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.	

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

REPLY BRIEF OF APPELLANT

Stephen D. Kelson
Scot A. Boyd
Kristen C. Kiburtz
Bryson R. Brown
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111-2047
801-323-5000
Attorneys for Appellant

TABLE OF CONTENTS

ARGUMENT **1**

I. THE DISTRICT COURT ERRED IN DISMISSING TRACY'S COMPLAINT ON THE GROUNDS THAT IT IS TIME-BARRED UNDER 31 U.S.C. § 3731(b)(1) **1**

A. This Court should reconsider its holding in Sikkenga. **1**

B. Tracy's complaint is timely under the fraudulent inducement theory. **8**

II. THIS COURT SHOULD DENY THE DISTRICT'S REQUEST TO AFFIRM ON THE ALTERNATIVE GROUNDS THAT TRACY'S COMPLAINT IS BARRED UNDER THE TEN YEAR STATUTE OF LIMITATIONS SET FORTH IN § 3731(b)(2). **12**

A. Standard of Review. **12**

B. Tracy's claims are timely under the ten year statute of limitations set forth in § 3731(b)(2). **13**

CONCLUSION **17**

TABLE OF AUTHORITIES

Cases

Blusal Meats, Inc. v. United States, 638 F. Supp. 824 (S.D.N.Y. 1986), aff'd, 817 F.2d 1007 (2d Cir. 1987) 14

Brown v. Montoya, 662 F.3d 1152 (10th Cir. 2011) 12

Diatect Int'l Corps. v. Organic Materials Review Inst., 2007 U.S. Dist. LEXIS 16295, *12, 2007 WL 752165 (D. Utah 2007) 12

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409 (2005) 15

Hanover Am. Ins. Co. v. Balfour, 594 Fed. Appx. 526 (10th Cir. 2015) 3

Jana, Inc. v. United States, 41 Fed. Cl. 735 (1998) 13, 14, 15

MP Nexlevel, LLC v. Codale Elec. Supply, Inc., 2010 U.S. Dist. LEXIS 40828, *19, 2010 WL 1687985 (D. Utah 2010) (unpublished) 12

Norman v. Elkin, 860 F.3d 111 (3d Cir. 2017) 17

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) 2

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 3

Rodriguez v. Wet Ink, LLC, 603 F.3d 810 (10th Cir. 2010) 12

Sexton v. Panel Processing, Inc., 754 F.3d 332 (6th Cir. 2014)..... 3

Union Pac. R.R. Co. v. Atoka, 6 Fed. App'x. 725 (10th Cir. 2001) (unpublished) 7

United States v. Incorporated Village of Island Park, 888 F. Supp. 419 (E.D.N.Y. 1995).....14

United States ex rel Sikkenga v. Regence Bluecross Blueshield, 472 F.3d 702 (10th Cir. 2006) .....passim

United States ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674 (E.D. Penn. 2009) 15

United States ex rel. Dugan, 2009 U.S. Dist. LEXIS 89701, *16 (D. Md 2009)....15

United States ex rel. Duvall v. Scott Aviation, 733 F. Supp. 159 (W.D.N.Y. 1990) 14

United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624 (N.D. Ill. 1992) 14

United States ex rel. Hunt v. Cochise Consultancy, Inc., 887 F.3d 1081 (11th Cir. 2018).....passim

United States ex rel. Hyatt v. Northrup Corp., 91 F.3d 1211 (9th Cir. 1996).....2, 4

United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993), cert. denied, 508 U.S. 973, 125 L. Ed. 2d 663, 113 S. Ct. 2962 (1993).....14

United States ex rel. Longhi v. United States, 575 F.3d 458 (5th Cir. 2009)..... 8

United States ex rel. Malloy v. Telephonics Corp., 68 F. App'x 270 (3rd Cir. 2003) 2

United States ex rel. Told v. Interwest Constr. Co., 267 Fed. Appx. 807 (10th Cir. 2008) (unpublished) 7

United States v. Tech Refrigeration, 143 F. Supp. 2d 1006 (N.D. Ill. 2001).....15

United States v. Univ. of Phoenix, 461 F.3d 1166, (9th Cir. 2006) 9, 10, 11

United States v. Woods, 571 U.S. 31 (2013)..... 6

Statutes

28 U.S.C. § 2415..... 5

28 U.S.C. § 2416.....4, 5

31 U.S.C. § 3729.....13

31 U.S.C. § 3731(b) 15

31 U.S.C. § 3731(b)(1) 1, 3, 6, 8

31 U.S.C. § 3731(b)(2) .....passim

Other Authorities

S. Rep. No. 99-345, reprinted in 1986 U.S.C.C.A.N 5266 6

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING TRACY'S COMPLAINT ON THE GROUNDS THAT IT IS TIME-BARRED UNDER 31 U.S.C. § 3731(b)(1)

A. This Court should reconsider its holding in Sikkenga.

Relator Mark Christopher Tracy's opening brief requested that the Court reconsider its holding in *United States ex rel Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702 (10th Cir. 2006). In *Sikkenga*, the Court held that a relator cannot rely on the tolling provision set forth in 31 U.S.C. § 3731(b)(2) of the False Claims Act (FCA or Act). In coming to this conclusion, the Court reasoned that the statute was ambiguous and therefore relied on legislative history. The Court also held that its interpretation was supported by the absurdity doctrine and would avoid rendering the statute of limitations set forth in § 3731(b)(1) superfluous. Tracy's opening brief responded to each of these rationales and argued that the reasoning in *Sikkenga* is inconsistent with the language and structure of the statute, and he respectfully requested that the Court reconsider it.

The Emigration Improvement District (the District) makes several arguments in response to Tracy's request. None of which have merit. First, the District argues that "Congress has had ample opportunity [to] amend the [Act] if it was concerned that the Tenth Circuit had misinterpreted the statute" and could have done so in 2009 when it made certain amendments to the FCA. (Aple. Br.,

12.) That argument is not persuasive. If it were, the same argument would hold true for Congress's decision not to amend the Act in response to the Ninth and Third Circuits' decisions, both of which were decided before the 2009 Amendments and both of which hold that a relator can rely on the tolling provisions set forth in § 3731(b)(2). *See United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996) (holding that relator can rely on tolling provisions set forth in § 3731(b)(2)); *United States ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x 270, 273 (3rd Cir. 2003) (unpublished) (same).

Thus, the Legislature's failure to amend the statute based on *Sikkenga* lacks "persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quotations omitted). Such an inference is consistent with the Ninth Circuit, Third Circuit, and now the Eleventh Circuit's decisions, which hold that § 3731(b)(2) applies to a relator. *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1086 (11th Cir. 2018).

Next, the District argues that *Sikkenga* got it right in holding that the statute is ambiguous, and it cites to the split of authority between the Ninth and Eleventh Circuits as supporting such ambiguity. There are several problems with that argument. First, the District misapplies the test for determining whether a statute is

ambiguous. Whether a statute is ambiguous does not depend on whether there is a split of authority on the meaning of the statute. Rather, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 341 (6th Cir. 2014) (refusing to find ambiguity in statute on the basis that there is a split of authority in the interpretation of a statute); *see also Hunt* 887 F.3d 1081 (recognizing split of authority regarding interpretation of § 3731(b), but determining ambiguity based on the language and structure of the statute); *Hanover Am. Ins. Co. v. Balfour*, 594 Fed. Appx. 526, 530 (10th Cir. 2015) (noting that a "split in authority over whether a certain term is ambiguous is insufficient to create an ambiguity" in interpreting an insurance policy).

Here, as explained in Tracy's opening brief, § 3731(b) is unambiguous. The statute applies to both the relator and government, and provides that the limitations period is six years, but is extended to "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 . . . ." 31 U.S.C. § 3731(b)(1) & (2).

The District's ambiguity argument regarding the Ninth and Eleventh Circuits' split is incorrect for the additional reason that these courts did not split on whether § 3731(b)(2) is applicable to the relator. Both courts held that a relator could rely on the tolling provision set forth in this section. These courts were split on whether the tolling provision in section 3731(b)(2) is triggered based on the government's knowledge or on both the government's and relator's knowledge. *Hunt*, 887 F.3d 1081, 1090-91 (11th Cir.) (limitations period triggered based on government's knowledge); *Northrup Corp.*, 91 F.3d 1211, 1218 (9th Cir.) (limitations period triggered based on government's knowledge or relator's knowledge). That question is not before this Court.

The District also argues that the Court's conclusion in *Sikkenga* is supported by the legislative history. Specifically, the District argues that senator Charles Grassley stated that the language— "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"—found in § 3731(b)(2) was borrowed from 28 U.S.C. § 2416. According to the District, the "fact that Congress adopted the language of § 2416, which by Tracy's [alleged] own admission applies only when the United States is a party, indicates that Congress understood and intended that § 3731(b)(2) would only apply when the United States was a party." (Aple. Br., 14). This argument does not support the District's

position. The language that Congress borrowed from § 2416 is the language that describes when the tolling provision in that section is triggered. Thus, under § 2416, the statute of limitations does not begin "when facts material to the right of action are not known and reasonably could not be known by the official of the United States." However, the limitations language found in § 2416 is not the language Congress used to limit the application of § 2416 to the United States Government.

Rather, the language used to limit § 2416 application to the United States Government is found in § 2415. Section § 2415, not § 2416, in turn provides that the "limitations period applies only to claims 'brought by the United States or an officer or agency thereof.'" *Hunt*, 887 F. F.3d 1081, 1095, *quoting* 2415(a), (b). There is nothing in section 3731(b)(2) that similarly limits its applicability to only claims brought by the United States. As the Eleventh Circuit recognized, simply borrowing the triggering provision found in § 2416 does not demonstrate Congress's intent to limit § 3731(b)(2)'s application to the government. Rather, the opposite is true. Had Congress intended to limit § 3731(b)(2)'s applicability to the government, section § 2415 demonstrates that Congress knew how to do so, and did not do so in relation to § 3731(b)(2). For this same reason, the Senate Report cited by the District is not helpful:

> Subsection (b) of section 3731 of title 31, as amended by section 3 of the bill, would include an explicit tolling provision on the statute of

> limitations under the False Claims Act. The statute of limitations does not begin to run until the material facts are known by an official within the Department of Justice with authority to act in the circumstances.

(Aple., Br., p. 15, *quoting* S. Rep. No. 99-345, at 30, reprinted in 1986 U.S.C.C.A.N 5266, 5295.) While this report states that the government's knowledge triggers the tolling provision found in 3731(b)(2), it does nothing to explain whether the relator can rely on the tolling provision subject to the government's knowledge.

The District next argues that *Sikkenga* was correct in holding that construing § 3731(b)(2) to apply to the relator eviscerates § 3731(b)(1). According to the District, "Tracy offers nothing more than weak tea to challenge this point." (Aple. Br., 16.) While courts should avoid interpretations that avoid rendering a particular provision—in this case § 3731(b)(1)—meaningless, this canon of construction has no application in cases "when a statutory provision would remain operative under the interpretation in question in at least some situations." *Hunt*, 887 F.3d 1081, 1093; *see also United States v. Woods*, 571 U.S. 31, 46 (2013) (refusing to find provision superfluous when it found that a particular section could apply in situations where another section could not.)

Here, as discussed in Tracy's opening brief, there are situations in which section § 3731(b)(1) still applies. 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." *Hunt*, 887 F.3d 1081, 1093.

Finally, the District argues that this Court should not reconsider its decision because "prior precedent 'includes not only the very narrow holding of those prior cases, but also the reasoning of those underlying cases." (Aple. Br., 16-17 (*quoting Union Pac. R.R. Co. v. Atoka*, 6 Fed. App'x. 725, 726 (10th Cir. 2001) (unpublished).) It is unclear what the District is attempting to argue by reference to this case. As instructed by *Union Pacific*, Tracy did not simply ask the Court to reconsider its holding in *Sikkenga*. Rather, Tracy outlined the reasoning set forth in *Sikkenga* and then set forth why the reasoning in that case should be reconsidered. Moreover, as *Union Pacific* instructs, Tracy also asked for *en banc* consideration of this issue. In short, contrary to the District's suggestion, Tracy does not simply disagree with the result in this case or in *Sikkenga*, rather, Tracy also disagrees with the reasoning underlying the result.[1]

[1] The District suggests in a footnote that Tracy's request that the Court reconsider *Sikkenga* would also require this Court to reconsider its ruling in *United States ex rel. Told v. Interwest Constr. Co.*, 267 Fed. Appx. 807 (10th Cir. 2008) (unpublished). That is incorrect. *Told* is an unpublished opinion and therefore has no precedential value. 10 Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value.") Moreover, *Told*

B. Tracy's complaint is timely under the fraudulent inducement theory.

Tracy's opening brief argued that his claims are timely under the fraudulent inducement theory of liability, under either the ten year statute of limitations found in § 3731(b)(2) or the six year statute of limitations found in § 3731(b)(1). "Under a fraudulent inducement theory, although the defendants' subsequent claims for payment made under the contract [are] not literally false, because they derived from the original fraudulent misrepresentation, they, too, became actionable false claims." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 468 (5th Cir. 2009) (alterations and quotation marks omitted). Pursuant to this principle, Tracy argued that, although the below market installment payments made by the District on the loan were not fraudulent, the District's payment of these obligations at below market rates constituted a claim for benefits (*i.e.*, a request for a subsidized interest rate) from the government.

The District responds that fraudulent inducement does not apply because Tracy alleged in his complaint that the purported false claims or misrepresentations were made in order to induce disbursement of $1.846 million loan. That is incorrect. Tracy also alleged in his complaint that his below market interest payments constituted a false claim. (Aplt. App., 40, 43, 49, 60, ¶¶ 53-56.) Mr.

---

contained no independent analysis regarding whether § 3731(b)(2) applies to a relator. Instead, it simply cited to *Sikkenga* for this proposition.

Tracy also asserted this same position in his opposition to the District's motion to dismiss. (Aplt. App. 402-405, 398-399.) Thus, each time the District made payments for less than the full amount of the principle due under its installment agreement with the Board, the District was implicitly affirming its continued entitlement to receive the government benefits (*i.e*, a subsidized interest rate). These interest payments started in or around 2003 and continue until 2023. (Aplt. App., 216.)

In *United States v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), for instance, the Ninth Circuit decided a similar issue and held that the defendant was liable under a fraudulent inducement theory when, with full knowledge that it was ineligible for federal grants, the defendant's students requested federal grants. In that case, the University applied to be eligible for the receipt of federal subsidies associated with certain student loans. As part of this eligibility process, it certified that it would comply with certain material statutory requirements, including that it would not pay any incentives based on the number of students the University recruited. However, the University never intended to comply with its certification regarding recruitment. Students attending the University subsequently submitted applications for government grants, which in some cases were directly deposited with the school. Students also obtained loans from private lenders for government insured loans. The Ninth Circuit held that under the fraudulent inducement theory,

it was not simply the underlying fraudulent certification that was actionable under the FCA, also actionable were the claims for government subsidies that were subsequently made by the students. *See also* (Aplt. Br., pp. 31-32 (collecting cases explaining the fraudulent inducement theory).)

Here, as is the case in *Univ. of Phoenix*, the District falsely certified, among other things, that it would comply with the Clean Water and Safe Water Drinking Act, that the District owned sufficient water rights to operate the system, and that the system was intended to bring clean water to existing users. (Aplt. Br. 9-10.) However, the District never intended to comply with this obligation and instead developed the system, not for existing users, but to help support future development. (*Id*.) These misrepresentations were material. Both the Bond Agreement and the District's correspondence with the Board required such certifications before approval of the loan and as a condition of continued receipt of the loan. *See* Aplt. Br., pp. 7-8; Aplt. App., 142, 143, 145, 224, 225, 228(U), 312; *see also* Aplt. App. 232 (stating that failure to comply with these covenants is grounds for default and the imposition of a penalty in the amount of 18% per annum on the outstanding principle).

Each time the District made payment on the loan, it was acknowledging its continued commitment to the Bond Agreement and its certifications therein. As the Ninth Circuit recognized, "it is irrelevant how the federal bureaucracy has

apportioned the statements among layers of paperwork. All that matters is whether the false statement or course of conduct causes the government to pay out money or to forfeit moneys due." *Univ. of Phoenix*, 461 F.3d 1166, 1177. In this case, the District's conduct caused the government to pay out a benefit (a subsidized interest rate) each time it made a payment on the loan.

The District argues that the statute accrued at the time the loan was paid because the crux of Tracy's entire case is that the fraudulent claim was made to induce the distribution of the $1.846 million in federal funds. (Aple. Br., 18.) Actually, it is not. While Tracy did make this allegation, Tracy also alleged in his Complaint that the District's certifications induced the government to provide a below market loan. (Aplt. Br. 40, 46, 59, 60.) It further made this argument in response to the District's motion to dismiss. Under the fraudulent inducement theory, a new violation occurs any time a defendants' claim or course of conduct causes the government to pay out or forfeit money. Tracy has alleged that occurred in this case.

The District also argues that the statute of limitations is triggered when the bond is approved because that is when the interest rate is set for the parties' agreement. That argument is contrary to the principles underlying the fraudulent inducement theory. As explained above, under the fraudulent inducement theory, it is not the defendant's conduct that induces the government to enter a contract

that triggers liability. Rather, liability is premised upon a request for a benefit under that contract that the defendant would not have ultimately received absent its false certification. *See e.g.*, *Diatect Int'l Corps. v. Organic Materials Review Inst.*, 2007 U.S. Dist. LEXIS 16295, *12, 2007 WL 752165 (D. Utah 2007) (unpublished) (holding that when a party accepts the benefit under a contract, the party is affirming the validity of that contract); *MP Nexlevel, LLC v. Codale Elec. Supply, Inc.*, 2010 U.S. Dist. LEXIS 40828, *19, 2010 WL 1687985 (D. Utah 2010) (unpublished) ("When one elects to continue with the contract, one accepts all the burdens contained in the contract as well as the benefits.")[2]

II. THIS COURT SHOULD DENY THE DISTRICT'S REQUEST TO AFFIRM ON THE ALTERNATIVE GROUNDS THAT TRACY'S COMPLAINT IS BARRED UNDER THE TEN YEAR STATUTE OF LIMITATIONS SET FORTH IN § 3731(b)(2).

A. Standard of Review.

"The construction and applicability of a federal statute of limitation is a question of law [the court] reviews de novo." *Rodriguez v. Wet Ink, LLC*, 603 F.3d 810, 812 (10th Cir. 2010). "In reviewing a motion to dismiss, all well-pleaded factual allegations in the . . . complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011) (internal quotations omitted).

[2] The Bond Agreement allows the District to redeem its bond obligations prior to the end of the loan period if it gives the appropriate notifications to the Bond holders. (Aplt. App., 216-217.)

B. Tracy's claims are timely under the ten year statute of limitations set forth in § 3731(b)(2).

The District argues that Mr. Tracy's claims are untimely even under the ten year statute of limitations set forth in § 3731(b)(2) because the limitations period is allegedly triggered only by "the submission of the false claim." (Aple. Br., 25). That is incorrect. Several courts have held that if the government makes payment on a submitted false claim, the Act's statute of limitations starts running on the "date payment was made, rather than on the (earlier) date that the claim was submitted." *See Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998) (collecting cases).

This interpretation is supported by the language of the Act, which states that the statute of limitations is triggered when the "violation of section 3729 is committed." The question, therefore, is what constitutes a "violation of section 3729" for purposes of triggering the statute of limitations. In *Jana*, the Federal Claims court recognized that, under the Act, a violation occurs at the time that a false claim is submitted, regardless of whether the claim is paid. 41 Fed. Cl. 735, 743. However, § 3729 of the FCA also provides that a person providing a false claim may be liable for actual damages. The statute thereby suggests that "violation of section 3729" encompasses not only the false claim but also the payments on that claim. *Jana*, 41 Fed. Cl. 735, 743.

This interpretation is consistent with federal law governing statutes of limitations, which require that all events necessary to state a claim have occurred. *Id*. In cases where the claim is seeking only civil penalties, all the events necessary to the claim have occurred upon the submission of the false claim. However, in a claim seeking actual damages, the events necessary to state the government's claims do not occur until the government has made full payment on a claim. Until payment is made, the defendant is not liable for any actual damages incurred. *Id*. Consistent with *Jana*, other courts likewise have found that the statute of limitations is triggered on both the submission of a false claim and the payment of damages. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (stating six-year limitations period runs upon date that payment is made), cert. denied, 508 U.S. 973, 125 L. Ed. 2d 663, 113 S. Ct. 2962 (1993); *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 441-42 (E.D.N.Y. 1995) (same); *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624, 629 (N.D. Ill. 1992) (same); *United States ex rel. Duvall v. Scott Aviation*, 733 F. Supp. 159, 161 (W.D.N.Y. 1990) (holding it is the payment and not the request which triggers the statute); *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) ("The six-year limitations period under the FCA begins to run on the date the claim is made or, if the claim is paid, on the date of the payment"), aff'd, 817

F.2d 1007 (2d Cir. 1987); *United States ex rel. Dugan*, 2009 U.S. Dist. LEXIS 89701, *14 (D. Md 2009) (unpublished) (statute triggered on payment of claim); *United States v. Tech Refrigeration*, 143 F. Supp. 2d 1006, 1007 (N.D. Ill. 2001).

The District argues that the above mentioned case law has been superseded by the United States Supreme Court's decision in *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005). However, in *Graham* the court was not asked to decide whether the statute of limitations found in § 3731(b) is also triggered upon payment of a claim. Instead, the court decided whether the statute of limitations set forth in § 3731(b) applies to retaliation claims brought under the FCA. In dicta the court stated under § 3731(b), "the time limit begins to run on the date the defendant submitted a false claim for payment." 545 U.S. 409, 415. However, that statement is consistent with *Jana*. Indeed, the *Jana* court expressly stated that the submission of a false claim triggers the statute of limitations. The *Jana* court, however, recognized that, because actual damages in addition to statutory damages are available under the Act, when a payment is made, a violation under the Act also occurs at that time. *Graham* does not address that issue.

Based on a Pennsylvania district court's decision, *United States ex rel. Bauchwitz v. Holloman*, 671 F. Supp. 2d 674 (E.D. Penn. 2009), the District also argues that the Act does not specify two separate statute of limitations based on the

types of damages requested, and therefore the statute can only be triggered based on when the claim is submitted, not on when payment is made. However, this argument ignores the fact that the Act allows for the recovery of actual damages, and actual damages are not incurred until they are paid. The other cases that the District cites for this same principal fail for that same reason. (*See* Aple. Br., p. 26.)

The District also claims that Tracy is not eligible for the ten-year statute of limitations because the government official charged with responsibility to act under the circumstances allegedly knew that the District used the loan to build a preposterously oversized water system. In other words, the District claims that the three year period provided in § 3731(b)(2) was triggered based on the government's knowledge and that period expired before Tracy brought suit. There are several problems with that argument. First, it does not accurately reflect the allegations made in Tracy's Complaint. Tracy did not simply allege that the tanks built by the District were oversized. Rather, he alleged, among other things, that the District misrepresented its intentions to bring clean water to existing users, misrepresented it had sufficient ownership rights to operate the system, and misrepresented its intentions to comply with the Clean Water and Safe Drinking Water Act.

Second, determining when a person in the government's position knew or should have known of a claim is a highly fact-intensive inquiry, not appropriately considered on a motion to dismiss. *Norman v. Elkin*, 860 F.3d 111, 115 (3d Cir. 2017). In this case, the District has not met its burden in demonstrating that, based on the allegations in the Complaint, Staff Engineer Steve Onysko knew or had reason to know that the District falsely certified its intentions under the loan agreement based simply on his personal opinion that the well was over-sized. Likewise, it is not clear from the face of the complaint that Mr. Onysko is the government official who is charged with the responsibility to act under the circumstances. The Court therefore should refuse to affirm on this alternative ground.

CONCLUSION

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

DATED this 2nd day of November, 2018.

CHRISTENSEN & JENSEN, PC

/s/ Kristen C. Kiburtz
Stephen D. Kelson
Scot A. Boyd
Kristen C. Kiburtz
Bryson R. Brown
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 4,154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

   [ ] this brief uses a monospaced typeface and contains <*state the number of*> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font, or

   [ ] this brief has been prepared in a monospaced typeface using <*state name and version of word processing program*> with <*state number of characters per inch and name of type style*>.

Date: November 2, 2018

/s/ Kristen C. Kiburtz
Stephen D. Kelson
Scot A. Boyd
Kristen C. Kiburtz
Bryson R. Brown
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT** was sent to the following individuals, by way of the Court's CM/ECF Filing System:

Craig R. Mariger – cmariger@joneswaldo.com
C. Michael Judd – mjudd@joneswaldo.com
JONES WALDO HOLBROOK & MCDONOUGH, PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Carollo Engineers, Inc. and Ronald R. Rash

Robert L. Janicki – rjanicki@strongandhanni.com
Michael L. Ford – mford@strongandhanni.com
STRONG & HANNI
9350 South 150 East, Suite 820
Sandy, Utah 84070
Attorneys for R. Steve Creamer

Jeremy R. Cook – jcook@cohnekinghorn.com
William G. Garbina – wgarbina@cohnekinghorn.com
Cohne Kinghorn, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Attorneys for the District, Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Eric Hawkes and Lynn Hales

Amanda A. Berndt – Amanda.berndt@usdoj.gov
Assistant U.S. Attorney
Office of the United States Attorney
185 South State Street, Suite 300
Salt Lake City, Utah 84111-1506

Date: November 2, 2018

/s/ Kristen C. Kiburtz
Stephen D. Kelson
Scot A. Boyd
Kristen C. Kiburtz
Bryson R. Brown
Attorneys for Appellant

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 12.1.5, which is updated daily, and according to the program are free of viruses.

Date: November 02, 2018

/s/ Kristen C. Kiburtz
Stephen D. Kelson
Scot A. Boyd
Kristen C. Kiburtz
Bryson R. Brown
Attorneys for Appellant