CASE NO. 18-4109

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA ex rel.
MARK CHRISTOPHER TRACY, *Appellant*,

v.

EMIGRATION IMPROVEMENT DISTRICT et al., *Appellees*

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
Case No.: 2:14-CV-00701 JP
The Honorable Jill N. Parrish

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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APPELLEES' RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure 26.1(a), Defendant Carollo Engineers, Inc. hereby declares that it does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

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10TH CIR. R. 28.2(C)(1) STATEMENT OF RELATED CASES

This case was the subject of a previous appeal. *United States of America ex rel. Tracy v. Emigration Improvement District, et al.*, Case No. 17-cv-04062, 717 F. App'x 778 (10th Cir. 2017).

FED. R. APP. P. 28(a)(5) STATEMENT OF THE ISSUES

I. Was the District Court correct to dismiss Appellant Mark Tracy's first cause of action as time-barred, given the applicable six-year statute of limitations set forth in 31 U.S.C. § 3731(b)(1) [1] and the Court's holding in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006) that the ten-year period of repose found in 31 U.S.C. § 3731(b)(2) "was not intended to apply to private qui tam relators"?

II. Was the District Court correct in rejecting Mr. Tracy's novel argument that the statute of limitations begins to run anew each time the Emigration Improvement District (the "District" or "EID") makes a bond payment to the Utah Division of Drinking Water ("DDW"), meaning that the limitations period would not expire on Mr. Tracy's claims until 2029 (six years after bond payments end)?

[1] The District Court dismissed the second cause of action because it was "based on conclusory allegations that [were] contradicted by a document that Mr. Tracy incorporated by reference into his complaint." (Aplt. App. 481). Mr. Tracy did not appeal the dismissal of his second cause of action. (Brief of Aplt. at 6).

III. Even if Tenth Circuit precedent is set aside and the ten-year period of repose found in 31 U.S.C. § 3731(b)(2) is applied despite the absence of government intervention, should the District Court's dismissal be affirmed on alternative grounds?

FED. R. APP. P. 28(a)(6) STATEMENT OF THE CASE

EID is a limited-purpose local district that provides water service to residents in Emigration Canyon, which is located just east of Salt Lake City. EID is governed by a three-member board of trustees elected by residents within EID's boundaries.[2] Carollo Engineers, Inc., performed work for EID as an environmental engineer. Steve Creamer, who Mr. Tracy alleges was a co-conspirator, is a land owner in Emigration Canyon.

Mr. Tracy filed this *qui tam* case on September 26, 2014. In his Third Amended Complaint ("Complaint"), Mr. Tracy asserts violations of the Federal False Claims Act, 31 U.S.C. § 3729 *et seq*. Mr. Tracy's claims are based on a lending transaction (which Mr. Tracy refers to in the Complaint as simply "the loan") that occurred in November 2002, pursuant to which Mr. Tracy alleges EID

[2] This is a unique case because Mr. Tracy does not allege that he is an insider or had any direct involvement in any of the claims or allegations in this matter. Both EID and DDW are public entities subject to the Utah Open and Public Meeting Act and the Utah Government Records Access and Management Act (GRAMA). Mr. Tracy's Complaint appears to be based on public meeting minutes or public documents he obtained through GRAMA requests.

issued $1.846 million dollars of bonds that were purchased by the Utah Division of Drinking Water ("DDW") to allow EID to finance improvements to its public drinking-water system in Emigration Canyon.[3] The money used by DDW to purchase the bonds came from Drinking Water State Revolving Fund (the "Revolving Fund"). The Revolving Fund was created pursuant to the federal Safe Drinking Water Act, 42 U.S.C. § 300f, with grant money from the federal government.

Mr. Tracy does not allege that EID has ever missed any of its bond/loan payments to DDW over the last 14 years, or that the funds were not used to construct improvements to EID's public drinking-water system. Instead, the crux of Mr. Tracy's First Cause of Action is that the water-system improvements that DDW approved to be constructed with the bond proceeds were "preposterously oversized" and constructed primarily to benefit wealthy land developers, as opposed to existing residents in Emigration Canyon. Mr. Tracy alleges that the use of the funds for the "preposterously oversized" improvements violated state and federal regulations, which prohibit use of DWSRS funds in projects intended

[3] Throughout the Complaint, Mr. Tracy alleges that the loan was for $1.846 million. However, the District Court admitted the bond documents were part of the Complaint, and they clearly show the loan was for $1.4 million.

primarily for "fire protection" or to "serve future population growth." (Aplt. App. 41).

As the District Court noted, although the Complaint is 93 pages long, there are only a few salient facts. (Aplt. App. 466). For the purposes of this appeal and the underlying motion to dismiss, the significant allegations are those which conclusively demonstrate that the action is time-barred under either the six-year period of limitations applicable to relators under the False Claims Act, or the ten-year period Mr. Tracy asks the Court to rely upon.

The loan closing at issue occurred on November 21, 2002, and bonds were purchased by DDW on the same date.[4] (Aplt. App. 189, 292–293). The proceeds from the sale of the bonds were then deposited by DDW into an escrow account held by the Utah State Treasurer. As EID spent money completing the project, it would be reimbursed from the escrow account. The Utah State Treasurer's last disbursement from the escrow account occurred on September 29, 2004, which was within the ten-year period of limitations by three days. (Aplt. App. 40, 60, 67, 132).

[4] Though Mr. Tracy's Complaint included numerous attachments, the actual "loan documents" were not included. However, because the actual documents contradict Mr. Tracy's allegations, EID submitted them with its motion to dismiss, and the District Court relied on them, as Mr. Tracy did not object to their submission or challenge their authenticity. (Aplt. App. 489–490).

After considering the Appellees' motions to dismiss, the District Court dismissed the case with prejudice. (Aplt. App. 492). Since Mr. Tracy's initial complaint was filed more than six years after September 29, 2004, the District Court held that, on its face, the Complaint was time-barred by 31 U.S.C. § 3731 (b)(1). (Aplt. App. 486).

Because Mr. Tracy amended his complaint three times, twice in response to prior motions to dismiss, the District Court ruled it would be futile to allow a fourth amendment. (Aplt. App. 487). This appeal followed.

FED. R. APP. P. 28(a)(7) SUMMARY OF THE ARGUMENT

The District Court properly concluded that Mr. Tracy's Complaint shows that he failed to timely file his action under the False Claims Act. The District Court applied the six-year statute of limitations applicable to relator claims, 31 U.S.C. § 3731 (b)(1),and refused Mr. Tracy's request to apply the ten-year period of repose found in 31 U.S.C. § 3731 (b)(2), which this Court has held "was not intended to apply to private qui tam relators." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006).

To satisfy the applicable statute of limitations, Mr. Tracy had to file his claim under the False Claims Act within six years "after the date on which the violation of section 3729 is committed." 31 U.S.C. § 3731 (b)(1); *see also*

Sikkenga, 472 F.3d at 725; *United States ex rel. Told v. Interwest Constr. Co.*, 267 F. App'x 807, 809 (10th Cir. 2008). He did not. The first iteration of his complaint was filed on September 26, 2014.

In an attempt to overcome the statutory bar, Mr. Tracy posits two arguments. First, Mr. Tracy argues that this Court should overrule *Sikkenga* and apply the 10-year period of repose to his relator claim.[5]

Second, Mr. Tracy argues that because he has made a claim for actual damages, in addition to statutory damages, that a new claim accrues "each day and every day that passes while some balance of the loan's principal is outstanding." (Brief of Aplt. at 35). Mr. Tracy bases this argument on the theory that the government did not "necessarily incur tangible damages when the District took possession of the $1.846 million in federal funds," but rather the damages are the difference between market-rate interest and the below-market-rate interest EID agreed to pay. (Brief of Aplt. at 34). Thus, Mr. Tracy's argument is that his claims are not time barred because the statute of limitations will not run until 2029 (6 years after 2023, the last year in which when principal will still be outstanding, assuming EID continues to make timely bond payments to DDW). This theory is

[5] Presumably, Mr. Tracy also wants the Court to overrule *United States ex rel. Told v. Interwest Constr. Co.*, 267 F. App'x 807 (10th Cir. 2008), in which this Court "declined the novel invitation" to overrule *Sikkenga.* Mr. Tracy never discusses, or even cites, *Told* in his brief.

illogical, is not supported by the cases Mr. Tracy cites, and is directly contradicted by plain language in the False Claims Act (which cuts off all claims ten years after the date of violation). See 31 U.S.C. § 3731(b)(2).

Moreover, assuming the Court rejects Mr. Tracy's 26-year statute of limitations theory, even if the Court overruled *Sikkenga* and *Told*, and applied a ten-year limitations period, Mr. Tracy's claims are still time-barred.

First, Mr. Tracy argues that "if Mr. Tracy's claims accrued upon distribution of the $1.846 million and if Mr. Tracy can avail himself of the ten-year limitations period, at least one payment occurred within the statutory window." (Aplt. App. 406 (emphasis added)). In other words, based on his own arguments, not only would Mr. Tracy have to prevail on overturning *Sikkenga* and *Told*, but the Court would have to find that Mr. Tracy's claims accrued on the date of the last disbursement from the escrow account, as opposed to the date of the bond closing, the date of the last alleged misrepresentation, or the date of the last claim for payment, all of which occurred more than ten years before Mr. Tracy' first filed his complaint.

Second, even if the Court finds the ten-year statute of limitations applies, and the Court finds Mr. Tracy's claims accrued on the date of final disbursement from the escrow account, Mr. Tracy's claims are barred because the three-year

tolling period does not extend his date to file. Mr. Tracy argues that the three-year tolling period runs from 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." (Brief of Aplt. at 28). Mr. Tracy acknowledges that states are granted authority from the federal government to administer the funds. Thus, the three-year tolling period would run from the date the state agency granted authority to administer the funds (in this case DDW) knew or should have known of the alleged violation, which occurred prior to the bond closing in 2002.

Finally, even if the Court were to find that the claims accrued on the date of payment, as opposed to the date of the claim, the date of payment in this matter was the date the funds were paid by DDW into the escrow account held by the Utah State Treasurer, and that date falls outside even the 10-year window Mr. Tracy urges the Court to apply.

This Court should affirm the District Court. It properly determined that the Complaint demonstrated that Mr. Tracy's action was filed outside the statutory period. Moreover, the Court should not overrule *Sikkenga* and *Told*, which were correctly decided. Under the circumstances of this case, such a ruling would merely be *dicta* because changing from a six-year to a ten-year period would not

change the outcome of the case. Mr. Tracy's claim would still be time-barred.

The judgment of the District Court should be affirmed.

FED. R. APP. P. 28(a)(8) ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DISMISSING MR. TRACY'S FIRST CAUSE OF ACTION ON THE GROUNDS THAT IT IS TIME-BARRED PURSUANT TO 31 U.S.C. § 3731(b)(1).

A. Standard of Review

This Court conducts a *de novo* review of a district court's determination that claims are time barred. *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1194 (10th Cir. 1998).

B. Mr. Tracy's First Cause of Action Is Time-Barred by the Six-Year Statute of Limitations Set Forth in 31 U.S.C. § 3731(b)(1).

Mr. Tracy's First Cause of Action purports to state a direct false claim. Under the False Claims Act, to state such a claim Mr. Tracy must show that defendants knowingly presented, or caused to be presented, a false or fraudulent claim for payment or approval, or knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim. *See* 31 U.S.C. § 3729(a)(1)(A) and (B).

Mr. Tracy expressly alleges in his Complaint that the purported false claims or misrepresentations were made "in order to induce disbursement of $1.846

million in federal funds" and that "[o]n or about September 29, 2004, EID received the final disbursement of a twenty-year, $1.846 million loan . . . ." (Aplt. App. 58, 64, 127–128). The District Court accepted the truth of these allegations for the purposes of the motions to dismiss and concluded that any alleged false claims or misrepresentations necessarily occurred prior to September 29, 2004. (Aplt. App. 486). Mr. Tracy did not file this action until September 26, 2014. (Aplt. App. 482).

The periods of limitations applicable to the False Claims Act are set forth in 31 U.S.C. § 3731(b). It reads:

> (b) A civil action under section 3730 may not be brought –
> (1) more than 6 years after the date on which the violation is committed, or
> (2) more than 3 years after the date when facts material to the right or 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).

In *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006), this Court held that the False Claims Act's six-year statute of limitations applies to actions pursued by private *qui tam* relators. Accordingly, given that Mr. Tracy initiated the action and the government declined

to intervene three times, the District Court held relator Tracy's initial complaint clearly was filed outside the applicable six-year statute of limitations and dismissed it.

The allegations are clear. The statute is clear. The holdings of *Sikkenga* and *Told* are clear. The District Court's decision to dismiss the First Cause of Action as untimely should be affirmed.

C. The Court Should Refuse to Overrule *Sikkenga.* The Determination that 31 U.S.C. § 3731(b)(2) Does Not Apply to Relator Claims Is Correct.

Mr. Tracy is not the first party to request that this Court overrule *Sikkenga* and hold that 31 U.S.C. § 3731(b)(2) applies to relator claims. Another relator, Morris Told, made the same request. Like Mr. Tracy, Mr. Told "believe[d] that this Court should reconsider and reverse itself on this issue for sound policy reasons." *United States ex rel. Told v. Interwest Constr. Co.*, 267 F. App'x 807, 809 (10th Cir. 2008). In response, this Court stated:

> Because "[w]e are bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court," *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (quotation omitted), we decline Told's novel invitation to revisit our decision in *Sikkenga*.

Id.

Ten years later, there is still no superseding contrary decision by the United States Supreme Court. Moreover, since the time *Sikkenga* was decided in 2006,

Congress has had ample opportunity amend the False Claims Act if it was concerned that the Tenth Circuit had misinterpreted the statute. Congress amended substantial portions of the False Claims Act on May 20, 2009, when it passed the FERA amendments. The holdings of the Fourth and Fifth Circuit Courts of Appeal, which are in accord with *Sikkenga*, were in place by the time of the FERA amendments. *See United States ex rel. Sanders v. North Am. Bus. Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008); *United States ex rel. Erskine v. Baker*, 213 F.3d 638, 2000 WL 554644 (5th Cir. 2000) (per curiam) (unpublished). Nonetheless, Congress did not choose to legislate over the holdings of the Fourth, Fifth, and Tenth Circuit Courts of Appeal.

The most compelling reason to refuse to overrule *Sikkenga* is that the holding is correct. In addition to Congressional acquiescence on the issue, the conflicting holdings of other Circuits actually demonstrate that the Tenth Circuit's interpretation is the correct one.

Ironically, the Circuit Courts of Appeal which have determined the statute is not ambiguous have come to different conclusions on its meaning. They differ on the issue of whose knowledge triggers the start of the three-year period in § 3731(b)(2). The Ninth Circuit holds that the three-year period in § 3731(b)(2) applies to relator claims, when the government has not intervened. *United States*

ex rel. Hyatt v. Northrop Corp. 91 F.3d 1211 (9th Cir. 1996). The Ninth Circuit holds that it is the *relator's knowledge* that triggers the three-year period, deeming the relator to be an "official of the United States charged with responsibility to act." *Id.* at 1217. In contrast, however, the Eleventh Circuit, which recently held that the three-year period in § 3731(b)(2) applies to relator claims in which the government is not a party, has determined that the limitations period is not triggered by the relator's knowledge, but only by the *knowledge of an official of the United States*. *See United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1096–97 (11th Cir. 2018). The Eleventh Circuit's split from the Ninth Circuit confirms this Court's determination that the statute is ambiguous.

Similarly perplexing is Mr. Tracy's argument regarding legislative history. Mr. Tracy argues that although legislative history "cannot be used to override the plain language of the statute," it nevertheless supports his position on appeal. Mr. Tracy specifically addresses a statement made by Senator Charles Grassley that the language of § 3731(b)(2) was borrowed from 28 U.S.C. § 2416(c). Mr. Tracy's conclusions regarding legislative history are erroneous.

Section 2416 contains a tolling provision which applies to various periods of limitations set forth in 28 U.S.C. § 2415. The periods of limitation in 28 U.S.C. § 2415 apply to cases in which the United States is the plaintiff. (The statute is

titled, "Time for commencing actions brought by the United States.")

Contrary to Mr. Tracy's assertion, this legislative history strongly supports the Tenth Circuit's holding that § 3731(b)(2) does not apply to relator claims. After explaining that § 2416 only applies to those periods of limitation found in § 2415, which only apply when the United States has commenced an action, Mr. Tracy asserts that the language of § 2416 is not expressly limited to cases in which the United States is a party. His reasoning his hard to follow.

The sheer fact that Congress adopted the language of § 2416, which by Mr. Tracy's 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 party. Logically, Congress would not adopt the language of a statute that only applies when the government is a party, to apply to a situation when the government is not a party.

Mr. Tracy's argument is also contrary to the holding of the United States Supreme Court. The Supreme Court previously analyzed congressional intent when language from one statute was borrowed for another statute. It stated:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. **So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the**

> **interpretation given to the incorporated law, at least insofar as it affects the new statute.**

Lorillard v. Pons, 98 S. Ct. 866, 870–71 (U.S. 1978) (citations omitted) (emphasis supplied).

With this guidance, the statement regarding the adoption of language from 28 U.S.C. § 2416clearly reinforces the conclusion that 31 U.S.C. § 3731(b)(2) was meant by Congress to apply only to the government and not *qui tam* relators. As this Court previously noted in *Sikkenga*, the Senate Report issued to explain the 1986 legislative changes to the False Claims Act confirms this notion. The Senate Report stated:

> 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 the authority to act in the circumstances.

S. Rep. No. 99-345, at 30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5295 (emphasis added).

While the statute itself uses different language, the Senate Report identifies who Congress intended to be considered an "official of the United States charged with responsibility to act in the circumstances," for purposes of § 3731(b)(2). It is clear the reference does not include relators.

Additionally, as this Court found in *Sikkenga*, construing § 3731(b)(2) to apply to relators eviscerates § 3731(b)(1). Mr. Tracy offers nothing more than weak tea to challenge this point. Mr. Tracy asserts that the False Claims Act has other provisions to encourage a relator to bring his or her claim rapidly. The connection of this point to the issue is too tenuous to make it relevant. He also offers that a government official may know of the fraud before the relator, such that the three-year period in § 3731(b)(2) expires before the six-year period in § 3731(b)(1). This seems to be an argument that Congress should give the government a longer period of time to file an action. Again, the point seems to have no bearing on the issue of whether Congress intended § 3731(b)(2) to apply to relator claims.

Mr. Tracy offers no broad policy reason for overturning *Sikkenga*. He makes no argument that he was confused by the statute, or *Sikkenga,* or that he could not have met the six-year statute. Apparently, he simply dislikes the result in this case. Mr. Tracy's dissatisfaction with the result is an insufficient reason to abandon precedent and ignore the principles underlying *stare decisis*. "Prior precedent 'includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law.' *Union Pacific R. Co. v. City of Atoka*, 6 F. App'x 725,

730 (10th Cir. 2001) (unpublished) (quoting *United States v. Meyers*, 200 F.3d 715, 719–20 (10th Cir. 2000)).

A further reason to decline Mr. Tracy's invitation is because a decision to reverse position on the meaning of § 3731(b)(2), as explained above, would constitute nothing more than *dicta*. Even under a ten-year period, Mr. Tracy's Complaint was late. The alleged "false claim" inducing the government to make the loan (buy the bonds) preceded the closing on November 21, 2002. And the alleged "false claim" inducing the government to "disburse" the loan proceeds from the escrow account, the verification by the engineer that "the project [w]as (sic) completed in compliance with the pre-construction plans" (Aplt. App. 70). was made on September 22, 2004 – ten years and four days before Mr. Tracy filed his Complaint.[6]

II. THE COURT SHOULD REJECT MR. TRACY'S ARGUMENT THAT THE STATUTE OF LIMITATIONS RUNS FROM THE LAST DAY ON WHICH PRINCIPAL IS UNPAID.

In an attempt to preserve some possibility that his claim is not barred if the Court upholds *Sikkenga*, Mr. Tracy argues that his claim is timely under even a six-year period of limitations because a new cause of action accrues on each day some amount of the loan principal on the 20-year loan remains outstanding.

[6] This argument is discussed in greater detail in Section III, below.

Assuming the District continues to timely make its required bond payments, Mr. Tracy's position is that the statute of limitations on his first cause of action would not expire until 2029 (six years from that date of the last bond payment). Mr. Tracy's novel theory is not only illogical and contrary to the six-year statute of limitations in the False Claims Act, it is unsupported by the cases Mr. Tracy cites.

To begin his argument, Mr. Tracy cites to cases that apply a fraudulent inducement or promissory fraud theory within the False Claims Act. Mr. Tracy relies on *United States ex rel. Brooks v. Stevens-Henager Coll.*, in which the Court explained:

> Promissory fraud, which is also referred to as fraudulent inducement, is a theory that attaches liability to each and every claim submitted under a contract obtained through fraudulent statements. Put simply, an initial falsehood "can taint subsequent claims for payment, even if those claims are for legitimate goods or services."

No. 2:15-CV-119-JNP-EJF, 2018 WL 1614336, at *8 (D. Utah Mar. 30, 2018).

Fraudulent inducement recognizes that the statute of limitations can extend from the date of a claim for payment even if the misrepresentation is outside the statute of limitations. However, Mr. Tracy alleges in his Complaint that the purported false claims or misrepresentations were made "in order to induce disbursement of $1.846 million in federal funds" and that "[o]n or about

September 29, 2004, EID received the final disbursement of a twenty-year, $1.846 million loan . . . ." (Aplt. App. 58, 64, 127–128 (emphasis added)). Accordingly, because any claim for payment occurred well outside the six-year period, the fraudulent inducement cases cited by Mr. Tracy contradict his argument.

Mr. Tracy then argues that 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." It is unclear how this is a "corollary" to the fraudulent inducement theory. In support of his argument, Mr. Tracy primarily relies on *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998). However, the holding in *Jana* states: "[W]hen the government pays a false claim, the False Claims Act statute of limitations begins to run on the date of final payment." *Id*. at 743 (emphasis added). Thus, like the fraudulent inducement cases, because Mr. Tracy alleges that the final disbursement of funds from the escrow account occurred well outside the six-year statute of limitation, the holding in *Jana* is directly contrary to Mr. Tracy's argument.

Mr. Tracy then jumps to the conclusion that "the statute of limitations accrues on Relator Tracy's claims when the government incurs actual damages." (Brief of Aplt. at 32). However, Mr. Tracy completely ignores the plain language of the statute, which states that 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 . . . ." 31 U.S.C. § 3731(b); *see also Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415–16 (2005).

Even if the Court were to ignore the plain language of the statute and accept Mr. Tracy's argument that the cause of action accrues at the time the government incurs actual damages, in order for Mr. Tracy's theory to succeed the Court would have to accept Mr. Tracy's argument that the "government did not necessarily incur tangible damages when the District took possession of the $1.846 million in federal funds." (Brief of Aplt. at 32–33). However, this position is untenable. First, Mr. Tracy's argument that the government did not incur tangible damages when it loaned the money runs contrary to the crux of Mr. Tracy's entire case—the premise that the loan itself was improper because it was intended to benefit wealthy land developers in violation of state and federal regulations. Second, even if the Court were to accept the argument that the federal government's damage was not the loan itself, but the below-market interest rate, those damages accrued at the time the loan was made. If the damage to the federal government was that the bonds issued by the District should have carried a higher interest rate, or that DDW could have obtained a higher rate by loaning money from the revolving loan fund for a different project, then the government incurred those damages at the time it

purchased the bonds at the below-market rate.

In summary, Mr. Tracy's creative attempt to extend the statute of limitations until 2029 is not supported by any cases and runs afoul of § 3731(b), which clearly provides that a cause of action accrues when a false claim for payment is submitted.

III. MR. TRACY'S FIRST CAUSE OF ACTION IS TIME-BARRED EVEN IF THE COURT OVERRULED *SIKKENGA* AND *TOLD* AND HELD THE 10-YEAR PERIOD OF 31 U.S.C. §3731(b)(2) APPLIED.

A. Standard of Review

This Court conducts a *de novo* review of a district court's determination that claims are time barred. *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1194 (10th Cir. 1998). While potentially innocuous, Mr. Tracy's description of the standard of review—that this Court should review the District Court's interpretation of a federal statute *de novo*—is misleading because the District Court did not render an independent interpretation of 31 U.S.C. §3731(b), but relied upon this Court's decisions in *Sikkenga* and *Told*. In any event, the issues presented should be reviewed *de novo*.

In *Richison v. Ernest Group, Inc*., this Court recognized the following:

> We have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal. *See United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003); *Griess v. State of Colo*., 841 F.2d

> 1042, 1047 (10th Cir. 1988); *see also S.E.C. v. Chenery Corp*., 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.") (internal quotation omitted). This preference for affirmance no doubt follows from the deference we owe to the district courts and the judgments they reach, many times only after years of involved and expensive proceedings. Because of the cost and risk involved anytime we upset a court's reasoned judgment, we are ready to affirm whenever the record allows it. fSo it is that appellants must always shoulder a heavy burden—they must come ready both to show the district court's error and, when necessary, to explain why no other grounds can support affirmance of the district court's decision.

634 F. 3d 1123, 1130 (10th Cir. 2011).

Accordingly, the Court should affirm the dismissal if the record supports alternative grounds for the dismissal.

B. Mr. Tracy's First Cause of Action Should Be Dismissed on Alternative Grounds Even If the Court Accepts His Argument that a Ten-Year Statute of Limitations Applies.

The District Court did not reach the alternative grounds for dismissal of Mr. Tracy's First Cause Action because it is clearly barred by 31 U.S.C. § 3731(b)(1) and the precedent of *Sikkenga*. Nevertheless, grounds exist to affirm the District Court even if the Court were to overturn *Sikkenga*. Because Mr. Tracy's complaint was not filed within ten years of the submission of a claim for payment, he asserts his complaint is timely because it was filed within ten years of payment. He then tries to move the line again by asserting that it is not payment

of the bond proceeds by the government into escrow, but disbursement of the funds from the escrow account that triggers the running of the statutory period.

The following timeline illustrates the distinction.

- November 21, 2002. Bond closing: the government purchases the bonds. Payments by DDW from the Revolving Fund to an escrow account administered by the Utah State Treasurer begin. (**Payment by the Government**).
- September 22, 2004. Engineer verification of project completion. (The last possible "misrepresentation.")
- September 26, 2004. Ten years prior to filing of initial complaint.
- September 29, 2004. DDW authorizes final disbursement of funds from escrow account (**Final Disbursement**).

As explained below, Mr. Tracy's attempts to move the line so his claim is timely run afoul of 31 U.S.C. § 3729 and numerous cases addressing when a cause of action under the False Claims Act accrues.

i. Even under a ten-year period of limitations, Mr. Tracy's Complaint shows that no "false claim for payment" was submitted within ten years of when he filed it. The "false claim," and not the payment, triggers the running of the statutory period.

In his brief on appeal, Mr. Tracy fails to describe how a ten-year statute of limitations would save his claim. Presumably, he will rely on the argument he made before the District Court. In his *Memorandum in Opposition to Defendant's Motion to Dismiss*, Mr. Tracy argued that "if Mr. Tracy's claims accrued upon distribution of the $1.846 million and if Mr. Tracy can avail himself of the ten-year limitations period, at least one payment occurred within the statutory window."

(Aplt. App. 406 (emphasis added)). Mr. Tracy appears to be referencing the September 29, 2004 disbursement from the escrow account as the "payment."

To prevail on his theory, this Court must overturn its holding in *Sikkenga* and *Told*. Additionally, the Court must find that Mr. Tracy's claims accrued on the date of the last disbursement from the escrow account, as opposed to when EID allegedly submitted false claims for payment.[7] Mr. Tracy's argument ignores that the False Claims Act's statute of limitations is triggered on "the date on which the violation of section 3729 is committed." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415–16 (2005).

In *Graham County*, the Supreme Court considered whether § 3731(b)(1)'s six-year limitations period applied to an employee's retaliation claim brought under § 3730(h). In addressing that issue, the Court stated that § 3731(b)(1)'s

[7] Mr. Tracy does not identify when EID submitted the last claim for payment to obtain funds from the escrow account. However, the Complaint includes as an attachment a September 29, 2004 letter from DDW approving the final pay request. It states: "Attached is the final Pay Request (#6) for the Emigration Improvement District project." However, the exhibit Mr. Tracy attached did not include the final Pay Request. If the final pay-request form had been submitted within the ten-year period preceding the filing of his complaint, Mr. Tracy likely would have included the attachment and argued that the final request for payment from the escrow, and not the final disbursement, occurred with the ten-year statute of limitations. After the Motion to Dismiss, EID obtained from DDW the September 29, 2004 letter with all of its attachments. Final Pay Request #6 was submitted to DDW on September 13, 2004, more than ten years before Mr. Tracy filed his complaint.

limitations period was triggered by the defendant's submission of a false claim. It stated, "In other words, the time limit [under § 3731(b)(1)] begins to run on the date the defendant submitted a false claim for payment." *Id.*

Despite this statement by the Supreme Court, Mr. Tracy relies on a court of federal claims decision from 1998, *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998). According to Mr. Tracy, this Court should rely on *Jana* to hold that a claim under the False Claims Act does not accrue until the claim is paid.

Jana is an outlier. An opinion from the U.S. District Court from the Eastern District of Pennsylvania explains why.

> The *Jana* court relied on dictum in *United States ex rel. Kreindler & Kreindler v. United Technologies, Corp.*, 985 F.2d 1148, 1157 (2d Cir.1993). In a discussion that was not necessary to its decision in *Kreindler*, the Second Circuit sought to correct the district court's comments with respect to the relator's continuing fraud theory. It pointed out that where there are multiple false claims in connection with a single contract, the statute of limitations for each claim runs from the date each claim accrued. Then, without analysis, it quoted the district court's holding that "the six-year limitation period of § 3731(b)(1) 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.'" *Id.* at 1157 (quoting *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2d Cir.1987)).
>
> To reconcile its conclusion with the fact that it is the false claim itself that constitutes the violation of the False Claims Act, the *Jana* court distinguished between cases seeking civil penalties and those seeking damages. It concluded that in the former cases, the cause of action accrues upon presentation of the false claim; and, in the latter, it occurs upon payment because it is not until then that the government suffers damage. *Id.* at 743. In effect, it established two

> statutes of limitations, one for civil penalty cases and another for damages cases.
>
> There is no justification for importing an optional statute of limitations into the statute. Nowhere in the False Claims Act is there a distinction between civil penalty and damages cases for purposes of applying the statute of limitations. Both types of cases are treated the same. Nor is there anything in the legislative history that suggests that Congress intended two different statutes of limitations depending on whether the cause of action was for civil penalties or for damages. Thus, the foundation of the *Jana* court's reasoning cannot support its holding that the limitations period in *qui tam* actions is not triggered until payment is made.
>
> Relying on the *Jana* decision, the government and Bauchwitz argue that until payment is made, there are no damages. Consequently, so they reason, the cause of action cannot accrue until then. This argument ignores the language of § 3731(b)(1) that refers to "the date on which the violation is committed" as the trigger date. Waiting for damages to start accumulating before starting the False Claims Act clock ticking is inconsistent with established legal principles and the purpose of the False Claims Act.

U.S. ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674, 687–88 (E.D. Pa. 2009).

It appears the *Bauchwitz* Court had the benefit of the *Graham County* decision. Alternatively, it understood the clear dictate of § 3731(b)(1). Numerous other courts read § 3731(b)(1) the same way. *See U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 816 (E.D. Tex. 2008) ("In an False Claims Act suit, the limitations period is computed from 'the date on which the violation of [the False Claims Act] is committed.'" (citing 31 U.S.C. § 3731(b)(1) and *Smith v. United States,* 287 F.2d 299, 303 (5th Cir. 1961)); *see also Smith*, 287 F.2d at 303 (concluding that the "violation" is the filing of a false claim); *Harrison v.*

Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999) ("Some courts have asserted that there is an additional element that the United States must have suffered some damages as a result of the false or fraudulent claim. There is no requirement that the government have suffered damages as a result of the fraud." (citing, in turn, *Blusal Meats, Inc. v. United States,* 638 F. Supp. 824, 827 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2nd Cir.1987), *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.,* 984 F. Supp. 374, 383 (D. Md. 1997) , and *United States ex rel. Pogue v. American Healthcorp., Inc.*, 914 F. Supp. 1507, 1508–09 (M.D.Tenn.1996)).

Mr. Tracy's creative attempt to plead around the statute of limitations runs afoul of § 3731(b), which clearly sets accrual of the cause of action when the false claim for payment is submitted, not when payment is made.

ii. Even <u>if</u> the Court overruled *Sikkenga* and *Told,* and <u>if</u> the Court ruled that payment and not the submission of a "false claim for payment" triggered the statute of limitations, September 29, 2004, was <u>not</u> the date the government paid money out of the revolving fund, it is the date EID received disbursement from the escrow account.

As explained above, the law is clear—the submission of a false claim for payment triggers the running of the statute of limitations. Notwithstanding the clarity of the statute, Mr. Tracy attempts convince the Court that *payment* triggers a false claim. He then takes it one step further. He then attempts to move the line by

arguing that *disbursement* of funds from the escrow account triggered the running of the statutory period, rather than the government's initial payment of the bond proceeds into escrow accounts.[8]

According to the Complaint, the September 29, 2004 disbursement was a release of "retainage" triggered by the report of the project engineer on September 22, 2004 (Aplt. App. 58, 64), which verified "the project [w]as (sic) completed in compliance with the pre-construction plans." (Aplt. App. 70). Thus, Mr. Tracy's Complaint shows that the September 29, 2004 disbursement was a release of funds from the escrow account, not the government's payment for the bonds.

Mr. Tracy's argument is that the Court should look past the call on the government fisc, when DDW paid out the federal monies from the Revolving Fund, to when monies from the escrow account were disbursed to EID. He has no support for this argument, which is contrary to 31 U.S.C. §§ 3729 and 3731 and the many cases cited in Section III.B.i, above.

[8] Once the monies were advanced on the bonds and paid into the escrow account, the funds were property of EID and EID was required to pay interest on the funds. (Aplt. App. 310 - 313). In accordance with the Escrow Agreement provided to the Utah State Treasurer by DDW and EID, the escrow funds could only be distributed by the Utah State Treasurer upon written request made by EID and authorized by DDW (Aplt. App. 276 - 277).

iii. The three-year tolling period does not aid Mr. Tracy's argument, because the Complaint includes allegations showing the government had knowledge of the size of the water tank at issue.

Even if the Court finds the ten-year statute of limitations applies, and the Court finds Mr. Tracy's claims accrued on the date of final disbursement from the escrow account, Mr. Tracy's claims are still barred because the three-year tolling is not applicable to his claims. Mr. Tracy argues that the three-year tolling period applies when "facts material to the right of action are not known or reasonably could not be known to the official of the United States charged with responsibility to act in the circumstances." (Brief of Aplt. at 27–28). In this case, Mr. Tracy acknowledges that states are granted authority from the federal government to administer the funds. Thus, the three-year tolling period would run from the date the state agency granted authority to administer the funds (in this case DDW) knew or should have known of the alleged departure from the plans and specifications on which it relied.

As noted above, the crux of Mr. Tracy's argument is that the loan violated state and federal regulations because the improvements built with the loan were "preposterously oversized" and built to primarily benefit wealthy land developers. Mr. Tracy's argument is taken directly from a "Speedy Memorandum" prepared by DDW staff engineer Steve Onysko on October 18, 2002 (prior to the bond closing),

which is attached as Exhibit B to the Complaint. In the Speedy Memorandum, Mr. Onysko argued that the one-million-gallon storage tank was "preposterously oversized" and cautioned that the Safe Drinking Water Act Amendments of 1996 prohibit the use of the funds for construction of water system infrastructure for future growth. In fact, the Complaint names DDW employees Kenneth Wilde and Michael B. Georgeson as defendants, presumably on the theory that they allegedly knew or should have known at the time of the bond closing that the project did not comply with state and federal regulations, yet they still approved the project.

The Speedy Memorandum shows government knowledge of the facts at the core of the alleged conspiracy. Three years from the date of the Speedy Memorandum is October 18, 2005, which is even before the six-year period in § 3731(b)(1) expired. The three-year tolling period avails Mr. Tracy of no additional time. The District Court should be affirmed.

FED. R. APP. P. 28 (a)(8) CONCLUSION

The District Court properly determined that Mr. Tracy failed to timely file his complaint. The District Court properly applied the law to the allegations, and its ruling should be affirmed on appeal.

Dated: October 19, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,227 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The undersigned also certifies that 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman style.

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to Section II, J of the CM/ECF User's Manual, issued by the United States Court of Appeals for the Tenth Circuit, I hereby certify the following:

a. All required privacy redactions have been made per 10th Cir. R. 25.5;

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 19th day of October, 2019, a true and complete copy of the foregoing **BRIEF OF APPELLEES** was served via the CM/ECF system upon the following:

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