

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

THE STATE OF NEW YORK

ex rel.

ERIC RASMUSEN,

CONFIDENTIAL
FILED UNDER SEAL

Plaintiff,

v.

Index No.: 13 100175

CITIGROUP, INC.,

Defendant.

COMPLAINT

Plaintiff, the State of New York *ex rel.* Eric Rasmusen, alleges as its Complaint against Defendant as follows:

INTRODUCTION

1. This is an action to recover damages, treble damages, and penalties on behalf of the State on account of false and fraudulent records or statements made, used, or caused to be made or used by Defendant, as well as its agents, employees, co-conspirators, and consolidated subsidiaries¹ (collectively, "Defendant" or "Citigroup") material to an obligation to pay money to the State in violation of the New York False Claims Act, State Finance Law §§

¹ Upon information and belief, Citigroup consolidates subsidiaries in which it holds, directly or indirectly, more than 50% of the voting rights or where it exercises control.

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187, *et seq.*, as amended ("the Act"). These violations involve the intentional and knowing failure to pay approximately \$800 million in taxes owed to the State, including its agencies and departments (in particular, the Department of Taxation and Finance), through unlawful deductions from taxable income.

2. Specifically, upon information and belief, Citigroup defrauded the State by failing to pay taxes owed pursuant to the State's franchise tax through the improper deduction of net operating losses from taxable income after undergoing ownership changes resulting from the federal government's purchase and sale of stock.

3. The Act provides that any person who knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State shall be liable to the State for a civil penalty of between \$6,000 and \$12,000 for each violation of the Act, plus three times the amount of damages sustained by the State from the violation. The Act's *Qui Tam* provisions further allow any person ("the relator") to bring a civil action for violations of the Act on behalf of the person and the State and to share in any recovery.

4. Based on these provisions of the Act, Eric Rasmusen, as plaintiff/relator, seeks to recover damages, treble damages, and civil penalties arising from materially false records and statements, knowingly made, used, or caused to be made or used by Citigroup to avoid the payment of taxes lawfully owed to the State. Rasmusen also seeks to recover attorneys' fees and costs of this civil action brought to recover the statutory penalties and damages from Citigroup for violations of the Act.

PARTIES

5. Plaintiff/relator 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. Rasmusen is a resident of the State of Indiana.

6. Rasmusen brings this action for violations of section 187, *et seq.*, of the Act, on behalf of himself and the State pursuant to section 190(2) of the Act.

7. Upon information and belief, Citigroup is a global diversified financial services holding company providing a broad range of financial products to consumers, institutions, corporations, and governments. It is incorporated in Delaware and has its principal executive offices at 399 Park Avenue, New York City, New York, 10022.

8. Upon information and belief, the net income or sales of Citigroup exceeds one million dollars for the relevant taxable years, and the damages to the State resulting from Citigroup's violations of the Act exceed \$350,000.

JURISDICTION AND VENUE

9. Citigroup is doing business in New York and is subject to this Court's jurisdiction.

10. Upon information and belief, Citigroup is authorized to do business in New York.

11. Venue is proper in this county under CPLR 503(a).

ALLEGATIONS OF FACT

The Deduction from Taxable Income of Net Operating Losses under Federal and New York State Law

12. At all relevant times, Citigroup has been subject to both federal and New York State income taxation.

13. The Internal Revenue Code ("IRC") sets forth a number of deductions that can be taken, under federal law, when computing taxable income. 26 U.S.C. § 161. One of these deductions is the net operating loss,² or "NOL," deduction. Federal law allows as a deduction an amount equal to the aggregate of the NOL carryovers to the taxable year plus the NOL carrybacks to such year. *Id.* at § 172.

14. Section 382 of the IRC, however, limits the ability of a corporation to carry forward NOLs if the corporation experiences an "ownership change" between the time it incurs the NOLs and the time it uses the NOLs to reduce its taxes. *Id.* at § 382(a), (c).

15. The purpose of this provision is to prevent "loss trafficking" by ensuring that NOLs cannot be used to reduce taxes for corporate shareholders who did not actually bear the corporation's losses. In other words, NOLs can only be carried forward to reduce a corporation's taxes if the corporation is owned by substantially the same shareholders that incurred the losses in the first place.

² A "net operating loss" is defined as the excess of deductions over gross income. *Id.* at § 172(c).

16. New York imposes a franchise tax on banking corporations based on a percentage of their entire net income or an alternative minimum tax. See N.Y. Tax Law §§ 1451, 1455. Unless the alternative minimum tax applies, the franchise tax is calculated, for taxable years after January 1, 2007, at 7 1/10% of entire net income or the portion thereof allocated to New York State. *Id.* at 1455.

17. Like federal law, New York allows a corporation to take a NOL deduction and, for taxable years beginning on or after January 2001, the New York NOL is “presumably” the same as the federal NOL calculated under section 172 of the IRC, with certain modifications. N.Y. Tax Law § 1453(k-1).

18. The franchise tax incorporates the NOL deduction under section 172 of the IRC and, thus, also incorporates the NOL limitation on carryovers in section 382 of the IRC.

**The 2008 Recession and the
Government’s Bailout of Citigroup**

19. In 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 (“EESA”), which authorized the Department of the Treasury (“Treasury”) to take steps to restore liquidity and stability to the financial system. 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.

20. One of the programs established by EESA was the Troubled Asset Relief Program (“TARP”). Through TARP, Treasury purchased equity interests in publicly traded companies, one of which was Citigroup.

21. Specifically, in October 2008, Treasury purchased \$25 billion of preferred stock in Citigroup. Then, in November 2008, Treasury invested an additional \$20 billion in Citigroup.

22. These transactions constituted an ownership change within the meaning of section 382 for Citigroup.

23. In October 2008, in an attempt to bolster the failing economy, the IRS issued Revenue Notice 2008-83, which provided preferential tax treatment for banks that had undergone an ownership change within the meaning of section 382.

24. Congress, however, prospectively repealed this notice when it enacted the American Recovery and Reinvestment Act of 2009 ("ARRA"). Congress expressly stated in ARRA that the IRS was not authorized to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers.

25. Then, effectively ignoring the prohibition on preferential treatment expressed by Congress in ARRA, the IRS issued Notice 2009-38 in April 2009 as "guidance" to corporate issuers. This notice provided relief from the restrictions on carrying forward NOLs in section 382 for Citigroup and other businesses benefitted by Treasury's purchases of stock. In other words, this Notice cancelled the restriction on the use of NOLs carried forward after the ownership change triggered by Treasury's purchases of stock.

26. In December 2009, the IRS superseded Notice 2009-38 with Notice 2010-2. This Notice, similar to the previous one, was issued as "guidance" and provided that the section 382 limitation would not be triggered by Treasury's purchase of stock. But, the Notice

went further, providing that Treasury's *sale* of stock also would not trigger the NOL limitation in section 382.

27. Citigroup purchased back the \$20 billion of Treasury's stock in December 2009 and, in February 2009, Treasury converted its \$25 billion of preferred stock into common stock.

28. In April 2010, approximately four months after the government issued Notice 2010-2, Treasury began to sell its Citigroup common stock and, as of December 2010, Treasury no longer owned any Citigroup stock.

29. Treasury's sale of its Citigroup stock constituted another ownership change within the meaning of section 382.

30. The federal government realized \$6,850,000,000 of profit from its sale of Citigroup stock. But, while the federal government realized a short-term profit, it will lose significantly more through the loss in tax revenue as a result of Citigroup's avoidance of the restriction on NOL deductions set forth in section 382.

31. Moreover, shareholders who purchased Treasury's stock in Citigroup in 2010 paid more for that stock than they would have if Citigroup adhered to the section 382 limitation because Citigroup was worth more as a company with the unrestricted use of its NOLs.

32. Upon information and belief, the IRS Notices were not approved by Congress, are contrary to the language and purpose of section 382 of the IRC, defy ARRA's

prohibition on preferential treatment of classes of taxpayers, conflict with the requirements of EESA, and constitute arbitrary and capricious action by Treasury.

33. Upon information and belief, because the IRS Notices were improperly promulgated by the IRS, Citigroup was not entitled to rely upon them to reduce its taxable income for purposes of the IRC or, for that matter, the New York Tax Law.

34. Upon information and belief, even if the IRS Notices are valid as a matter of federal law, they were not adopted or incorporated into the New York State Tax Law and, thus, Citigroup was not entitled to rely upon them to reduce its New York State tax liability.

35. Nevertheless, on information and belief, Citigroup did just this on its federal and state tax returns.

Violations of the False Claims Act

36. Upon information and belief, between 2010 and 2012, Citigroup knowingly made, used, or caused to be made or used, or is knowingly making, using or causing to be made or used, false records or statements material to an obligation to pay money to the State.

37. Specifically, upon information and belief, Citigroup knowingly prepared false State tax returns with excessive and improper NOL deductions to reduce its taxable income and avoid the payment of taxes owed to the State pursuant to the State's franchise tax.

38. Upon information and belief, as a result of the knowingly false records or statements used by Citigroup to avoid the payment of taxes to the State, the State did not receive approximately \$800 million in tax revenues to which it was entitled.

39. Upon information and belief, as a result of the knowingly fraudulent conduct of Citigroup, Citigroup is liable to the State for taxes owed to the State, trebled, plus penalties, interest, and attorneys' fees under the Act. *See* N.Y. State Fin. Law § 189(1)(g).

JURY DEMAND

40. Rasmusen demands a jury on all issues and matters triable by a jury.

RELIEF REQUESTED

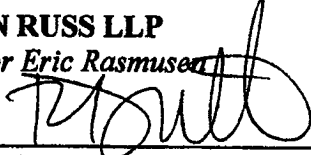
WHEREFORE,

- a) For treble damages under State Finance Law §§ 189(1)(g) in an amount to be determined at trial, plus penalties, costs, interest, and attorneys' fees;
- b) For the damages sustained by the State; and
- c) For award of such other and further relief as this Court deems proper as a matter of law or under the New York False Claims Act, State Finance Law §§ 187, *et seq.*

Dated: Buffalo, New York
January 24, 2013

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