No. 18-4109

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA Ex. rel. Mark Christopher Tracy, Appellant, vs. EMIGRATION IMPROVEMENT DISTRICT, et al., Appellees.	**ORAL ARGUMENT REQUESTED**

Appeal from the District of Utah, Central Division
Hon. Jill N. Parrish
D.C. No. 2:14-cv-00701-JNP

BRIEF OF APPELLANT

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GLOSSARY

DWSRF: Drinking Water State Revolving Fund

FCA: False Claim Act

SDWA: State Drinking Water Act

STATEMENT OF RELATED CASES

This case was previously before this Court in a related appeal: *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.,* Case No.: 0:17-cv-04062, 717 F. App'x 778 (10th Cir. 2017).

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331, as this case involves the federal False Claims Act ("FCA" or "Act"), 31 U.S.C. § 3729 *et seq*. This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court's judgment of dismissal was entered June 25, 2018. (Aplt.App., 494.) Appellant's notice of appeal was filed July 25, 2018. (Aplt.App., 495.) The appeal is from a final judgment disposing of all claims.

STATEMENT OF THE ISSUES ON APPEAL

1. Should this Court reconsider its decision in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702 (10th Cir. 2006), and hold that the ten year statute of limitations set forth in 31 U.S.C. § 3731(b)(2) applies to the relator in FCA claims in which the government does not intervene?

<u>Standard of Review</u>: This Court "review[s] [a] district court's interpretation of a federal statute de novo." *Sikkenga*, 472 F.3d 702, 710. This court also reviews de novo a "district court's determination that [a] plaintiff's claims are

barred by the statute of limitations." *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1194 (10th Cir. 1998).[1]

Preservation: This issue was ruled at Aplt.App. 484-487.

2. Did the district court err in concluding that Appellant Relator Mark Christopher Tracy's claims were barred by the six year statute of limitations provided by 31 U.S.C. § 3731(b)(1)?

Standard of Review: This Court reviews de novo a "district court's determination that [a] plaintiff's claims are barred by the statute of limitations." *Sterlin*, 154 F.3d 1191,1194.

Preservation: This issue was raised at Aplt.App., 396-405; 484-487.

STATEMENT OF THE CASE

The instant appeal involves a *qui tam* action under the False Claims Act in which Appellant Mark Christopher Tracy alleges that the Appellees Emigration Improvement District (the "District") along with its co-conspirator's made fraudulent representations to the federal government to obtain a $1.846 million loan from the federal Drinking Water State Revolving Fund program (the "DWSRF"). (Aplt.App., 39-40.) Congress created the DWSRF program in 1996

[1] Appellant recognizes that the Court "cannot overrule the judgment of another panel of this court . . . absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). Pursuant to Fed. R. App. P. 25 and 10th Cir. R. 35(b), Appellant will be filing a motion for *en banc* consideration by or before the date Appellee's brief is due.

via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. (the "SDWA"). (Aplt.App., 40.) The purpose of the SDWA is to protect the quality of drinking water in the United States through the creation and enforcement of minimum standards for culinary or drinking water. (*Id.*) The DWSRF furthers this purpose by providing low-interest financing or grants for infrastructure projects that "address a current violation or will prevent a future violation of health-based drinking water standards."[2] (*Id.*)

Under guidelines from the United States Environmental Protection Agency, states administering federal funds under the DWSRF program give priority to projects that will ameliorate the most serious risks to public health, enable compliance with the SDWA, and make access to clean water more affordable. (Aplt.App., 41.) Federal and state regulations governing the use of DWSRF funds prohibit their use for projects intended primarily for "fire protection" or to "serve future population growth."[3] (*Id.*)

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[2] *See* United States Environmental Protection Agency, Drinking Water State Revolving Fund Program Operations Manual, p. 31. https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1007ZKN.txt, last accessed September 19, 2018.

[3] 40 C.F.R. § 35.3520(e)(3) and (e)(5); *see also* 40 C.F.R. § 35.3520(a)(2)(5) ("Capacity to serve future population growth cannot be a substantial portion of a project"); Utah Admin. Code § 309-705-4(3)(c) ("Projects which are ineligible for financial assistance include … [a]ny project meant to finance the expansion of a drinking water system to supply or attract future population growth").

When applying for the $1.846 million loan, the District made various false representations to the government that it would use the loan to fund a project to bring clean water to 67 existing households in Emigration Canyon. (Aplt.App., 41, 60.) Based on these representations, the proposed project appeared to fall within the parameters of the DWSRF program. (Aplt.App., 41, 60.) The District, however, did not use and never intended to use the government funds that it received to bring clean water to the existing residents of Emigration Canyon. Instead, the District intended to use the federal funds for the benefit of wealthy developers with whom it had conspired to use federal funds to install water infrastructure to support the development of hundreds of new homes in Emigration Canyon. (*See* Aplt.App., 66, ¶ 94; 67, ¶ 97-98, 69, ¶ 109, 71, ¶¶ 121, 127;77-80; 81, 85, ¶ 211.)

Mark Christopher Tracy ("Relator Tracy" or "Relator") filed a *qui tam* suit as a relator under the FCA in the U.S. District Court for the District of Utah on September 26, 2014, alleging claims under § 3729 (a)(1)(A) and § 3729 (a)(1)(B) against, among others, the District and its co-conspirators that the "Defendants knowingly presented or caused to be presented a false or fraudulent claim to an officer or employee of the United States Government—in order to induce disbursement of the $1.846 million in federal funds." (Aplt.App., 487.)

The District along with the other co-conspirator defendants involved in the scheme (Fred A. Smolka, Michael Hughes, Mark Stevens, David Bradford, Lynn Hales, Eric Hawks, R. Steve Creamer, and Carollo Engineers) filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss on the grounds, among others, that Relator Tracy's FCA Claims were barred by the statute of limitations. (Aplt.App., 483.) The district court dismissed Relator Tracy's complaint on June 22, 2018, holding that his claims were time barred under 31 U.S.C. § 3731(b)(1). (Aplt.App., 486.) Specifically, the court ruled that it was "bound by Tenth Circuit precedent, and the Tenth Circuit has held that the six-year statute of limitations found at § 3731(b)(1) [not the limitations period in § 3731(b)(2)] applies to actions pursued by private *qui tam* relators." *Id.* The district court therefore concluded that because any violation of § 3729(a)(1)(A) or § 3729(a)(1)(B) must necessarily have occurred on or before September 29, 2004, the date on which the District received the final disbursement of the $1.864 million loan, these claims would be barred by the six-year statute of limitations (Aplt.App., 486-487, 493.) Although Relator Tracy argued that some of his damage claims still fell within the six year statute of limitations set forth by § 3731(b)(1), the district court's decision did not address this argument. (*See* Aplt.App. 396-398, 402-405, 482-492.) The district court also ordered Relator Tracy to show cause why the other named defendants should not

also be dismissed based on the statute of limitations.[4] Relator Tracy could not articulate an argument outside the one he had already presented to the court in relation to the dismissed defendants. (Aplt.App., 493, 477-478.) The district court therefore dismissed the remaining named defendants on the same statute of limitations grounds set forth in its June 22 Amended Memorandum Decision. (Aplt.App., 493.)

STATEMENT OF FACTS

Because this case was dismissed under Federal Rule Civil Procedure 12(b)(6), Relator Tracy's Statement of Facts is derived primarily from his Complaint. (Aplt.App., 38-152.)

At the time of the events alleged in the Complaint, Relator Tracy was a resident of Salt Lake County, Utah. (Aplt.App., 53.) The water at issue in this case is located in Salt Lake County in Emigration Canyon. (Aplt.App., 42) Relator's Complaint alleges that the District is a special service district organized under the Laws of Utah to provide water and sewage services to residents of Emigration Canyon. (Aplt.App., 53). Relator Tracy's Complaint alleges that the District was provided a $1.846 million loan by the U.S. Government through the federal DWSRF program to provide clean drinking water to 67 households within

[4] Relator Tracy's complaint alleged two causes of action—(1) a Direct False Claim under 31 U.S.C. § 3729 (a)(1)(A) and § 3729 (a)(1)(B) and (2) a Reverse False Claim under § 3729(a)(1)(G). Relator Tracy only challenges the district court's ruling as relates to the dismissal of his first cause of action.

the canyon when, in fact, the District intended to actually use and used the funds to build capacity for future growth and land development. (Aplt.App., 45-46; 60-61.) The District received the final disbursement of the $1.846 million loan on September 29, 2004. The loan carried a below-market interest rate of 2.1 percent and was to be paid over a period of twenty years from January 2003 until January 2023. (Aplt.App., 40, 58, 60, 215-216.)

In applying for the loan and obtaining disbursement of the funds, the District represented, among other things, that 67 residents of Emigration Canyon needed access to a community water system because their private wells had problems with bacterial contamination, chemical composition, and low water supply. (Aplt.App., 41.) It represented that it would use part of the money received to build three water lines to connect these 67 residents to its then existing community water system. (Aplt.App., 41, 60-61.) The 67 residents lived in Killyon Canyon, Burr Fork, and Young Oak neighborhoods in Emigration Canyon, and at the time of the loan application, were obtaining drinking water from private wells. (Aplt.App., 41, 60.) The District also represented that it would use the remainder of the $1.846 million to build a large-diameter commercial well (the "Brigham Fork Well") and a commercial reservoir (the "Wildflower Reservoir") to ensure that it had capacity to provide water to those 67 new customers. (Aplt.App., 41, 60.) To obtain the loan, the District had to certify that it obtained "firm commitments" from at least 57 of

the 67 homeowners that they would participate in the project. (Aplt.App. 45, 60-61.) The SWDA defined firm commitment as “actual payment of a connection fee and a signed contract to pay water utility bills.” (Aplt.App., 45.). The District also had to certify that it had sufficient water rights to operate the system. (Aplt.App., 45, 61.)

However, the District did not intend to and did not provide drinking water to these 67 residents. To be sure, fourteen years later, no more than 30 households from these neighborhoods have connected to the system. (Aplt.App., 47.) The District and its co-conspirators made additional misrepresentations as well that influenced the government’s decision to provide funding. Among other things, although the District represented that the 67 homeowners were struggling with water contamination, there was only one private well in Emigration Canyon that actually had contamination issues. (Aplt.App., 45.) Moreover, the District withheld material information about the ability of Emigration Canyon to sustain the operation of large-diameter commercial wells. In 1996, one of the District’s hydrologists published a master’s thesis concerning Emigration Canyon’s hydrology. (Aplt.App. 47-48.) This thesis concluded that the Canyon could not sustain large-diameter commercial wells and, even if such wells were to successfully draw large quantities of water from the canyon’s riparian system, impairment of private wells within the canyon would be “almost a certainty.” (*Id.*)

The failure to disclose this information was significant. Most of the households within Emigration obtain their water from private wells. If commercial wells decrease the water supply, these private wells become more susceptible to contamination because wells with low water flows are prone to bacterial contamination and chemical imbalances. (*Id.*) Thus, instead of providing clean drinking water to the existing residents of Emigration Canyon, the District's project actually would reduce the clean drinking water available to existing residents. (*Id.*)

The District also misrepresented that its water rights had priority over all other water rights in the Canyon. (Aplt.App. 48.) To operate the Brigham Fork Well, the District was required to change its point of diversion, thereby making its water rights inferior to that of existing canyon residents. (Aplt.App., 49.) Thus, if the District's government-funded project interfered with any of these resident's superior water rights, these residents could shut down the entire system. (Aplt.App. 48-49.)

Consistent with its intended purpose and contrary to its representations to the government, the District did not supply clean drinking water to the 67 residents identified in its project. (*See* Aplt.App., 47.) Instead, the District used the wells funded by the government as a means to provide infrastructure to support the development of several new housing subdivisions and over 500 hundred new

homes in the Canyon. (Aplt.App. 46.) Additionally, instead of connecting the 67 existing residents to the project as it represented it would do to the government, the District along with its co-conspirator's used the wells to supply water to pipelines that run from Wildflower Reservoir to vacant, developable land owned by several developers who have plans to build housing developments in the Canyon. (Aplt.App. 46, 85.)

SUMMARY OF ARGUMENT

The district court erred in holding that Relator Tracy's FCA claims are barred by the six year statute of limitations and that he could not rely upon the ten year statute of limitations set forth in § 3731(b)(2). Congress enacted the FCA to reduce fraud committed on the government. Unique to the Act is its *qui tam* provisions, which allow a private individual to enforce the FCA in the name of the United States Government. The *qui tam* provisions benefit both the relator and the government. The government may choose to intervene in an FCA action brought by a relator. However, even if it does not intervene, the government receives a percentage of the ultimate damage award and retains an interest and an ability to control the FCA case.

In 1986, Congress amended the FCA to expand the *qui tam* provisions to encourage more *qui tam* suits. One of these amendments provided an alternative to the existing six-year statute of limitations for false claims, namely a period of no

more than three years after material facts should have been known by the relevant government official, but never longer than ten years after the violation was committed. The government enacted this provision to ensure that its rights were not lost through a wrongdoer's deceptive conduct.

The plain language of the FCA's amended statute of limitations—31 U.S.C. 3731(b)(2)—indicates that the ten year limitations period applies to a relator. In *Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702 (10th Cir. 2006), this Court held that the relator cannot rely upon the ten year statute of limitations. Since *Sikkenga* was published, the Eleventh Circuit as well as several other district courts have held that § 3731(b)(2) applies to the relator. The reasoning of these courts is persuasive and justifies this Court in overruling *Sikkenga*.

However, even if the ten-year statute of limitations does not apply, Relator Tracy's claims are still not time barred. It is well-established that the statute of limitations does not begin to run on a claim for actual—as opposed to statutory—damages until the government actually suffers damages. In this case, the government is still accruing damages. Specifically, the government damages in this case include, among other things, the $1.846 million tied up in a loan at a below-market interest rate. The District has not yet paid back this loan. The government is, therefore, still incurring damages based on the District's and its co-conspirator's fraudulent acts.

ARGUMENT

I. Background Regarding The FCA And Its Statute Of Limitations.

Because the purpose and structure of the FCA is important in analyzing the meaning of the statutory language at issue, Relator Tracy provides some background regarding that Act.

The FCA was enacted in 1863 and was "originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016). Its adoption occurred following "a series of sensational congressional investigations prompted hearings where witnesses painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *Id.* (internal quotation marks omitted). Congress's response was to "impos[e] civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment." *Id.*

Since its enactment, the FCA has been amended several times. However, the FCA's focus remains the same—"those who present or directly induce the submission of false or fraudulent claims." *Id.* Consistent with its purpose, the Act "imposes civil liability on an individual who, *inter alia*, 'knowingly presents . .

. a false or fraudulent claim for payment or approval' to the Federal Government." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016), quoting § 3729(a)(1)(A).

The Act may be enforced either by the Attorney General or by a private *qui tam* relator (as is relevant here) in the name of the United States. 31 U.S.C. §§ 3730(a), 3730(b). The Act's unique "*qui tam* enforcement provisions were designed to benefit both the relator and the Government." *State Farm Fire & Cas. Co.,* 137 S. Ct. at 440. "A relator who initiates a meritorious *qui tam* suit receives a percentage of the ultimate damage award, plus attorney's fees and costs." *Id*., citing § 3730(d). This procedure "encourag[es] more private enforcement suits [and] serves to strengthen the government's hand in fighting false claims." *Id*. (internal quotation marks omitted).

"If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the government, which then has 60 days to intervene in the action." *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 769 (2000), citing § 3730(b)(2), (4). If the Government intervenes, "it assumes primary responsibility for prosecuting the action, though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement." *Id*., citing § 3730(c)(1) If the government chooses not to intervene,

"the relator has the exclusive right to conduct the action and the [g]overnment may subsequently intervene only on a showing of good cause." *Id.*, citing § 3730(c)(3). If the relator is successful in its action, the government is awarded damages, however, the relator receives a share of the damages—"generally ranging from 15 to 25 percent if the Government intervenes (depending on the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of what is reasonable)—plus attorney's fees and costs." *Id.*, citing § 3730(d)(1)

In 1986, Congress amended the FCA "to increase the financial and other incentives for private individuals to bring suits under the Act and thereby to enlist the aid of the citizenry in combatting the rising problem of sophisticated and widespread fraud." *United States Ex. Rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993). "Following a decline in the use of *qui tam* suits as a weapon in fighting fraud against the government, the 1986 amendments sought to expand the *qui tam* provisions to encourage more private enforcement suits." *United States ex. rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497-98 (11th Cir. 1991).

The 1986 FCA included an amendment that expanded the statute of limitations so as to bring more fraud claims within the statute's reach. Before the 1986 amendment, § 3731(b) had a six-year statute of limitations for all FCA claims. *United States ex. Rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1035

(9th Cir. 1998). Congress amended the statute to include § 3731(b)(2), which "provides an alternative to the six-year statute of limitations for false claims, namely a period of no more than three years after material facts should have been known by the relevant government official, but never longer than ten years after the violation was committed." *Id.*, citing 31 U.S.C. § 3731(b). "The legislative history to this section indicates that this change was enacted to 'ensure the Government's rights are not lost through a wrongdoer's successful deception because 'fraud is, by nature deceptive . . ." *Id.* (citing S. Rep. No. 99-345, at 15 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5280). The full language of the amended statute of limitations states:

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

31 U.S.C. § 3731(b)

There is a three-way split of authority regarding how the statute of limitations set forth in § 3731(b)(2) applies to *qui tam* actions in FCA claims. *Sikkenga*, 472 F.3d 702, 722. The first view, is that the three year tolling provision

set forth by § 3731(b)(2) only applies to government officials. "These courts view § 3731(b)(2) as simply inapplicable to FCA suits brought by a relator, and rely upon the statute's use of the term 'Official of the United States' as an indication that Congress did not intend the tolling provision" to apply to private *qui tam* relators. *Id.* This construction has been adopted by the Fourth and Tenth Circuit's. *See United States ex. rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008); *Sikkenga*, 472 F.3d 702.

The second interpretation espoused by some courts is that "*qui tam* relators are considered to stand in the place of the United States through the FCA. *Sikkenga,* 472 F.3d 702. "Thus, even though Congress referred only to the government in the FCA's text or legislative history, the context made obvious that Congress intended to include" *qui tam* relator's in § 3731(b)(2) and that the statute of limitations should be read to apply as if the relator were [the] "Official of the United States" referenced in the statute. *Id.* According to this interpretation, "the three year statute of limitations begins running when the relator gains knowledge of the wrongdoing, limited by the ten year statute of repose in § 3731(b)(2). *Id.*

The third interpretation "is that the literal text of the statute does not make § 3731(b)(2) inapplicable to relators, and interpret[s] § 3731(b)(2) such that a relator has until three years after a government official learns of a violation to file an FCA claim." *Id.* at 723. This interpretation was recently adopted by the Eleventh

Circuit and has been applied by a growing number of district court's belonging to the First, Second, Seventh, and District of Columbia. *See infra* 25-26. This is also the position adopted by the dissent in *Sikkenga*, 472 F.3d at 735.

II. The Court Should Adopt The Position That The Relator Can Rely on the Statute of Limitations Set Forth in Section 3731(b)(2).

The District Court held that Relator Tracy's claims are barred by the six year statute of limitations set forth by § 3731(b)(1) and that he could not rely on the ten year statute of limitations set forth by § 3731(b)(2). The district court was compelled to reach this conclusion based on *Sikkenga*, 472 F.3d 702, in which this Court held in a two-to-one decision that section (b)(2) does not apply to a relator in cases in which the government does not intervene. Since *Sikkenga* was published, the Eleventh Circuit as well as a growing number of district courts from other circuits have reached the contrary conclusion. *See infra*. The reasoning of these courts is persuasive and justifies that the Court take a second look at its holding in *Sikkenga*.

A. The plain language of section 3731(b) applies to the relator in cases where the government does not intervene.

The language and structure of § 3731(b)(2) indicates congress's intent that the statute of limitations provided for in that section apply to both the government and the relator in non-intervened cases. This Court "review[s] [a] district court's interpretation of a federal statute de novo." *Sikkenga*, 472 F.3d 702, 710.

The primary task when "construing a statute is to determine congressional intent, using traditional tools of statutory interpretation." *In re Mallo*, 774 F.3d 1313, 1317 (10th Cir. 2014) (internal quotations omitted). This analysis begins and generally ends "by examining the statute's plain language." *Id.* In performing this analysis, "the statute should be construed as written since it may be presumed that [Congress] meant what it clearly said." *Helmer v. Goodyear Tire & Rubber Co.*, 828 F.3d 1195, 1201 (10th Cir. 2016). The Court "also looks to the structure and context of the statute to ascertain its meaning." *In re Mallo*, 774 F.3d 1317. (internal quotation marks omitted). "When confronted with clear and unambiguous statutory language, [the Court's] duty is simply to enforce the statute that Congress has drafted." *United States v. Brown*, 529 F.3d 1260, 1264 (10th Cir. 2008). Only if the face of the statute is "inescapably ambiguous" may a court resort to other interpretive tools such as legislative history to determine Congress's intent. *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984).

Section 3731(b)(2) sets forth two limitations periods under the FCA that potentially apply. Specifically, this section states:

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with

> responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

31 U.S.C. § 3731(b).

Both the language and the structure of the statute indicates that the statute of limitations unambiguously applies to both the relator and the government, with subpart 2 being triggered based on the government's knowledge of the right of action. The opening clause of the statute expressly states that the limitations period contained within both subsection (b)(1) and (b)(2) applies to "civil actions under 3730." This would include both actions brought by the government and actions brought by a relator in non-intervened cases. Section 3731(b) is then broken into two subparts—subpart (b)(1) and (b)(2). However, nothing in the language of these subparts indicates that the relator is restricted to the limitations period set forth in subsection (b)(1) or that the government is limited to the limitations period set forth in subsection (b)(2). The first subpart does not make any distinction between the relator and the government at all. Rather, subsection (b)(1) merely states that the limitations period accrues upon the commission of a violation of section 3729. The second subpart also does not contain any language excluding the relator from the limitations period set within. Rather, this section contains a discovery rule that tolls the limitations period until "the official of the

United States charged with responsibility to act in the circumstances knows or should have known about the cause of action" and limits the limitations period to three years after the violation is discovered, but no later than 10 years after the violation is committed.

Finally, the closing clause of Section 3731(b) ends by stating "whichever occurs last" (i.e., the limitations period set forth in (b)(1) or in (b)(2)). This language indicates that Congress intended sections (b)(1) and (b)(2) to be read together.

Relying on a plain language analysis, several other courts, including the 11th Circuit and the dissent in *Sikkenga* have concluded that a relator may rely on the limitations period set forth in § 3731(b)(2) in cases where the government declines to intervene. *United States Ex. Rel Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081 (11th Cir. 2018); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 474 F. Supp. 2d 75, 85 (D.D.C. 2007) ("[T]he statute says what it says, and it says that (b)(2)'s three-year statute of limitations applies across the board, measured by the government's knowledge.) *United States ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Actavis Mid Atlantic LLC*, 659 F. Supp. 2d 262, 273-74 (D. Mass. 2009) ("As they chose not to limit the tolling provision to the Government, the statute gives the benefit of the tolling provision to relators as well. For the same reason, the tolling period is started by the knowledge of 'the official of the United

States charged with responsibility to act in the circumstances,' not the relator. The language of the statute supports no other meaning.") *United States ex rel. Salmeron v. Enter. Recovery Sys.*, 464 F. Supp. 2d 766, 769 (N.D. Ill. 2006) ("Funds would have this Court read that provision as providing a six-year statute of limitations for lawsuits under the Act, essentially ignoring alternative (2)(remember that it is the later of the two alternatives that establishes the time bar."); *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 801 (S.D.N.Y. 2017) (overruled on other grounds by 899 F.3d 163 (2d Cir. 2018); *see also Sikkenga*, 472 F.3d at 735-36 (Hartz, J. dissenting); *United States ex. rel Colunga v. Hercules Inc.*, No. 89-cv-954B, 1998 U.S. Dist. LEXIS 21811, 1998 WL 310481 (D. Utah Marc. 6, 1998) (unpublished) (overturned by *Sikkenga*).

And at least two other circuits—the ninth and third—have also recognized that section (b)(2) does not contain language limiting its applicability to the government, albeit these circuits allow the discovery rule to be triggered based on both the relator's and government's knowledge of the violation. *Supra* 21.

B. This Court should reconsider its analysis in *Sikkenga*.

In *Sikkenga*, 472 F.3d 702, the Court found that a relator could not rely on the statute of limitations set forth in § 3731(b)(2). In coming to this conclusion, the Court determined that the statute was ambiguous and therefore relied on legislative history. The Court also held that its interpretation was supported by the

ambiguity doctrine and would avoid rendering the statute of limitations set forth in § 3731(b)(1) superfluous. As recognized by the Eleventh Circuit and the dissent in *Sikkenga*, the majority's analysis in *Sikkenga* is inconsistent with the language and structure of § 3731(b) and the purpose of the FCA.

1. The language of section 3731(b)(2) is not ambiguous.

As already described *supra*, the statute is not ambiguous. Both the plain language and the structure of the statute show that the Legislature intended that section (b)(2) applies to a relator and is triggered based on the government's knowledge of the alleged violation. *Supra*; *see also United States Ex. Rel Hunt, v. Cochise Consultancy, Inc.*, 887 F.3d 1081 (11th Cir. 2018); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 474 F. Supp. 2d 75 (D.D.C. 2007).

2. The absurdity doctrine does not apply to overcome the plain language of the statute.

In *Sikkenga*, this Court held that even if the statute is not ambiguous, reading the limitations period to be triggered by the government non-party would lead to an absurd result because the limitations period would be triggered by a non-party. But as Justice Hartz recognized in his dissent, the application of subsection (b)(2) to a relator does not constitute one of the rare instances in which the absurdity doctrine should apply. *Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006) ("[W]e can apply the [absurdity] doctrine only when it would have been unthinkable for Congress to have intended the result commanded by the words of

the statute--that is, when the result would be so bizarre that Congress could not have intended it.")

The Court correctly noted in *Sikkenga* that a discovery based limitations period generally begins to run when a party plaintiff (not a non-party) knew or should have known about the claim. But to apply that general rule to *qui tam* actions fails to recognize that the government plays a unique role in FCA cases. The FCA "is one of only four statutes authorizing *qui tam* actions that remain in effect." *Hunt*, 887 F.3d 1081, 1091 n.9, citing *Stevens*, 529 U.S. at 768 n.1. Although under the FCA, "the United States is not a party to a non-intervened *qui tam* action, the United States remains the real party in interest and retains significant control over the case." *Id.* Thus, "even in a non-intervened case, the relator brings the suit as the partial assignee of the United States and asserts a claim based on injury suffered by the United States and the victim of the fraud. *Id.*, *citing United States ex. rel. Eisenstein v. City of New York*, 556 U.S. 928, 934-35 (2009). Indeed. "as the victim of the fraud, the United States—not the relator—is entitled to the bulk of the recovery." *Id.* Even in non-intervened *qui tam* actions, the government retains a significant formal rule in relation to the litigation of the FCA claims. Among other things, the government may "intervene at any time upon a showing of good cause, request service of pleadings and deposition transcripts, seek to stay discovery if it would interfere with the Government's

investigation or prosecution of a criminal or civil matter arising out of the same facts and veto a relator's decision to voluntarily dismiss the action." *Id.* In light of the government's unique role, it is not absurd "to peg the limitations period to the knowledge of a government official when the government official declines to intervene." *Id.*

Nor is it absurd that Congress wanted to put relator's in an equal position as the government as relates to the statute of limitations. As one district court noted, there are numerous reasons why Congress may have pegged the statute of limitations to the government, none of which are absurd. Among other things, "measuring (b)(2)'s limitations period by the government's knowledge, and never by the relator's, makes sense because it means that (1) the government's rights will never be impaired by the relator's conduct; and (2) the government will be able to recover upon the maximum amount of claims within the overall ten-year repose period." *Pogue*, 474 F.Supp. 2d 75, 88.

Additionally, since the objectives of the FCA is to "increase the government's ability to punish, deter, and recover upon false claims, then including relators in that provision increases the government's ability to these things even more." *Id.* Moreover, an alternative scheme in which section 3731(b)(1) does not apply when the government does not intervene produces uncertainty as to the applicable statute of limitations. "For instance, if §

3731(b)(2) does not apply in any case where a *qui tam* relator proceeds alone, then the government gets to decide what the statute of limitations will be: six years under § 3731(b)(2) if the government chooses not to intervene, or as much as ten years if the government intervenes and tolling applies." *Id.* Thus, "not only would the government be able to increase the defendant's exposure by deciding to intervene at the outset, it could also do so after the litigation has advanced significantly, since the government retains the right to intervene upon a showing of good cause." *Id.*

3. Allowing a Relator to benefit from the limitations period set forth in (b)(2) does not render portions of the statute superfluous.

In *Sikkenga*, this Court concluded that Section (b)(2) applies to relators because it would be hard pressed to find a circumstance in which (b)(1) would ever apply thereby making that provision meaningless. However, this rationale overlooks key aspects of the FCA. First, as described *infra*, the FCA already contains provisions that encourage a relator to bring their claims rapidly. Second, there are situations in which section 3731(b)(1)'s six year statute of limitations will expire later. Specifically, "because § 3731(b)(2)'s limitations period begins to run when the relevant government officials learn about the fraud from any source, a relator who delays reporting the fraud to the government also runs the risk that the government will learn about the fraud from another source and thus that 3731(b)(2)'s three year

period will expire before the relator files suit" and the six year statute would be the applicable statute of limitations. *Hunt*, 887 F.3d 1081, 1093.

4. The legislative history does not contradict the plain language of the Statute.

Although legislative history cannot be used to override the plain language of the statute, even if it could, the relevant history supports the position that 3731(b)(2)'s statute of limitations is available to the relator.

There is little legislative history for section 3731(b)(2) and the legislative history that is available does not directly address the question of whether the statute of limitations set forth in § 3731(b)(2) is available to the relator in cases where the government does not intervene. However, the legislative history demonstrates that one of the primary purposes for the amendment to § 3731 was to "encourage more private enforcement suits." S. Rep. No. 99-345, at 23-24 (1986). This purpose is consistent with the historical purpose of the FCA's *qui tam* provision to encourage private citizens to help the government root out fraud against the government. *See supra* 17-20. "Allowing relators to continue to pursue FCA claims even after the government declines to intervene is consistent with the broad underlying purpose of the FCA because it creates the potential for more fraud [to] be discovered, more litigation [to] be maintained, and more funds [to] flow back into the Treasury." *Hunt*, 887 F.3d at 1094.

In *Sikkenga*, the Court relied heavily upon the statements made by Senator Charles Grassley and the statements of Assistant Attorney General Richard K. Willard to support its holding that § 3731(b)(2) is inapplicable to a relator. However, the statements made by these individuals do not directly address the question that is before the Court and are therefore not helpful in interpreting whether that statute of limitations in subsection (b)(2) applies to the relator.

First, Senator Grassley stated that § 3731(b) is borrowed directly from 28 U.S.C. § 2416(c). However, this statement does not tell us whether Congress intended that subsection (b)(2) apply only to the government. Instead, this statement merely recognizes that Congress borrowed the discovery rule language (i.e., "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act") from 28 U.S.C. § 2416. This does not support the inference "that Congress intended to make the statute of limitations in § 3731(b) available only when the United States is a party." *Hunt* at 1095. As the 11th circuit explained, "[t]o understand 28 U.S.C. § 2416, we must look to § 2415," which establishes "various limitations periods for certain categories of claims 'brought by the United States or an officer or agency thereof,' such as contract or tort claims. *Id.*, *citing* § 2415(a), (b). Section 2416 in turn "tolls the limitations period for the United States to bring such claims when 'facts material to the right of action are not known and

reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances.'" *Id.*, quoting 2416(c). Thus, section 2416 "is not what specifies that a limitations period in § 2415 applies only when the United States is a party. Instead, § 2415 itself dictates that the United States must be a party for the limitations period to apply." *Id.*; *see also* § 2415(a), (b) (stating that the limitations period applies to claims "brought by the United States or an officer or agency thereof.") Unlike § 2415, there is no express provision in § 3731(b) that states that the United States must be a party for the limitations period to apply. Without such limiting language, it cannot be inferred that by borrowing the "description for the trigger for the limitations period from § 2416 Congress evinced an intent that the United States must be a party for the limitations period in § 3731(b)(2) to apply." *Id.* at 1095.

Second, the statements of Assistant Attorney General Richard K. Willard are likewise unhelpful. Mr. Willard stated that the purpose of § 3731(b)(2)'s limitation period was to "give us a little more flexibility in bringing some cases that otherwise would be barred." *See Sikkenga*, 472 F.3d 702, citing *False Claim Act Amendments: Hearing Before the H. Subcomm. On Admin Law and Governmental Relations of the H. Comm. On the Judiciary*, 9th Cong. 159 (1986) (statement of Richard K. Willard, Assistant Att'y Gen.). Although Willard's testimony indicated that section 3731(b)(2) extended the time in which the

government could bring an action under the FCA, his testimony "offered nothing about the intended effect of § 3731(b)(2) on *qui tam* actions or, more specifically, whether § 3731(b)(2) was intended to apply to *qui tam* actions when the government declined to intervene." *Hunt*, 887 F.3d 1096.

Third, the senate report that accompanied the amendment to § 3731(b) also does not support any legislative intent to exclude relators from the statute of limitations provided for in that section. The senate report merely reiterated the history of the FCA by quoting statements made by Justice Black regarding one of the purposes of the FCA to achieve rapid exposure of fraud against the public:

> [The FCA] is intended to protect the Treasury against the hungry and unscrupulous host that encompass it on every side, and should be construed accordingly. It was passed on the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

Sikkenga, 472 F.3d 725, quoting S. Rep. No. 99-345, at 11 (1986), as reprinted in 1986 U.S.C.C.A.N. 5276.

Nothing in this language indicates that Congress intended that a shorter limitations period should apply to the relator or that the relator cannot benefit from equitable tolling, triggered by the government's knowledge. Indeed, nothing in this statement addresses the length of time that a relator should have to bring an

action at all. Moreover, there are other provisions in the statute that already provide strong incentives for a relator to bring an FCA action rapidly. Among other things, section 3730(b)(5) states that a relator's clam may be barred if another relator beats him to the courthouse with an FCA claim based on the same facts. *Hunt*, 887 F.3d 1094. Section 3730(e)(4) also bars a relator's claim "if the allegations or transactions are publicly disclosed either in a federal hearing where the government was a party or in a news report, unless the relator was the original source of the information." *Id.* Also, the court in determining the amount that the relator may recover may consider whether he substantially delayed in reporting the fraud or filing the complaint. *Id.*, citing *United States ex rel. Shea v. Verizon Commc'ns Inc.*, 844 F.Supp. 2d 78, 89 (D.D.C. 2012). And as stated above, because section 3731(b)(2)'s limitation period runs when the government learns about the fraud, there are situations where the statute's three year limitation period will have already run before the relator could bring his FCA action. *Id.*

III. Even If The Six Year Statute Of Limitations Did Apply, The District Court Erred In Holding That The FCA Claims Are Time Barred.

The district court held that Relator Tracy's claims are barred because the Defendants' misrepresentations to the Government occurred outside the applicable limitations period. The district court's holding is err.

This Court reviews de novo a "district court's determination that [a] plaintiff's claims are barred by the statute of limitations." *Sterlin*, 154 F.3d 1191,

1194. It is well-established that the government may recover damages incurred during the limitations period even if the fraudulent acts or misrepresentations giving rise to the damages occurred outside the limitations period. *See United States ex rel. Brooks v. Stevens-Henager Coll., Inc.*, No. 2:15-cv-00119-JNP-EJF, 2018 U.S. Dist. LEXIS 2329, at *7-12 (D. Utah Jan. 4, 2018) (recognizing promissory fraud as a viable theory of recovery under the FCA); *see also United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006) (noting FCA "liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct"); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 468 (5th Cir. 2009) ("Under a fraudulent inducement theory, although the Defendants' 'subsequent claims for payment made under the contract were not literally false, [because] they derived from the original fraudulent misrepresentation, they, too, became actionable false claims'") (alteration in original) (quoting *United States ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 491 F.3d 254, 259 (5th Cir. 2007)); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4th Cir. 1999) ("In [fraudulent inducement] cases, courts, including the Supreme Court, found False Claims Act liability for each claim submitted to the government under a contract, when the contract or extension of government benefit was obtained originally

through false statements or fraudulent conduct" (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943))).

A corollary to this principal is that the statute of limitations does not begin to run on a claim for actual – as opposed to statutory – damages until the government suffers the damages. *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998); *see also United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (quoting *Blusal Meats v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (the statute of limitations "'begins to run on the date the claim is made or, if the claim is paid, on the date of the payment"); *but see Armstrong v. Wyo. Dep't of Envtl. Quality, 674 F. App'x* 842, 846 (10th Cir. 2017) (a nonpublished opinion affirming a district court's dismissal of plaintiff's claims on grounds that the plaintiff did not adequately brief whether the statute of limitations runs from the date payment is made).

Under federal law governing statutes of limitation, "'a cause of action accrues when all events necessary to state a claim have occurred.'" *Sikorsky Aircraft Corp. v. United States*, 110 Fed. Cl. 210, 220 (2013) (quoting *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991). Here, Relator Tracy has made a claim for actual damages. Accordingly, the statute of limitations accrues on Relator Tracy's claims when the government incurs actual damages. The government did not necessarily incur tangible damages when the District took

possession of the $1.846 million in federal funds. However, that does not mean that damages did not accrue following issuance of the $1.846 million. Under the FCA, "there is no set formula for determining the government's actual damages." *United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988). "Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case." *Id.* (internal quotation marks omitted). Accordingly, "courts should remain free to fashion measures of damages on a case by case basis." *Id.*

Here, Relator Tracy has alleged that in exchange for the District's false promise to use the $1.846 million to further the purposes of the SDWA, the government gave the District a below-market loan. Accordingly, the government's damage is not the relinquishment of the $1.846 million; rather, the government's damage is having its funds tied up in a loan yielding a below-market interest rate for a project that does not fulfill the purposes of the DWSRF.

Under these circumstances, one way to measure the government's damages is the difference between the amount of interest that the government's revolving funds earned at the below-market rate paid by the District and the amount of interest that the revolving fund would have earned (a) had the District paid an at-market interest rate or (b) had the funds been invested in other interest bearing

obligations. The court has discretion to fashion the measure of the government's damages in this way.

Measuring damages in this way makes sense. The government offered the District a below-market interest rate to further the purposes of the SWDA. If the District and its co-conspirators knowingly failed to carry out those purposes, they should have to pay (a) market rates for funds that the government otherwise could have invested in projects that would have furthered the purposes of the SWDA or (b) the rate of return that the government could have obtained by investing the funds in other interest bearing obligations. *Cf. United States v. Science Application Int'l Corp.*, 626 F.3d 1257, 1279, 393 U.S. App. D.C. 223 (D.C. Cir. 2010) (using market value as a means of measuring damages under the FCA); *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976) (same); 42 U.S.C. § 300j-12(c) (requiring funds not out to loan to be "invested in interest bearing obligations").

If Relator Tracy elects to pursue damages based upon either (a) the difference between the rate of return on the District's below-market loan and the rate of return on an at-market loan or (b) the difference between the rate of return on the District's loan and the rate of return on other types of investments, the government suffered damages within six years of filing of the original complaint. Because interest accrues on an ongoing basis, the government has suffered and will continue to suffer ongoing damages until the District pays off the loan in full.

Each day and every day that passes while some balance on the loan's principal is outstanding represents a day in which the government incurs a new, never-before-incurred damage. Indeed, the difference between the interest actually earned and the interest that the government's revolving fund could have earned had the District paid an at-market rate or invested the funds elsewhere augments with each passing day.

Even if the statute of limitations on Relator Tracy's claims is six years, the government incurred new damages within the six-years immediately preceding the September 24, 2014 filing of his complaint. The statute of limitations does not bar recovery of these damages, nor does it bar recovery of the damages that the government continued and continues to incur after the filing of the complaint. Accordingly, the government has claims for actual damages that are not barred by the six-year statute of limitations, and the Court should reverse the district court's dismissal.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant requests oral argument. The basis for this request is the issues and arguments set forth herein are complicated and involve detailed statutory analysis. Oral argument will assist the Court in ruling on this appeal by permitting counsel for the parties to address the Court's questions regarding the issues outlined in the parties' briefs.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal and remand for further proceedings.

DATED this 19th day of September, 2018.

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Date: September 19, 2018

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