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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT *et al.*, Defendants.	**DEFENDANT CAROLLO ENGINEERS INC.'S REPLY MEMORANDUM SUPPORTING ITS RENEWED MOTION TO DISMISS TRACY'S THIRD AMENDED COMPLAINT** Case No. 2:14-cv-701-JNP-JCB Judge Jill N. Parrish Magistrate Judge Jared C. Bennett

Introduction

One claim remains in Tracy's Third Amended Complaint [ECF 204]—a cause of action styled "Direct False Claims." *See* Third Am. Compl. ¶¶ 501–514.[1] By statute, Tracy's claim is timely only if brought within ten years of "the date on which the violation is committed." *See* 31 U.S.C. § 3731(b)(2).[2] The alleged "violation" is the submission of a false claim or statement, which (based on Tracy's pleading) occurred no later than September 22, 2004. *See* Tracy Opp. to Defs.' Mots. to Dismiss ("Tracy Opp."), at 9 (contending that Carollo "certified the water project [at issue] as complete" on September 22, 20014). Tracy filed suit on September 26, 2014. His claim is thus time-barred.

Tracy also states no plausible claim for relief with respect to Carollo. Tracy fails to allege any meaningful connection between Carollo and the Request for Payment at issue, and Tracy fails to plausibly allege either scienter or materiality, both essential elements of his claim against Carollo. Tracy has tried four times to cobble together a legal basis for his suit, and the reason he cannot state a claim is "because he has none." *See* Am. Order Granting Mots. to Dismiss, at 11 [ECF 226]. The Court should dismiss Tracy's remaining claim with prejudice.

Matters Raised in Tracy's Opposition

Tracy makes three sets of arguments in response to Carollo's motion to dismiss. The first relates to the timeliness of his claim. He argues that his claim is timely because under *Jana*, a 1998 Court of Federal Claims case, his "limitations period" didn't begin to run "until the government actually suffer[ed] the damages." "Tracy Opp., at 6–7.

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[1] Tracy's Third Amended Complaint includes two claims: a "Direct False Claims" claim, *see* Third Am. Compl. ¶¶ 501–514, and a "Reverse False Claims" claim, *see id.* ¶¶ 515–532. But after the Court dismissed both claims in June 2018, *see* Order Granting Mots. to Dismiss [ECF 222], Tracy appealed dismissal of the first claim but not the second. *See United States ex rel. Tracy v. EID*, 804 F. App'x 905, 907 n.1 (10th Cir. 2020). On remand, then, only the first claim remains.

[2] Tracy acknowledges that this statutory provision imposes a ten-year statute of *repose*, not a statute of limitations, *see* Tracy Opp., at 3, 4—a key distinction and a dispositive admission, as discussed at length below.

Tracy also makes three arguments related to the sufficiency of his pleading. First, Tracy insists that he has, in fact, "identified false claims by Carollo" and tied them to the purported scheme to defraud the government through the construction of an Emigration Canyon water system. *Id.* at 9. Second, Tracy maintains that his allegation "that the project [at issue] was 'preposterously oversized'" is enough to "meet the scienter requirements" for pleading a False Claims Act ("FCA") claim. *Id.* at 11–13. Third, Tracy characterizes *qui tam* claims as operating under a "relaxed pleading requirement," *id.* at 14, then, after listing the central allegations of his Third Amended Complaint, concludes summarily that he "has adequately pleaded [his claim] in compliance with the Rule 9(b) standards," *id.* at 14–18.[3]

Argument

I. The Governing Statute Functions as a Statute of Repose, and It Is the Defendants' Alleged Conduct—Not the Government's Payment of a Claim—that Starts the Clock.

Though Tracy acknowledges that 31 U.S.C. § 3731(b)(2) imposes a ten-year statute of *repose*, he relies on cases that analyze and apply statutes of *limitation*. That distinction matters, and read with that distinction in mind, the cases Tracy relies upon do not support his position. In any event, the cases Tracy relies upon can be safely set aside, because those cases directly contradict established law in this district.

A. The Final Clause of 31 U.S.C. § 3731(b)(2) Creates a Statute of Repose, Not a Statute of Limitations.

Tracy concedes that the Carollo conduct he describes in his Third Amended Complaint all occurred more than ten years before he filed suit. Tracy relies instead on another theory: Tracy argues that his FCA "limitations period" did not begin to run until the government "incur[red] actual damages," and thus a "final payment" made to EID on September 29, 2004, makes his claim

[3] Tracy also responds to an argument raised by the EID Defendants about the public-disclosure bar applicable to cases brought under the False Claims Act. That argument, if successful, would also require dismissal of Tracy's remaining claim as it applies to Carollo. Carollo therefore adopts the EID Defendants' public-disclosure argument by reference, but does not repeat that argument here.

timely, even if that payment was made based on claims and/or statements that occurred more than ten years before he filed suit. Tracy Opp'n, at 6–8.

Tracy's argument conflates statutes of limitation with statutes of repose. A statute of limitations simply "bars claims after a specified period," *see Statute of Limitation, Black's Law Dictionary* (3d pocket ed. 2006), and, as Tracy notes, typically begins to run "when all events necessary to state a claim have occurred," Tracy Opp., at 8. By contrast, a statute of repose "bar[s] any suit that is brought after a specified time *since the defendant acted in some way*." *See Statute of Repose, Black's Law Dictionary* (3d pocket ed. 2006) (emphasis added). Critically, the bar imposed by a statute of repose applies "even if [the repose] period ends *before the plaintiff has suffered a resulting injury*." *Id.* (emphasis added).

The governing statute here—the final clause of 31 U.S.C. § 3731(b)(2)—plainly imposes a statute of repose. That clause provides that a claim like Tracy's may "in no event [be brought] more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). Defendants have long emphasized that the statute at issue functions as a statute of repose. This Court itself has already reached that conclusion, *see* Am. Order Granting Mot. to Dismiss, at 6 n.5, as have other courts facing the same question, *see United States ex rel. Wood v. Allergan, Inc.*, No. 19-cv-4029, 2020 WL 3073293, at *2–3 (S.D.N.Y. June 10, 2020). And Tracy himself now acknowledges that fact. *See* Tracy Opp., at 3, 4.

By statute, the "triggering" violation in this case is the Defendants' alleged conduct (the false claims or statements described in the Third Amended Complaint), not the "resulting injury" (which Tracy argues came in the form of the government's "final payment"). Because Tracy concedes that the conduct he describes all occurred more than ten years before he filed suit, his claim is time-barred and this action should be dismissed in full.

B. Tracy Ignores Applicable District of Utah Precedent.

In arguing that his claim is timely, Tracy leans heavily on *Jana*, a 1998 Court of Federal Claims case, as well as a small handful of Second Circuit cases that include similar language. *See* Tracy Opp'n, at 6–7 (citing *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); *Blusal Meats v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986)). Tracy acknowledges the existence of a recent Tenth Circuit case that affirmed an order dismissing an FCA claim as time-barred because the appellant didn't "explicitly argue—let alone provide authority establishing—that the FCA's statute of limitations begins to run only when a party *accepts payment* from the government on a false claim, as opposed to when a party 'knowingly presents' such a claim to the government." *Armstrong v. Wyo. Dept. of Envtl. Quality*, 674 F. App'x 842, 845–46 (10th Cir. 2017).

To the extent the cases Tracy relies upon fail to distinguish between the statutes of limitation that appear in 31 U.S.C. § 3731 and the ten-year statute of repose at issue here, those cases are distinguishable and of little use in this case. Other circuit-level cases, more thoroughly reasoned on this point, conclude that "because 'the FCA attaches liability . . . to the claim for payment,'" courts must determine the timeliness of an FCA claim by asking when the defendant "presented the allegedly false claim" to the government. *See Houpt v. Wells Fargo Bank, N.A.*, 800 F. App'x 533, 534 (9th Cir. 2020).

But this Court does not need to decide between competing bodies of case law from other jurisdictions here, because the District of Utah has already addressed and decided this issue in a 1998 case called *Colunga*. The question presented in *Colunga* is the same question presented here: What constitutes a "violation" of the FCA for the purposes of triggering its statutes of limitation and repose? *See United States ex rel. Colunga v. Hercules, Inc.*, No. 89-cv-954, 1998 WL 310481, at *1 (D. Utah Mar. 6, 1998).

Colunga did three things: (1) it clearly differentiated between the three- and six-year statutes of limitation and the ten-year statute of repose, *id.* at *2 (unpacking the statute's "three plateaus of limitation"); (2) it expressly rejected the argument Tracy makes here—that the clock does not start ticking until the government pays the claim, *id.* at *3 ("This court rejects the contrary conclusion that the date of payment starts the violation."); and (3) it specifically applied that framework to the ten-year statute of repose, *id.* at *5 ("In no event does the limitations period extend beyond the ten years from the violation (time of presentment of the false claim).").[4]

There is no reason to stretch outside the Tenth Circuit to examine *Jana* or the other cases Tracy relies upon. In *Colunga*, this district court took up the argument Tracy makes and rejected it. The Court should take *Colunga*'s lead and, as a result, dismiss Tracy's claim as time-barred.[5]

II. Tracy Has Not Plausibly Pleaded a Claim Against Carollo.

To state a claim against Carollo, Tracy must plausibly plead, among other things, that (1) Carollo's conduct caused a false claim to be presented the government and (2) that Carollo acted "knowingly" in presenting a false claim. In doing so, Tracy must satisfy the pleading standards of Rules 8(a) and 9(b). The Third Amended Complaint fails in all three respects.

A. By Simply Listing the Work Carollo Performed, Tracy Has Not Pleaded a Nexus Between Carollo and the Alleged False Claim.

A defendant cannot be liable for an FCA violation unless a relator establishes "a sufficient nexus between the conduct of the party and the ultimate *presentation* of the false claim." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 723 (10th Cir.

[4] In *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 723 (10th Cir. 2006), the Tenth Circuit declined to follow *Colunga* on other grounds. But *Colunga* remains good law for the principles cited above.

[5] Tracy adds that it doesn't matter whether Carollo's alleged misconduct occurred outside the limitations period, because he is liable under a "conspirator fraud theory" for conduct by other defendants that occurred within the ten years prior to his filing date. *Id.* at 8–9. But the statute of repose that applies here bars Carollo's claim against the EID Defendants as well, leaving no "co-conspirator" to whom Tracy can attach Carollo's claim.

2006) (emphasis added).[6] As Carollo has pointed out, Carollo's participation in this alleged scheme makes no conceptual sense, as the Third Amended Complaint offers no explanation for how Carollo could benefit from an illicit "upsizing" of water lines, an illicit *downsizing* of other water lines, or the construction of a "preposterously oversized" water tank. *See* Renewed Mot. to Dismiss, at 12–13 [ECF 281]. Tracy's timeline also cuts *against* any connection between Carollo's statements and the presentation of a false claim: Tracy relies on an alleged "final payment" on September 29, 2004, which was prompted by a September 13 "Request for Reimbursement" (the "false claim" at issue). The "false statements" that Tracy attributes to Carollo appear in a certification dated September 22—nine days *after* the "false claim" that Tracy insists gives rise to liability. *Id.* at 13.

Tracy's opposition does nothing to address these problems. Instead, Tracy simply lists paragraphs of the Third Amended Complaint that refer to Carollo, then states summarily that "[t]hese particular allegations are all relevant to [his] first cause of action." *See* Tracy Opp., at 9. To "connect" Carollo's allegedly false statements to the EID Defendants' allegedly false claim, Tracy "must prove that [Carollo] intended that [its false statements] be material to the government's decision to pay or approve the false claim." *See Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 665 (2008); *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1300–03 (10th Cir. 2010). The Third Amended Complaint makes no such connection, and as a result, Tracy's claim against Carollo fails.

B. By Describing the Project as "Preposterously Oversized," Tracy Has Not Plausibly Alleged that Carollo Knowingly Made False Statements to the Government.

FCA liability for false statements attaches only to statements made *knowingly*. *See* 31 U.S.C. § 3729(a)(1)(B). In this context, that means that Carollo could be liable for false statements only if it had "actual knowledge" that its statements were false or if it acted "in deliberate ignorance"

[6] As discussed at length in the parties' briefs, *Sikkenga*'s limitations reasoning was recently abrogated in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S.Ct. 1507 (2019), but *Cochise Consultancy* does not alter *Sikkenga*'s treatment of this "nexus" requirement.

or in "reckless disregard" of the falsity of those statements. *United States ex rel. Ellsworth v. United Bus. Brokers of Utah, LLC*, No. 2:09-cv-353, 2011 WL 1871225, at *3 (D. Utah May 16, 2011). Put differently, the False Claims Act is not a strict-liability statute—mistakes or inaccuracies in government claims do not create liability in the absence of evidence that a claimant has made a *knowing* attempt to defraud the government.[7]

In his opposition, Tracy does not point to paragraphs of his Third Amended Complaint in which he makes adequate, non-conclusory allegations about Carollo's mental state. Instead, Tracy insists that he has met that pleading requirement by "alleg[ing] numerous times that the [EID] project include[d] construction of a '[preposterously] oversized' reservoir," and that the reason "the project was 'preposterously oversized' [was] to fuel development and benefit developers." Tracy Opp., at 12–13.[8]

Whether or not those vague accusations about a project "upsized for development" are enough to plead scienter for *the developers*, they do nothing to plead scienter with respect to Carollo, an entity hired to provide engineering work on the project on a fee basis. Even if—as Tracy alleges—Carollo's September 22, 2004 certification of completion was somehow false, the Third Amended Complaint offers no support for the conclusion that Carollo's statements were *knowingly* false. As a result, Tracy has failed to adequately plead a claim against Carollo.

C. By Offering a Bullet-Point Summary of His Ninety-Page Third Amended Complaint, Tracy Has Not Demonstrated that He Has Met the Pleading Standards of Rules 8(a) and 9(b).

Tracy acknowledges that his pleading is subject to Rules 8(a) and 9(b), but characterizes the *qui tam* pleading standard as "relaxed." Tracy Opp., at 14. Tracy ignores Carollo's central argument related to those rules: to plead with particularity under Rule 9(b), Tracy must "show the

[7] *See, e.g.*, *Bahrani*, 624 F.3d at 1303 (emphasizing that the False Claims act was not meant to impose "a strict liability standard"); *United States ex rel. McElderry v. Praxair Healthcare Servs., Inc.*, No. 2:04-cv-59, 2006 WL 3421839, at *3 (D. Utah Nov. 22, 2006).

[8] In support of these characterizations of his pleading, Tracy writes, "*See* Complaint, generally."

specifics of a fraudulent scheme" by offering enough specifics to afford each defendant fair notice of the claims brought against it, as well as the factual ground upon which those claims are based. *See United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010). In doing so, Tracy must also comply with Rule 8(a) by "providing these factual allegations in a clear, organized, and relatively concise manner." *Id.*

In responding to Carollo's argument that his Third Amended Complaint fails to comply with those standards, Tracy offers nothing more than a bullet-point summary of his 93-page pleading, followed by the conclusory assertion that he "has adequately pleaded the Complaint in compliance with the Rule 9(b) standards." Tracy Opp., at 15–18.

As Carollo pointed out in its renewed motion to dismiss, this Court took up similar pleading problems in *Brooks*, another False Claims Act case brought against a long list of defendants. *See* Renewed Mot. to Dismiss, at 15–16. In that *Brooks* decision, the court lamented the relators' "shot-gun approach to pleading," including the sheer length of the relators' filing and their failure to "distinguish between individual defendants in their claims for relief." *United States ex rel. Brooks v. Stevens–Henager Coll.*, 305 F. Supp. 2d 1279, 1307–08 (D. Utah 2018). As that court concluded, "it is not the court's job to construct causes of action for plaintiffs that are unwilling to do so themselves." *Id.* at 1308 (citations omitted).

Tracy's Third Amended Complaint is no better. Over six years and three attempts at re-pleading, Tracy remains unable to articulate a coherent theory of relief against Carollo. As the Court has already observed, Tracy's failures this far into litigation indicate that the reason he cannot state a claim is "because he has none." *See* Am. Order Granting Mots. to Dismiss, at 11 [ECF 226]. Tracy's sole remaining claim should be dismissed with prejudice, and this action should be brought to a close.[9]

[9] In the final paragraph of his opposition, Tracy argues that even if the Court dismisses the Third Amended Complaint, it should do so without prejudice, because "[t]o date, EID has not paid back [the loan at issue] in full," and that EID thus "could still default in the future." Tracy Opp., at 18.

Conclusion

Tracy's claim is governed by a ten-year statute of repose, which runs from the date a false claim is submitted or a false statement is made—not from the date the government pays that claim. Tracy has alleged no false claim or false statement that occurred on or after September 26, 2004, and his claim is thus time-barred.

Even if Tracy's claim were timely, the Third Amended Complaint fails to plausibly allege a theory of relief against Carollo, because Tracy offers no adequate allegations about Carollo's mental state or any nexus between Carollo's alleged false statements and the EID Defendants' alleged false claim. The Third Amended Complaint—Tracy's fourth attempt at pleading a viable claim—falls well short of the Rule 9(b) and 8(a) standards.

The Court should dismiss Tracy's sole remaining claim with prejudice.

Dated: October 13, 2020.

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That theory has no merit, given that FCA liability is premised on the submission of *false claims*, not on a hypothetical future loan default. But in any event, that argument does not touch Carollo, and thus should have no bearing on the dismissal with prejudice of Tracy's claim against Carollo.

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed this *Reply Memorandum Supporting Carollo's Renewed Motion to Dismiss Tracy's Third Amended Complaint* with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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