3d 717, 723, 736 (D.C. Cir. 2011) (applying the APA to IRS revenue notices). Section 706 of the APA provides, in part, that a reviewing court shall hold unlawful and set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 103 S. Ct. 2856, 2862 (1983) (holding an action by the National Highway Traffic Safety Administration was arbitrary and capricious because the agency failed to articulate a satisfactory explanation for its action); *see also Dominion Resources, Inc. v. U.S.*, 681 F.3d 1313 (Fed. Cir. 2012) (striking down former Treasury Regulation for same reason). Here, the Notices offer no explanation, cogent or otherwise, of their evisceration of IRC § 382 for Citigroup's benefit. The Notices did not go through the APA's notice-and-comment period, and they do not provide explanations. They run contrary to Congress's intent to replace a subjective standard for loss trafficking with a bright-line rule in order to eliminate the need to ask whether loss trafficking is the motive. Even if a non-profit (even less interested than Treasury in earning capital gains) had acquired Citigroup, it

[8] The Supreme Court has confirmed that the APA's "arbitrary or capricious" standard involves the same analysis as step two of the Supreme Court's *Chevron* standard (in which the court reviews whether an agency ruling is a permissible construction of the statute). *See Judulang v. Holder*, 565 U.S. 42, 52, 132 S. Ct. 476, 484 n.7 (2011).

would not escape IRC § 382 even though a non-profit pays no income tax and this is not motivated by loss trafficking.

3. The Notices receive no federal agency deference.

IRS notices are *not* "regulations." They are equivalent to mere "press releases" and, as such, are not authoritative and *not entitled to deference*. *See Stobie Creek Invests., LLC v. United States*, 82 Fed. Cl. 636, 671 (Ct. Claims 2008), *aff'd*, 608 F.3d 1366 (Fed. Cir. 2010). They do *not* go through the APA's stringent notice and comment process for regulations, *see* 5 U.S.C. §551 *et seq*., and are, therefore, are not entitled to *Chevron* deference. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 46, 131 S. Ct. 704, 707 (2011) (referring to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984)). For these reasons, Citigroup's previous citation to a provision in IRC § 382 — permitting Treasury to "*prescribe regulations*" to treat certain stock as "not stock" — fails as a matter of law. The Notices are *not regulations*, having not gone through the stringent procedures of explanation, public input, and transparency to which regulations are subject. Rather, they merely represent the Treasury Secretary's declared federal policy preference.

4. Regardless of their federal validity, the Notices cannot be given weight in New York because of their disparate effect on the State's treasury.

Even if federal law were to deem the Notices valid for federal purposes, that would still not give effect to them in New York. The Notices allow Citigroup to realize substantial benefits from its NOLs, despite "ownership changes" under IRC § 382. This has already cost New York several hundred million dollars in tax revenue, and it jeopardizes New York's interest in preserving its fiscal health. Where federal guidance favors Treasury's fisc, but hurts New York, New York does not follow this federal guidance. *See Isabella Geriatric Cent., Inc. v. Novello*, 2005 WL 3816962, at *6 (Sup. Ct., New York County Dec. 9, 2005), *aff'd*, 38 A.D.3d 356, 833 N.Y.S.2d 5 (1st Dep't 2007) (rejecting petitioners' reliance on a 2004 letter from the United States Department of Health and Human Services, holding New York State "is not statutorily obligated to rely on HHS's" reimbursement guidance, which benefited the federal government's bottom line but hurt New York State's). Here, like the HHS reimbursement suggestions in *Isabella Geriatric Cent.*, the Notices allowed Treasury to realize immediate economic gain from its sale of its Citigroup shares. New York, on the other hand, had no Citigroup stock to sell. If New York recognized the Notices, it would not share the benefits reaped by Treasury *and* it would suffer lost tax revenue. Consequently, New York law gives no weight to the Notices.

B. New York Tax Law Incorporates the Federal Tax Code and Its Regulations, Not One-Time Agency Decisions Not To Enforce the Federal Tax Code.

Citigroup justifies its tax dodge by arguing New York looks "to the federal tax regime" for computation of "net income." *See* Citigroup's Br. Point II at 21-22. This argument fails for two reasons. First, this is true only with respect to federal statutes and the regulations interpreting them.[9] Again, *the Notices are not regulations*. They are the equivalent of "press releases," *see Stobie Creek Invests., LLC*, 82 Fed. Cl. at 671, as they were never promulgated in accordance with the Administrative Procedure Act and its notice and comment requirements. *See* 5 U.S.C. §551 *et seq*. They simply declared — and purported to allow *federal* taxpayers to

[9] Citigroup relies on a handful of New York decisions that pertain to federal statutes or regulations, not notices. *See People ex rel. Conway Co. v. Lynch*, 258 N.Y. 245, 251, 179 N.E. 483, 485 (1932) ("Gains reflected in the gross income must be calculated in the manner authorized by the ***United States statutes***") (emphasis added); *Michaelsen v. New York State Tax Comm'n*, 67 N.Y.2d 579, 584, 496 N.E.2d 674 (1986) (determining whether New York would follow a ***federal tax regulation***); *Delese v. Tax Appeals Tribunal*, 3 A.D.3d 612, 771 N.Y.S.2d 191 (3d Dep't 2004) (determining New York tax liability based on ***federal statute and regulations***, holding "the regulations merely aid in the interpretation of the statute"); 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); *New York ex rel. Rasmusen v. Citigroup Inc.*, No. 15-CV-07826, 2016 WL 7031054, at *4, n.30 (S.D.N.Y. Dec. 2, 2016) (citing the same sources as above except *Conway*).

"rely on" their declaration — that Treasury's purchase or sale of stock in the affected banks under TARP would not be enforced as an "ownership change," despite the *bright-line* definition set forth in IRC § 382 and its properly promulgated regulations. In other words, Treasury said "never mind" regarding *its own stock trades*. Like "press releases," the Notices resemble an administrative order unilaterally exercising discretion in the enforcement of a statutory mandate as a matter of public policy.

Second, the definition of "net income" — which is the term in the cases Citigroup cites — is differs from the definition of "net operating losses" (NOLs) under New York Tax Law.[10] Indeed, "net income" is defined as the amount "taxpayer is required to report to the United States treasury department" — essentially incorporating from the federal tax return. N.Y. Tax Law § 1453(a)(1). In contrast, New York Tax Law defines "net operating losses" (NOLs), which are at issue here, as the deduction "allowed ***under section one hundred seventy-two of the internal revenue code***." (Emphasis added). Citigroup conflates them, but the difference is critical. While "net income" incorporates the dollar amount the taxpayer reports to the federal government, the provision at issue here (Section 1453(k-1), which is an exception to "net income"), instead directly incorporates the taxpayer's liability *according to a federal statute*, as opposed to what the IRS ultimately collects (or chooses not to collect). If the New York legislature intended for a bank's NOLs simply to mirror those it reports on its federal tax return, it could have said so. It did not.

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10 N.Y. Tax Law § 1453 begins with a definition of "net income" as the taxable income reported to the United States Treasury, but then lists dozens of specific exceptions, each of which is designed to create a change between the federal and New York systems, including "net operating losses." *See* § 1453(k-1).

This is why Citigroup's reliance on *Conway Co.*, 258 N.Y. at 251, and *Pierce-Arrow Motor Corp. v. Mealey*, 270 A.D. 286, 291, 59 N.Y.S.2d 568 (3d Dep't 1946) — for the position that New York simply adopts the same taxable income reported to the federal government — is erroneous. These decisions — which are 85 and 71 years old, respectively — are based on a *different provision* of New York Tax Law, defining "net income," as opposed to "net operating losses." In particular, *Conway* and *Pierce-Arrow Motor Corp.* were based on N.Y. Tax Law § 209, which defined "net income" as "presumably the same as the entire net income ***which such corporation is required to report to the United States***." *See Conway Co.*, 258 N.Y. at 248 (emphasis added). In contrast, N.Y. Tax Law § 1453(k-1), which is at issue here, defines "net operating loss" as the deduction "allowed ***under section one hundred seventy-two of the internal revenue code***." (Emphasis added). Thus, these cases do not apply. Citigroup owes New York taxes.

II. THE COMPLAINT PROPERLY ALLEGES SCIENTER

Citigroup's argument that the complaint does not adequately allege scienter — because Citigroup acted on a "reasonable" interpretation of the law — is premature, as set forth by the Court of Appeals in *People v. Sprint Nextel Corp.*, 26 N.Y.3d 98, 42 N.E.3d 655 (2015). Further, Citigroup's claim that greater specificity is required in pleading its "knowledge" is contrary to established precedent as well as the plain text of the NYFCA, which states that "no proof of specific intent to defraud" is required.

A. *Sprint* Confirms Citigroup's "Reasonableness" Argument Is Premature.

Citigroup claims its position regarding its New York State taxes — even if incorrect — was "reasonable," and therefore it could not have acted with the requisite scienter under the NYFCA. New York law is settled that such an argument is premature on a motion to dismiss.

Citigroup's citation to *People v. Sprint Nextel Corp.* is curious. In that case, Sprint moved to dismiss under CPLR 3211, arguing that it held a reasonable interpretation of a disputed tax law provision, and, as such, there could be no "knowing" violation, *i.e.*, no scienter. *See* 26 N.Y.3d at 112, 42 N.E.3d at 661-62. The Court of Appeals *rejected* this argument, stating, "***[t]his is not the stuff that a CPLR 3211 dismissal is made of***." *Id.* (emphasis added). Rather, the Court determined that Sprint would have to substantiate, in further proceedings — after discovery — that it actually held such a reasonable belief and actually relied on it. *Id.* Denying the motion to dismiss, the Court of Appeals held that the State was entitled to discovery and the benefit of every possible inference at this juncture. *See id.* at 113, 42 N.E.3d at 62. Discovery into Citigroup's decision-making will shed significant light on the issue of scienter. As in *Sprint*, discovery should proceed.

Further, *Sprint* is consistent with two decades' worth of federal jurisprudence regarding the "reasonableness" of a FCA defendants' actions, which is *not dispositive*, and certainly not on a motion to dismiss. *See, e.g.*, *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463-64 n.3 (9th Cir. 1999) (denying defendant summary judgment where defendant relied on its "reasonable interpretation" of the applicable regulations, but relator's evidence showed that defendants acted purposely to defraud the government); *Minnesota Assoc. of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (reversing summary judgment to defendants who had argued that regulations were "susceptible" to their interpretation; defendants certified compliance with regulation while knowing that the agency interpreted the regulation differently); *United States ex rel. K & R Ltd. Partnership v. Massachusetts Housing Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008) (reasonableness of a defendant's interpretation is "merely evidence, the absence of which does not preclude a finding of knowledge"); *United States v. Kellogg Brown & Root Servs*., No. 4:12-cv-4110-SLD, 2014 WL 1282275, at *7 (C.D. Ill., March 31, 2014) (rejecting a "reasonable interpretation" argument on a motion to dismiss; an objectively reasonable interpretation may be knowingly false); *United States ex rel. Chilcott v. KBR, Inc.*, No. 09-CV-4018, 2013 WL 5781660, at *8-9 (C.D. Ill., Oct. 24, 2013) (same, holding "[c]ontractors should not be permitted to escape liability for knowingly choosing [what may be] a 'reasonable,' but incorrect, interpretation of a contract or regulation"); *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 560-66 (E.D. Va. 2003) (rejecting on summary judgment defendant's argument that ambiguity in the regulation rendered it impossible for the defendant to have knowingly submitted false claims). This issue provides no free pass to Citigroup here.

B. <u>Knowledge May Be Averred Generally under the FCA's "Liberal" Pleading Policy.</u>

The NYFCA's "knowledge" requirement is met by any one of three things: (a) actual knowledge, (b) deliberate ignorance, or (c) reckless disregard. N.Y. State Fin. Law § 188(3)(a). Moreover, "no proof of specific intent to defraud" is required. *See id.* § 188(3)(b). Under the NYFCA and its federal corollary, scienter may be alleged generally. *See Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1477 (2d Cir. 1995) ("***the FCA has a liberal scienter requirement***: 'no proof of specific intent to defraud is required' to state a claim under it") (quoting 31 U.S.C. § 3729(b), which mirrors N.Y. State Finance Law § 188(3)(a)) (emphasis added).

Moreover, the Second Circuit's policy of leniency on scienter issues at pre-trial stages such as on a Rule 12(b)(6) motion — or a CPLR 3211 motion in New York State court — ought to be *dispositive* here as well. *See, e.g.*, *Meijer, Inc. v. Ferring B.V.*, 585 F.3d 677, 693 (2d Cir. 2009) ("We are, however, '***lenient*** in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences,' because such issues are 'appropriate for resolution by the trier of fact'") (emphasis added) (citations omitted). Thus, any heightened pleading standard "requires only the *circumstances* of fraud to be stated with particularity; knowledge itself can be alleged generally." *Id.* at 695 (emphasis in original). This policy of leniency has been applied even at the summary judgment phase. *See, e.g.*, *United States ex rel. Feldman v. Van Gorp*, 674 F. Supp. 2d 475, 481 (S.D.N.Y. 2009) (denying summary judgment); *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 411 (3d Cir. 1999) (citation omitted) ("we must heed the basic rule that a defendant's state of mind typically should not be decided on summary judgment") (superseded by statute on other grounds).

The complaint sufficiently avers knowledge under the NYFCA. Citigroup gave itself a free pass in New York in derogation of express federal and state statutes. The statutes clearly disallow Citigroup's NOL deductions. Citigroup stuck its head in the sand and now asks this Court to bless that reckless strategy. As a matter of New York law, Citigroup's NOLs are not allowed. *See* Point I, *supra*. Citigroup and its advisors should have known this, or did know it. Under these circumstances, and given Citigroup's sophistication, its decision to deduct the NOLs in its New York tax returns — in the face of a statutory bar to its conduct — evinces at least recklessness or deliberate ignorance. Billions of dollars were at stake and, as Citigroup's brief says, there were numerous claims in the media that the federal NOLs were improper despite the IRS Notices. *See* Citigroup's Br., Point I, and the numerous articles in provides. Citigroup's advisors should have understood the weaknesses of the Notices as well as, or better than, Professor Rasmusen. It is inconceivable that Citigroup's army of tax lawyers and advisors did not flag this issue, yet it seems Citigroup proceeded without getting pre-clearance from the New

York State Department of Taxation and Finance through an Advisory Opinion.

Citigroup relies on *United States ex rel. Pervez v. Beth Israel Med. Ctr.*, 736 F. Supp. 2d 804 (S.D.N.Y. 2010), and other authority for the proposition that there is no plausible allegation of scienter.[11] In doing so, Citigroup argues for a free pass, claiming that there is uncertainty in the law and, as such, Citigroup did not have the knowledge required for a NYFCA violation. For the reasons stated above, Citigroup is wrong. There is no uncertainty in the law. The plain text of the statutes and regulations is clear. Citigroup does not argue to the contrary. And no authority supports Citigroup's position — just the unexplained opinion of the IRS.[12]

III. CITIGROUP'S NEW YORK TAX DODGE WAS NOT "PUBLICLY DISCLOSED"

The fact that Citigroup knowingly evaded payment of its *state* taxes by utilizing an IRS reprieve on its *federal* taxes was not "publicly disclosed" by anyone before the filing of the complaint. Neither the note written by a law student that Citigroup cites nor Citigroup's SEC filings, nor any news article identified by Citigroup, includes allegations of knowingly improper conduct by Citigroup *pertaining to its New York State taxes*. They are not "substantially the same" as the allegations in the complaint and cannot serve as a basis for dismissal. But even if, as Citigroup claims, all of the information required for Professor Rasmusen's claims can be

[11] Citigroup also relies on authority that has nothing to do with the adequacy of pleading "knowledge" on a NYFCA (or FCA) claim. For example, in *State ex rel. Seiden v. Utica First Ins. Co.*, 96 A.D.3d 67, 943 N.Y.S.2d 36 (1st Dep't 2012), the complaint was dismissed because "plaintiffs have provided no factual allegations to support [their] theory" of an illegal "marketing scheme." *Id.* at 72. In other words, the complaint failed to sufficiently allege *actions* that constituted a violation (as opposed to intent). Likewise, in *Gall v. Summit, Rovins & Feldesman*, 222 A.D.2d 225, 635 N.Y.S.2d 17 (1st Dep't 1995) — which does not even involve a NYFCA or FCA claim — the complaint was dismissed for failure to plead facts "which sufficiently demonstrate a causal relationship between purported conduct on the part of defendants and damages suffered by plaintiff." *Id.* at 226.

[12] Notably, Citigroup cites two cases that were decided on summary judgment, as opposed to a pre-discovery motion to dismiss, in support of its position. *See* Citigroup's Br., Point III, at 24, citing *United States ex rel. Kirk v. Schindler Elevator Corp.*, 130 F. Supp. 3d 866 (S.D.N.Y. 2015), and *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999).

gleaned from SEC filings (and if these filings are considered "federal government reports"), the NYFCA expressly *prohibits* dismissal based on a public disclosure in a "federal government report," particularly one submitted to a public agency for public review. Notably, there is no such prohibition in the federal FCA. This demonstrates New York has a distinct, relator-friendly policy to preserve claims that may be subject to greater public disclosure scrutiny under the federal FCA. Thus, even accepting as true Citigroup's assertions, its motion must still be denied.

A. <u>No Allegation That Citigroup Dodged its *State* Taxes Was Publicly Disclosed.</u>[13]

The test to determine a relator's standing to bring a NYFCA claim is whether the relator's specific allegations have been "publicly disclosed" in one of three specific channels *defined by the NYFCA*. The statute requires the Court to dismiss an action "if substantially the same allegations or transactions as alleged in the action were publicly disclosed" in: (1) public hearings to which the government is a party; (2) "a federal, New York state, or New York local government report, audit, or investigation;" or (3) "the news media." N.Y. State Fin. Law § 190(9)(b).[14] Citigroup alleges such a disclosure in both "federal government reports" and "the news media." But these purported disclosures are not "substantially the same," as matter of law. Rather, they pertain only to Citigroup's *federal* tax liability, and contain no allegations whatsoever about its *state* tax dodge.

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13 Citigroup repeatedly implies that a NYFCA relator must be a corporate insider. There is *no such requirement* under the NYFCA or its federal analog. *See United States. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506, 523 n.23 (3rd Cir. 2007) (". . . neither the text of the FCA nor its legislative history suggests that non-insiders should never be able to bring *qui tam* actions"); *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1044-45 (10th Cir. 2004) ("Our review of the relevant caselaw revealed no requirement that a relator be a corporate insider. Additionally, we can think of no valid reason for creating such a restriction."). Citigroup's proposed public disclosure bar would leave its internal tax accountants as the only possible whistleblowers in this case. This is not the law.

14 The NYFCA does *not* bar publicly disclosed information outside of these three enumerated sources.

In determining whether "substantially similar" allegations have been publicly disclosed, courts consistently "warn[] against reading *qui tam* complaints at only the 'highest level of generality.'" *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 578 (9th Cir. 2016) (quoting *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 831 (7th Cir. 2013)).[15] Where "prior public reports had described general problems" but "none provided specific examples or the level of detail" offered by the relator, dismissal is not permitted. *See Mateski*, 816 F.3d at 578 (reversing district court's dismissal of FCA claim). "Allowing a public document describing 'problems' — or even some generalized fraud in a massive project across a swath of an industry — to bar all FCA suits identifying specific instances of fraud in that project or industry would deprive the Government of information that could lead to recovery. . . ." *Id.* at 577.

Federal courts typically apply a test from *United States ex. rel. Springfield Term. Ry. v. Quinn*, 14 F.3d 645, 653-55 (D.C. Cir. 1994). There, the court vacated a district court dismissal on public disclosure grounds because only some, *but not all*, relevant detail had been publicly disclosed. The D.C. Circuit provided an illustration that applies equally here: if X + Y = Z, where Z is the allegation of fraud and X and Y are its essential elements, a public disclosure must involve either Z (*i.e.*, the entire allegation of fraud) or both X and Y, the essential elements from which Z can be inferred. *Id.* at 654. If, like here, only one element exists in one of the barred information sources (*e.g.*, X), then the relator's case may proceed by alleging Y or Z. *Id.* at 655.

15 It is noteworthy that this standard even applies to the more stringent public disclosure bar of the federal FCA, which, unlike the NYFCA, does not include the relator-friendly prohibition on dismissal for public disclosure.

Citigroup improperly asks this Court to read all of the prior disclosures "at only the 'highest level of generality.'" *See Mateski* 816 F.3d at 578. In particular, Citigroup appears to be claiming that its *State* fraud is not actionable because its improper *federal* deductions were no secret. This argument fails because none of the purportedly "public disclosures" specifically alleges or even generally discusses Citigroup's *State* tax dodge to trigger dismissal under the NYFCA.

1. The prior news articles, related oversight reports, and student note.

While the IRS Notices and Citigroup's NOLs in its *federal* tax returns were publicly discussed in news articles and other reports in 2009 and 2010, the possibility of *New York State* tax fraud was not. The allegations in this NYFCA case are not "substantially the same" as the allegations of federal tax fraud that were made. *See* N.Y. State Fin. Law § 190(9)(b). Receiving an improper exemption on one's federal tax returns is not substantially the same act as cheating on state tax returns. It is a separate allegation. Proving one does not prove the other.[16]

Citigroup conflates the *federal* and *state* governments by pointing to press reports pertaining exclusively to Citigroup's federal taxes. *See* Citigroup's Br., at 8-10, 14-16. Any public disclosure of allegations concerning Citigroup's federal taxes does not address New York taxes, does not imply that Citigroup filed its New York tax returns claiming New York NOLs, and is not "substantially the same" as this NYFCA action.[17] *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 522-23 (9th Cir. 1998), is instructive. There, the Ninth

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[16] For example, if the Court rules that Citigroup owes New York taxes, that ruling would not require the IRS to collect federal taxes.

[17] Citigroup also claims that "substantially the same allegations" in Professor Rasmusen's complaint were publicly disclosed in his prior policy paper. *See* Citigroup's Br. at 16. But that policy paper pertains to Citigroup's *federal* taxes and does not include a single reference to *any state* taxes owed by Citigroup (or anyone else), let alone Citigroup's New York State taxes.

Circuit reversed that part of the District Court's dismissal on public disclosure grounds because the public disclosure about one group of defendants did not address a separate group of defendants. Here, there is even more reason to reject this defense, namely, that there are two distinct governments and tax filings at issue.

The law student note, for example, discusses the *federal* tax liability of "banks" (generically) and why "states" (generically, except with reference to California) should be given "notice and time to decouple their own laws" from tax determinations made "at the federal level" "before losing corporate tax revenue." Sunil Shenoi, *Undoing Undue Favors: Providing Competitors with Standing to Challenge Favorable IRS Actions*, 43 U. MICH. J.L. REFORM 531, 540 (2010). Even reading this note at the "highest level of generality" rejected in *Mateski* does not support dismissal. *See* 816 F.3d at 578. The note is about a different Notice (2008-83, not 2009-14). And there is no reference to *Citigroup*, let alone any allegation or suggestion that it failed to pay required taxes to any state, or even whether it planned to, or did, take NOL deductions in *New York* as a result of its *2009* ownership change. Also, the note's generic discussion of states "decoupling" their tax code from federal determinations does not apply to New York, which expressly follows the federal tax *code* (IRC §§ 172 and 382) — not IRS notices or one-time exemptions — to calculate the NOLs that may be deducted from a bank's corporate franchise tax. *See* N.Y. Tax Law § 1453(k-1). "Decoupling" would be necessary here only if New York Taw Law stated that it adopted the amount of NOLs calculated and reported to the United States Treasury. But this *not* what the statute says. *See* Point I(B), *supra*.

2. Citigroup's SEC filings.

Like the press reports cited by Citigroup, its 10-K filings with the SEC include no allegations that Citigroup filed a false tax return with New York State. While Citigroup's SEC filings were *a factor* in Dr. Rasmusen's analysis and the allegations in the complaint, they do not constitute a "substantially similar" public disclosure. The X + Y = Z analysis in *Springfield Term. Ry.* applies here. *See* 14 F.3d 645, 653-55. Citigroup's *New York* filing (Y) and *New York* tax fraud (Z) were not revealed in public and, instead, *only* its federal filing per the notices (X) was revealed. But even if *all of the information* needed to bring this complaint was publicly revealed in the SEC filings, dismissal is still barred under the NYFCA. *See* Point III(B), below.

B. A NYFCA Case Cannot Be Dismissed Based on Certain Publicly Disclosed Government Reports.

The NYFCA critically differs from its federal analog in two respects that make its public disclosure bar more whistleblower-friendly. First, it limits the definition of a "federal report" that is "publicly disclosed." Second, it prohibits dismissal based solely on a prior public disclosure in a federal report. Therefore, even if the allegations of information in the complaint regarding Citigroup's New York taxes came from Citigroup's SEC filings, this cannot be a basis for dismissal under the NYFCA.

1. The NYFCA does not categorize SEC reports as "publicly disclosed."

If, as Citigroup argues, filings that it prepared and filed with the SEC are to be considered "government reports," the NYFCA still includes a public disclosure exception for information obtained from "federal government reports." Under Section 190(9)(b)(ii) of the NYFCA, a "federal… government report… shall not be deemed 'publicly disclosed'" when disclosure stems from "any… federal… law, rule, or program enabling the public to review… documents in the possession of … public agencies." Put another way, if a statute mandates that the public has the right to review certain documents of public agencies, then the NYFCA's public disclosure bar *does not apply* to a relator's claims based on those documents.

A SEC filing fits within the definition of the public disclosure exemptions in § 190(9)(b)(ii). The SEC is a public agency of the United States Government. Under the Securities and Exchange Act of 1934 (15 U.S.C. § 78a), companies with more than ten million dollars in assets whose securities are held by more than five hundred owners must file annual reports with the SEC. These reports, in turn, must be made available to the public. *See* 15 U.S.C. § 78m(f)(4) ("Promptly after the filing of any such report, the Commission shall make the information contained therein conveniently available to the public for a reasonable fee"). Citigroup fits this description, and its reports to the federal government are available on the SEC website. Because the law requires these documents to be publicly available, even if one were to deem a report *to* a government as "a federal, New York state or New York local government report, hearing, audit, or investigation," a relator such as Professor Rasmusen can use them in his complaint unaffected by the NYFCA's public disclosure bar.

2. The NYFCA bars dismissal based on certain types of public disclosures.

Even if SEC filings did not fit within the definition of the public disclosure exemptions in § 190(9)(b)(ii), the NYFCA would still bar dismissal. New York has an express public policy against dismissal based on public disclosure. In particular, the New York Attorney General's regulation governing public disclosure motions requires his office to oppose such a motion in a relator's case if dismissal is sought "solely because of alleged public disclosures in a federal report. . . ." *See* 13 N.Y.C.R.R. § 400.5(b). In such a case, ***a NYFCA claim cannot be dismissed***

based on a public disclosure. *See* N.Y. State Fin. Law § 190(9)(b). Citigroup ignores this statutory and regulatory language and the policy behind it.

Without Professor Rasmusen, this suit would not have been brought and Citigroup's tax dodge would have gone unnoticed. There has been no rush of relators trying to be first to file. And if this suit had been frivolous, the Attorney General had the power to police it by moving to dismiss. *See* N.Y. State Fin. Law § 190(5)(b)(i). There is no public disclosure bar here.

CONCLUSION

For the foregoing reasons, the Court should deny Citigroup's motion to dismiss.

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