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

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

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

PRELIMINARY STATEMENT

As set forth in Citigroup's opening brief, relator's claim fails for three independent reasons. Relator's opposition does not meaningfully refute any of these grounds for dismissal.

First, the NYFCA's public disclosure bar requires dismissal because relator's complaint does not plead a single nonpublic fact, but instead rehashes information publicized years before relator filed suit. Relator acknowledges that there was widespread commentary on the very matters at issue in this case, including the IRS Notices, the federal government's authority to issue them, and Citigroup's reliance on them. Indeed, *all* of the factual allegations in relator's complaint were lifted wholesale from a policy paper (itself based entirely on public sources) that relator coauthored more than a year before he filed suit. Though relator alleges no new *facts*, and does not claim to be an original source of any factual allegations in his complaint, he seeks to avoid dismissal because his complaint offers the legal conclusion—not adopted by any taxing authority—that Citigroup's New York taxes were wrong. But the law is clear that a relator cannot avoid the public disclosure bar by offering a novel legal conclusion drawn from public facts. Relator also claims that Citigroup's own annual reports do not constitute public disclosures for purposes of the NYFCA. But there is no support for the relator's contention, and in any event, the many other public disclosures of Citigroup's reliance on the IRS Notices easily trigger the public disclosure bar.

Second, relator has failed to plead falsity because Citigroup accurately reported its net

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[1] Terms defined in the Memorandum of Law in Support of Citigroup Inc.'s Motion to Dismiss (NYSCEF Doc. No. 4) ("Mem.") have the same definitions herein. Eric Rasmusen's Memorandum of Law in Opposition to Citigroup's Motion to Dismiss (NYSCEF Doc. No. 12) is referred to as the "opposition" and cited as "Opp'n."

income under New York tax law. Relator's opposition does not dispute that Citigroup faithfully followed the IRS Notices in claiming the deductions at issue, and no court or other tax authority has ever questioned the IRS Notices. Relator nevertheless contends that New York tax law rejects the IRS Notices, either because he believes that the IRS guidance was not properly promulgated or because he believes that New York should disregard Treasury and the IRS's official interpretation of the Internal Revenue Code in favor of his preferred interpretation. But relator lacks standing to challenge the underlying validity of the IRS Notices as a matter of federal law, as the federal court opinion on remand makes clear. And as to relator's claim that New York should adopt his creative interpretation of its tax laws, it is well settled that New York tax law conforms to federal guidance—including informal IRS guidance—wherever possible, and there is no contrary authority here.

Third, relator certainly cannot claim that Citigroup made any misstatement knowingly. Relator's opposition does not point to a single alleged fact that would support scienter. Instead, he assumes that an allegation of a false statement, with nothing more, suffices to plead that Citigroup *intended* to make a false statement. This is circular and insufficient to state a claim under the NYFCA. It is undisputed that Treasury and the IRS had authority to issue the IRS Notices; that the IRS Notices expressly stated that they could be relied on; that New York tax law presumably follows parallel federal tax law; and that no New York authority has ever questioned the applicability of the IRS Notices. These undisputed facts belie relator's conclusory assertion that Citigroup intended to violate State law by relying on the IRS Notices.

ARGUMENT

I. Relator Lacks Standing Under the Public Disclosure Bar

Relator's claim must be dismissed if "substantially the same allegations or transactions as alleged in the action" were publicly disclosed before he filed suit, unless he is an "original source" of the allegations in his complaint. See N.Y. State Fin. Law §§ 188(7), 190(9)(b).

There is no dispute that all of the *facts* upon which relator bases his claim were widely disclosed in public documents. Relator concedes, for example, that "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." Opp'n 26. Indeed, relator himself made the same factual allegations at the core of his complaint in a policy paper published more than a year before he initiated this action, and he has described his policy paper as "the article that led to the suit." See Mem. 16 (citation omitted). Likewise, relator has admitted that he "derive[d] his factual knowledge" of "Citigroup's underpayment of New York taxes" from "Citigroup's annual reports," which are of course publicly filed and widely available. See id. at 15-16 (citation omitted). Accordingly, it is clear that "substantially the same allegations or transactions as alleged in the action" were publicly disclosed before relator filed suit. See N.Y. State Fin. Law § 190(9)(b). Because relator's opposition does not even attempt to assert that he is an "original source," his complaint must be dismissed. See id.

Relator seeks to avoid dismissal by claiming that his novel legal assertion—rooted in public facts—that Citigroup's State taxes were wrong somehow avoids the public disclosure bar, and by asserting that the Court may not consider certain public information because it was disclosed in Citigroup's own widely disseminated SEC filings. Neither contention has merit.

As to the first, relator cannot evade the public disclosure bar by claiming that he made a unique (and incorrect) *legal* assertion that Citigroup's New York taxes were wrong or fraudulent. As explained above, relator derived all of his *factual* knowledge about any supposed fraud from public sources. It is well established that if the "essential elements" of a purported fraud have been publicly disclosed, the legal conclusion of fraud need not have been disclosed for the public disclosure bar to apply. See, e.g., U.S. ex rel. Found. Aiding the Elderly v. Horizon W. Inc., 265 F.3d 1011, 1015 (9th Cir. 2001) (citation omitted); see also id. ("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."); 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.").[2]

Relator's second argument—that Citigroup's publicly disclosed SEC filings are not public disclosures for purposes of the NYFCA—seeks to turn the public disclosure bar on its head. See Opp'n 29-30. It was from *Citigroup's own disclosures* in federally mandated filings, available for free from Citigroup and from the SEC, that relator learned that Citigroup relied on the IRS Notices when preparing its State tax returns. See Mem. 8 & n.9, 15-16 & n.13; Opp'n 28. Relator cannot overcome the public disclosure bar by parroting information that Citigroup itself put into the public domain, which is exactly what relator has done. See, e.g., U.S. ex rel. Calilung v. Ormat Indus., Ltd., 2015 WL 1321029, at *16-17 (D. Nev. Mar. 24, 2015) (public disclosure bar triggered where complaint cited to defendant's SEC filings to the extent they were substantially similar to allegations in complaint); U.S. ex rel. Barber v. Paychex, Inc., 2010 WL 2836333, at *8 (S.D. Fla. July 15, 2010) (public disclosure bar triggered where relators "appear to concede they learned of [certain] facts themselves by reading defendants' SEC filings"). Relator's attempt to remove Citigroup's public disclosures from this Court's consideration finds

[2] See also State ex rel. Jamaica Hosp. Med. Ctr., Inc. v. UnitedHealth Grp., Inc., 84 A.D.3d 442, 442-43 (1st Dep't 2011) (dismissing claims under the NYFCA where "plaintiffs' allegations . . . [were] derived from and substantially similar to allegations publicly disclosed in numerous lawsuits"); U.S. ex rel. Chen v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 297 (S.D.N.Y. 2013) (dismissing claims under both the FCA and NYFCA where disclosures contained "substantially the same allegations . . . . [because they] exposed all the essential elements of the fraud alleged and made public the crux of the alleged fraud" (internal quotation omitted)).

no support. The NYFCA provides that a court "shall dismiss" an action based on allegations that were disclosed "in a federal . . . government report . . . that is . . . disseminated broadly to the general public." N.Y. State Fin. Law § 190(9)(b)(ii). This is precisely what SEC filings are. See Mem. 15 n.13 (collecting cases).[3]

In any event, relator would still lack standing under the public disclosure bar even if it were not triggered by SEC filings. Citigroup's global headquarters is in New York, making Citigroup subject to New York tax law. That indisputably public fact, coupled with extensive public disclosures of the IRS Notices, the authority (or purported lack of authority) of Treasury and the IRS to issue them, and their application to Citigroup, would qualify as public disclosure of "substantially the same allegations or transactions as alleged in the action" even if Citigroup's annual reports were completely disregarded. See N.Y. State Fin. Law § 190(9)(b).

Citigroup is not, as relator contends, asking the Court to review his complaint at "the highest level of generality." Opp'n 25. Rather, dismissal is required here because there are simply *no* allegations of nonpublic facts in the complaint. The cases relator cites all stand for the unremarkable proposition that insiders who *do* disclose new, material, and previously undisclosed *facts* may maintain *qui tam* actions even if less specific public disclsoures were previously made. See Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 833 (7th Cir. 2013) (prior

[3] Relator misconstrues the NYFCA by arguing that it differs from the FCA in this respect. See Opp'n 23-24, 28-29. In the language quoted by relator, the New York Legislature amended the NYFCA to make clear that an agency's response to a FOIL request (or other open records law) does not trigger the public disclosure bar under the NYFCA. See N.Y. State Fin. Law § 190(9)(b)(ii) ("information shall not be deemed 'publicly disclosed' in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents in the possession of public officials or public agencies"). This provision—and its focus on FOIL—makes sense in light of a federal circuit split as to whether an agency's response to a FOIA request triggers the public disclosure bar under the FCA, which the U.S. Supreme Court ultimately resolved by ruling that it does. See Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 406 (2011). Relator cites no authority for the proposition that the New York Legislature simultaneously chose to adopt the radical position that relators should be rewarded for uncovering so-called "secrets" that were, in fact, deliberately disclosed through the U.S. government's official mechanism for disseminating information on publicly traded companies.

public disclosure was not made where relator "used inside information that she obtained during her decade-long employment to make allegations that are noticeably different from any prior allegations against" the defendant); accord U.S. ex rel. Mateski v. Raytheon Co., 816 F.3d 565, 568, 578 (9th Cir. 2016) ("[a]lthough prior public reports had described general problems with Raytheon's work on VIIRS, none provided specific examples or the level of detail offered by Mateski," an "engineer who worked at Raytheon from 1997 to 2006, [and who] was assigned to work on VIIRS beginning in 2005"); see also U.S. ex rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 522-23 (9th Cir. 1999) (public accusations of conspiracy do not bar *qui tam* action based on previously undisclosed facts about specific conspirators). These cases describe exactly what relator failed to do here: bring new and material *factual* information to the State's attention.[4] They do not contradict the well-settled law that a relator cannot avoid dismissal by applying a fraud label to previously publicized information. See supra pp. 3-4 & n.2.[5]

Finally, relator points to a regulation requiring the Attorney General to oppose dismissal of *qui tam* suits that would otherwise be dismissed "*solely* because of alleged disclosures in a federal report." Opp'n 29 (quoting 13 N.Y.C.R.R. § 400.5(b)) (emphasis added). This provision is obviously inapplicable here: the Attorney General has not opposed this suit, and Citigroup's motion is not based solely on Citigroup's annual reports. Relator also lacks standing under the

[4] See Jamaica Hospital, 84 A.D.3d at 443 (for purposes of the NYFCA, "[w]hen the material elements of a fraud are already in the public domain, the government has no need for a relator to bring them to its attention"); Alcohol Found., Inc. v. Kalmanovitz Charitable Found. Inc., 186 F. Supp. 2d 458, 462 (S.D.N.Y. 2002) (the FCA was "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator" (quoting U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993))), aff'd, 53 F. App'x 153 (2d Cir. 2002).

[5] In any event, a law student observed the potential impact on the states of federal agency guidance on Section 382 years before relator filed suit. See Mem. 9-10, 14-15 (citation omitted). Relator assails the student note as being too general to qualify as a public disclosure because it does not specifically reference Citigroup or New York. See Opp'n 27. But the student note warns of exactly what relator complains of here: Treasury and IRS guidance on Section 382 of the Internal Revenue Code that "reduced a bank's federal tax liability . . . could also have reduced state tax liability in any state in which the bank operates," because "'states with corporate income taxes almost universally base their corporate taxes on federal rules.'" See Mem. 9-10, 14-15 (citation omitted).

public disclosure bar because of overwhelming publicity in a range of sources, including the news media and relator's own policy paper, about the IRS Notices and Citigroup's reliance on them. Whatever this regulation may require the *Attorney General* to do, the regulation does not provide the relator with standing or otherwise save his complaint from dismissal.

II. Relator Fails to Allege Use of a False Record or Statement

Even if relator could overcome the public disclosure bar, his complaint must be dismissed because he has failed to plead a false record or statement, since Citigroup's treatment of NOL deductions on its State tax returns was correct as a matter of New York law.

Relator concedes that Citigroup's tax treatment was perfectly consistent with the IRS Notices. See Opp'n 1. And relator does not challenge Citigroup's reliance on the IRS Notices for purposes of federal tax reporting. See id. ("Citigroup's reliance on the Notices may or may not put Citigroup in a safe place vis a vis its federal tax returns" (emphasis omitted)). Relator nevertheless contends that Citigroup's reliance on the IRS Notices caused its State tax filings to be false, either because he believes that the IRS Notices were not properly promulgated as a matter of federal law, or because he believes that the federal government's official guidance on the Internal Revenue Code should not be followed in New York. Both arguments are incorrect.

As to the first contention—relator's claim that the IRS Notices violate the AARA, EESA, and APA, and are not entitled to administrative deference as a matter of *federal* law, Opp'n 14-16—relator clearly lacks standing. As the federal court explained, "Rasmusen concedes, and in any case the Court holds, that he lacks standing to challenge the validity of the IRS Notices." N.Y. ex rel. Rasmusen v. Citigroup, Inc., 2016 WL 7031054, at *3 (S.D.N.Y. Dec. 2, 2016). In his opposition, relator does not even acknowledge—much less dispute—the federal court's conclusion on this question of federal law. Relator has no greater ability to lodge these challenges in this Court than he did in federal court.[6]

As to his second argument, relator cannot dispute New York's longstanding policy of interpreting its tax laws in accordance with federal law whenever possible, and of looking to the federal tax regime for the computation of entire net income and NOLs in particular. See Mem. 21-22 (citing, inter alia, Michaelsen v. N.Y.S. Tax Comm'n, 67 N.Y.2d 579, 587 (1986); People ex rel. Conway Co. v. Lynch, 258 N.Y. 245, 250-52 (1932); Delese v. Tax App. Trib., 3 A.D.3d 612, 613 (3d Dep't 2004); Pierce-Arrow Motor Corp. v. Mealey, 270 A.D. 286, 291 (3d Dep't 1946)). Nor does relator dispute that the relevant New York statute expressly provided that a taxpayer's New York taxable income was identical to that which "the taxpayer [was] required to report to the United States treasury department," N.Y. Tax Law § 1453(a)(1) (Consol. 2010) (repealed effective Jan. 1, 2015), and that state NOL deductions were "presumably the same as the [NOL] deduction allowed under [Section 172] of the [Internal Revenue Code]," id. § 1453(k-1), subject to exceptions not relevant here.

Relator implies that the use of the word "presumably" in the definition of NOL deductions in Section 1453 permits New York to offer a different interpretation of Section 382 than Treasury and the IRS. See Opp'n 11. That is wrong under New York law. As explained in Citigroup's opening brief, New York courts have long made clear that the phrase "presumably the same" in analogous provisions of New York tax law was not meant to alter the referenced federal definition of entire net income, but only to "afford[] a taxpayer to have a hearing if there was a claimed inaccuracy in the figure reported to the Federal Government." Mem. 22 n.18 (quoting 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); citing People ex rel. Standard Oil Co. of N.Y. v. Law, 237

[6] Even if relator had standing to make these challenges, they would be meritless. For example, Congress implicitly affirmed the reliability of the IRS Notices when it enacted the ARRA. See Mem. 7.

N.Y. 142, 146-47 (1923); People ex rel. Barcalo Mfg. Co. v. Knapp, 227 N.Y. 64, 70-71 (1919)). Relator does not attempt to distinguish Dreyfus and does not even cite Standard Oil or Barcalo.

Similarly, relator's suggestion that New York follows federal guidance on entire net income, but not on NOLs, Opp'n 18-19, makes no sense: NOLs are a component of entire net income. See N.Y. Tax Law § 1453(k-1). It would not be possible for State entire net income to mirror federal entire net income, as relator concedes it does, Opp'n 18, if State NOLs did not mirror federal NOLs. In this way, relator's attempt to distinguish Conway and Pierce-Arrow is both puzzling and wrong. Relator suggests that those cases are inapplicable here because they interpret different statutory language. See Opp'n 19. But the statutory text relator quotes is materially identical to the provision of Section 1453 at issue here. Compare id. ("'presumably the same as the entire net income which such corporation is required to report to the United States'" (citation omitted)), with N.Y. Tax Law § 1453(a)(1) ("the same as the entire taxable income . . . which the taxpayer is required to report to the United States treasury department").

Nor can relator support his idiosyncratic interpretation of the statute by claiming that the IRS Notices are inconsistent with the Internal Revenue Code itself. See Opp'n 11-14. This argument has at least three flaws. First, relator lacks standing to raise it, as it is based entirely on the premise that the IRS Notices are invalid because they cannot be reconciled with the Internal Revenue Code. See supra pp. 7-8.[7] Second, the cases that relator relies on concern the deference that State courts owe to *State agencies'* interpretations of law. See Bosh v. Fahey, 53 N.Y.2d 896, 901 (1981) (State agency's interpretation of federal law); Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 457-59 (1980) (State agency's interpretation of State law); Belmonte v.

[7] For this reason, relator's citations to cases where taxpayers sued the government to challenge adverse tax rulings made against them are irrelevant. See Dixon v. United States, 381 U.S. 68 (1965); Samonds v. Comm'r, T.C. Mem. 1993-329 (U.S.T.C. 1993).

Snashall, 2 N.Y.3d 560, 562-67 (2004) (same). In contrast, relator has not identified any relevant State agency interpretation of Section 382 of the Internal Revenue Code, much less an interpretation contrary to the definitive Treasury and IRS guidance that Citigroup followed. Third, the IRS Notices *are* consistent with Section 382. That statute authorizes regulations "treat[ing] stock as not stock" so that its anti-loss trafficking protections are not triggered, which is exactly what the IRS Notices did. See 26 U.S.C. § 382(k)(6)(B).[8]

Relator also wrongly contends that New York follows only federal statutes and formal federal regulations approved after notice and comment. Opp'n 17-18. This is demonstrably incorrect. Notices and announcements issued by the IRS and published in the Internal Revenue Bulletin have the same weight of authority as revenue rulings,[9] and New York courts routinely look to IRS revenue rulings to interpret State tax law provisions governing the deduction of NOLs for nonbanks. See, e.g., Goodbody & Co. v. State Tax Comm'n, 118 A.D.2d 1025, 1030-31 (3d Dep't 1986) (applying IRS Revenue Ruling 81-88 in holding that plaintiff was entitled to take into account overpayments as offsets in calculating NOLs); In re Petition of Dewey & Dewey, 1983 WL 20588, at *2-3 (N.Y. Dep't Tax. & Fin. July 15, 1983) (applying IRS Revenue Ruling 75-299 in determining whether tax liability arose from a year in which the NOL was

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[8] In this respect, the IRS Notices are wholly consistent with the purpose of Section 382, which is to prevent loss trafficking by corporate raiders who acquire companies solely to take advantage of their NOLs. See Mem. 4-5. Relator alleges that, with respect to Citigroup, the IRS Notices twice prevented Section 382 from being triggered: when Treasury converted Citigroup preferred stock to common stock, and when Treasury sold that common stock to the public. Opp'n 8-9. Treasury plainly was not engaged in loss trafficking when it converted its preferred stock to common stock to help Citigroup, among other financial institutions, weather the global financial crisis. And even crediting relator's allegation that the IRS Notices caused Citigroup's common stock to trade at a higher price than it otherwise would have, id., the public investors who purchased that stock from Treasury could not have bought it to use Citigroup's NOLs to offset some unrelated gain.

[9] See, e.g., Rev. Rul. 90-91, 1990-2 C.B. 262, at *1 (1990) ("[F]or purposes of applying the penalty imposed under Section 6661 of the Code, notices and announcements released by the Internal Revenue Service are to be considered authority and the Service will be bound by substantive or procedural guidance provided in a notice or announcement to the same extent as a revenue ruling or revenue procedure."); see also Hall v. Comm'r, 1998 WL 646609, at *6 n.8 (U.S.T.C. 1998) ("Taxpayers are entitled to rely on and the Internal Revenue Service states that it will be bound by substantive and procedural guidance provided by notices or announcements.").

incurred or in its carryback year); In re Petition of Unicorp Am. Corp., 1995 WL 774866, at *5-6 (N.Y. Tax App. Trib. Dec. 28, 1995) (applying IRS Revenue Ruling 88-98 to determine when interest on an item would begin to accrue).[10]

Finally, relator contends that the IRS Notices are invalid in New York because "[w]here federal guidance favors Treasury's fisc, but hurts New York, New York does not follow this federal guidance." Opp'n 16. This statement is wrong both as a factual and a legal matter. On the facts, this notion is belied by relator's own complaint and the policy paper that motivated it, which each assert that the IRS Notices caused Treasury to *lose* money. See, e.g., Compl. ¶ 30 (alleging that the federal government would "lose significantly more through the loss in tax revenue" as a result of the IRS Notices than it would gain in "profit"); Relator's Policy Paper at 20 (NOLs "transfer[] funds from the public fisc to the firm") (Ex. 22); see also Opp'n 9. As to the law, relator's lone citation in support of his argument, Isabella Geriatric Center, Inc. v. Novello, 2005 WL 3816962 (Sup. Ct. N.Y. Cty. Dec. 9, 2005), aff'd, 38 A.D.3d 356 (1st Dep't 2007), does not support him. Isabella Geriatric rejected a challenge to a change in State guidance on State regulations, and noted as an aside that the federal government naturally may have preferred contrary guidance that would have caused federal cash outlays to decrease. Id. at *2-3, *6. Nothing about Isabella Geriatric purports to permit a New York court to disregard an authoritative interpretation of federal law because it concludes that the interpretation is more economically beneficial to the federal government than to the State.

III. Relator Fails to Allege Intent

Finally, even if relator could overcome the public disclosure bar and plead a false

[10] Contrary to relator's assertion, Opp'n 17 n.9, Michaelson and the other New York authorities requiring deference to federal interpretation apply broadly to *all* federal authority, not just to federal statutes or notice and comment regulations. The Court of Appeals' authoritative statement in Michaelson is clear—"New York income tax law evinces a strong intent to conform to Federal *authority* wherever possible"—and it is in no way limited to a subset of federal authority. See Michaelson, 67 N.Y.2d at 583 (emphasis added).

statement under the NYFCA, he cannot plausibly allege fraudulent intent—i.e., that Citigroup made a false claim with actual knowledge of falsity, or with deliberate ignorance of or reckless disregard for the truth. See N.Y. State Fin. Law § 188(3)(a).

In his opposition, relator does not point to any specific allegations concerning Citigroup's intent. Indeed, there are no factual allegations whatsoever in the complaint about the knowledge or belief of any individual at Citigroup. Instead, relator seeks to meet his pleading burden with the generalized assertion that, in light of its size and sophistication, Citigroup should have arrived at and applied relator's own idiosyncratic interpretation of the tax code, in defiance of the official Treasury and IRS guidance. Opp'n 22-23. Relator's theory assumes intent solely from the alleged fact of a supposed false statement. Such circular reasoning is insufficient to sustain a claim under the NYFCA. See, e.g., State ex rel. Seiden v. Utica First Ins. Co., 96 A.D.3d 67, 72 (1st Dep't 2012) (because "[p]laintiff must state a reverse false claim with particularity," it was insufficient for plaintiff to allege that the defendant "deliberately" engaged in a "scheme" to defraud); see also Gall v. Summit, Rovins & Feldesman, 222 A.D.2d 225, 226 (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").[11]

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[11] Relator's attempts to distinguish Seiden, Gall, and Pervez fall short. First, relator misconstrues Seiden as affirming dismissal solely for insufficiently alleging falsity. Opp'n 23 n.11. Seiden also affirms dismissal for insufficiently alleging scienter. E.g., Seiden, 96 A.D.3d at 72 (addressing allegations of what the defendant allegedly "deliberately" did); id. at 72 (addressing allegations of what the defendant "must have known"); id. at 73 (addressing allegations that defendant "knows that fraud is involved"). Second, relator focuses on language in Gall about all causes of action failing for insufficiently alleging causation, Opp'n 23 n.11, but ignores the additional holding that "[t]he cause of action for legal malpractice fails to allege specific facts to show that defendants acted negligently in the provision of legal representation . . . but rather contains only repetitive conclusory allegations." Gall, 222 A.D.2d at 226 (internal citation omitted). Finally, relator effectively concedes that he has no basis to

Relator's reliance on a conclusory and speculative theory of scienter is not surprising, considering that relator is alleging that Citigroup somehow committed fraud by *following* authoritative Treasury and IRS guidance. Indeed, each of the IRS Notices stated that "taxpayers may rely on the rules set forth in this notice." See Mem. 6 (citation omitted). And, as discussed above, New York presumably follows federal tax law, including with respect to NOLs, and no New York authority has questioned the application of the IRS Notices to State tax filings. See supra pp. 8-9. In this respect, relator's own complaint and the IRS Notices themselves affirmatively negate any notion that Citigroup knowingly violated State law by following the IRS Notices. See, e.g., Chapman v. Office of Children & Family Servs., 423 F. App'x 104, 105 (2d Cir. 2011) (a plaintiff cannot survive a motion to dismiss an FCA claim without establishing a "plausible allegation of scienter"). Even if there were merit to relator's view as to the proper tax treatment (which there is not), his assertion would not remotely meet the NYFCA's scienter standard, which requires relator to allege actual knowledge of falsity, or deliberate ignorance of or reckless disregard for the truth. See N.Y. State Fin. Law § 188(3)(a); see also U.S. ex rel. Grupp v. DHL Exp. (USA), Inc., 47 F. Supp. 3d 171, 177 (W.D.N.Y. 2014) (where defendant's submission was reasonable and consistent with the governing contract, fraud allegation "based solely on a disputed interpretation of the contract documents" was insufficient to raise inference of scienter), aff'd sub nom. U.S. ex rel. Grupp v. DHL Worldwide Exp., Inc., 604 F. App'x 40 (2d Cir. 2015).

Unable to meet his burden, relator argues that dismissal based on failure to allege scienter is "premature" at the pleading stage, pointing to a supposed "policy of leniency on scienter

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distinguish Pervez, and instead accuses Citigroup of citing Pervez to give itself a "free pass." Opp'n 23. Citigroup does not seek a "free pass," but rather the dismissal of the complaint because, inter alia, it does not actually allege that Citigroup knowingly violated State tax law.

issues" to which he claims *federal* courts adhere. Opp'n 21. This is not an accurate statement of federal law and is certainly not an accurate statement of State law. The NYFCA expressly acknowledges that, with one exception not at issue on this motion, the heightened pleading requirements of CPLR 3016 apply. N.Y. State Fin. Law § 192(1-a).[12] The First Department has made clear that conclusory allegations of scienter are not sufficient under CPLR 3016, or even under ordinary pleading standards. See Mem. 23-24 (citing Seiden, 96 A.D.3d at 72; Gall, 222 A.D.2d at 226). Relator's assessment of federal law also is not accurate. Indeed, the very case relator relies on makes clear that scienter must be alleged "with particularity" even though allegations of specific intent are not required. Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1477 (2d Cir. 1995) (collecting cases).[13] Federal courts regularly dismiss *qui tam* complaints that—like relator's—fail to plausibly allege scienter. See, e.g., Grupp, 604 F. App'x at 43 (affirming dismissal of FCA claim for failure to allege scienter); Chapman, 423 F. App'x at 105 (2d Cir. 2011) (same); Pervez, 736 F. Supp. 2d at 814 (dismissing FCA claim for failing to "plead[] any facts tending to make [Plaintiff's] allegations of actual knowledge plausible").

Finally, there is no relevance to the cases cited by relator for the proposition that the reasonableness of a legal interpretation is not dispositive as to the defendant's state of mind. Opp'n 20-21. All of those cases, including People ex rel. Schneiderman v. Sprint Nextel Corp., 26 N.Y.3d 98 (2015), cert. denied, 136 S. Ct. 2387 (2016), concern a defendant's interpretation

[12] That exception is 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." N.Y. State Fin. Law § 192(1-a). Citigroup therefore has not moved to dismiss on the ground that relator has not identified the specific statement in its State tax returns reflecting its allegedly improper treatment of NOLs.

[13] Relator also misstates the holding of Meijer, Inc. v. Ferring B.V. (In re DDAVP Direct Purchaser Antitrust Litigation), 585 F.3d 677 (2d Cir. 2009). See Opp'n 21-22. Meijer did not, as relator asserts, defer consideration of scienter. To the contrary, it held that scienter was sufficiently pleaded through specific allegations of protracted misconduct that had already been judged in another litigation to be "clear and convincing evidence" of fraudulent intent. Meijer, 585 F.3d at 692-93. Relator otherwise relies on cases denying summary judgment in the face of triable evidence of scienter, see Opp'n 22, which have no bearing on the ability of the conclusory allegations in relator's complaint to survive this motion to dismiss.

of law that was *at odds* with government guidance.[14] In contrast, here relator challenges the reasonableness of the *government's* interpretation of the law and seeks to hold Citigroup liable for *complying* with definitive government guidance. Relator has not pointed to any case where a valid false claims act claim was stated against a defendant who complied with clear government guidance. Relator's theory is inconsistent with any inference of scienter.

CONCLUSION

For the reasons stated above and in Citigroup's opening memorandum of law, the complaint should be dismissed in its entirety.

Dated: New York, New York
April 19, 2017

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By: ______________________

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[14] The court in Sprint permitted discovery into a defendant's state of mind where the defendant disregarded explicit official tax guidance in favor of its own unsupported interpretation. Sprint, 26 N.Y.3d at 111-12. Here, in contrast, Citigroup complied with the only available guidance, and it is relator who claims that Citigroup should have arrived at his unsupported view in contravention of that guidance.