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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 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

Defendant Carollo Engineers, Inc. ("Carollo") moves the Court to dismiss the sole remaining claim in the Third Amended Complaint ("Complaint") [ECF 204] filed by qui tam relator Mark Christopher Tracy.[1]

[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. In June 2018, the Court granted motions to dismiss both claims. *See* Order Granting Mots. to Dismiss [ECF 222]. The Court dismissed the first claim as time-barred, *see id.* at 4–7, and the second claim because it was "apparent" that Tracy could not "state a claim for relief against the defendants because he has none," *id.* at 11.

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). Given a change in the underlying law, the Tenth Circuit vacated the Court's dismissal of the first claim and remanded for further proceedings. *Id.* at 909. Nothing has altered the Court's decision regarding the dismissal of Tracy's second claim. That leaves Tracy with a single claim—a "Direct False Claims" claim.

RELIEF SOUGHT

Tracy filed this action on September 26, 2014. His remaining claim is subject to the ten-year statute of repose found in the False Claims Act, 31 U.S.C. § 3731.[2] As a result, if the "violation" upon which Tracy bases his claim occurred prior to September 26, 2004, the claim is time-barred.

Tracy says his claim is timely because the last "disbursement" of the loan at issue occurred on September 29, 2004. To support that argument, Tracy attaches to his pleading a document dated September 29, 2004, which refers to a "Pay Request." But that document is only a cover memo. The actual "Pay Request" accompanying that memo is dated September 13, 2004. Even a ten-year period of repose, then, does not save Tracy's claim. It's time-barred, and it should be dismissed.

Even if Tracy's action were timely—which it is not—Carollo has no place in it. "[T]he *sine qua non* of a False Claims Act violation is the submission of a false claim to the [G]overnment." *United States ex rel. Brooks v. Stevens–Henager Coll.*, 305 F. Supp. 3d 1279, 1306 (D. Utah 2018). If Tracy has identified any false claim at all, it is the Request for Payment that led to the final disbursement of the loan at issue. Tracy fails to allege any connection between Carollo and that claim, and Tracy's theory of the case thus falls apart with respect to Carollo.

Finally, Tracy fails to plausibly allege that Carollo made false statements knowingly or recklessly or that any statements made by Carollo were material to the disbursement of the loan at issue. That failure is also fatal to Tracy's claim against Carollo.

As the Court said in its dismissal order, Tracy has had four chances to state a claim for relief, and the reason Tracy cannot state a claim is "because he has none." *See* Am. Order Granting Mots. to Dismiss, at 11 [ECF 226]. Tracy's last claim against Carollo should be dismissed with prejudice.

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[2] Section 3731(b)(2) creates a ten-year statute of repose: "In no circumstances . . . may a suit be brought more than 10 years after the date of [an FCA] violation." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1974 (2015); *see also, e.g., United States ex rel. Mei Ling v. City of L.A.*, No. CV 11-974, 2018 WL 3814498, at *22 (C.D. Cal. July 25, 2018); *Barber v. Barchi*, Civ. No. 16-6582, 2018 WL 2441767, at *3 (D.N.J. May 31, 2018).

BACKGROUND

The Third Amended Complaint's Allegations Regarding Carollo

Tracy insists that "[t]his lawsuit is simple." *See* Third Am. Compl., at 2. Tracy summarizes his theory of the case this way: On September 29, 2004, EID "received the final disbursement" of a $1.846 million loan. *Id.* at 3.[3] That loan didn't come from the federal government—it came from Utah's Drinking Water State Revolving Fund. *Id.* But Tracy insists that doesn't matter, because that state fund "uses federal funds." *Id.*

Tracy says that certain federal guidelines require that "revolving funds" like Utah's must "give priority" to projects related to public health and clean water. *Id.* Instead, Tracy insists, EID used a loan from the Utah revolving fund to "benefit millionaire land developers" by using the loan proceeds to pay for part of what Tracy calls a "[$12 million] water system to serve future population growth." *Id.* at 2, 14.

Tracy's FCA claim centers on those purported "misrepresentation"—statements through which EID allegedly induced a $1.846 million loan by telling the government that it intended to use the money to provide clean water to existing residents, when EID really intended to use the loan for an infrastructure project to serve future growth. *Id.* at 9. EID would benefit from that scheme, Tracy says, through "fees, taxes, and assessments" associated with that growth. *Id.* at 15. Existing landowners would also benefit from that infrastructure (through increased property values), *id.* at 6–7, as would the company responsible for the "defunct water system" built in the canyon years before (through relief from "legal liability" that it would face "should the system run out of water"), *id.* at 5.

None of that explains why Carollo is named as a defendant. Over several stretches of the Third Amended Complaint, Tracy does refer to Carollo or Ronald Rash (who Carollo identifies as

[3] According to a cover memo penned by a government employee and attached as an exhibit to Tracy's Third Amended Complaint, the "amount of [the] requested payment" disbursed in late September 2004 was $188,650.10.

a Carollo shareholder). Tracy alleges, for instance, that sometime prior to October 2000, EID incorporated Carollo statements into environmental assessments. *See* Third Am. Compl. ¶¶ 63–70, 103, 257, 262–263, 268, 279, 297. He also alleges that Carollo mishandled aspects of an August 2002 survey, *see id.* ¶ 93, issued change orders in 2003 that differed from construction drawings but "refused to consider upsizing" certain water lines, *see id.* ¶¶ 114–116, and "failed to report" sometime in 2003 that a certain reservoir was "larger than planned," *see id.* ¶¶ 94, 103.

Tracy makes no real effort to connect those acts by Carollo to the scheme he describes—a scheme to use a "revolving fund" loan to enrich EID and certain property owners. The last Carollo-related allegation is the one that Tracy places the most weight on. On September 22, 2004, Tracy alleges, Carollo "certified successful project completion." *Id.* ¶¶ 76, 117, 334, 342, 386. Tracy insists that that certification was false, because certain portions of the water-infrastructure project were not "built according to the [initial] plans and specifications." *Id.* ¶ 508.

Relevant Procedural History

Tracy's Third Amended Complaint contained two claims, both brought under the False Claims Act. The first is styled, "Direct False Claims under 31 U.S.C. § 3729." *See* Third Am. Compl. ¶¶ 501–514. The second is styled, "Reverse False Claims under 31 U.S.C. § 3729." *See id.* ¶¶ 515–532. In mid-2018 the Court dismissed both claims.

The Court dismissed the first claim as time-barred, based on the six-year statute of limitations[4] that the Tenth Circuit had applied to claims like Tracy's. *See* Am. Order Granting Mot. to Dismiss, at 4–7 [ECF 226]. In doing so, the Court found that (1) Tracy alleged that the "date of final disbursement" for the government loan at issue was September 29, 2004, (2) "[a]ny false statements that induced the Government to disburse the $1.846 million loan must necessarily have

[4] This provision, too, is actually a statute of repose, but this Court has referred to it as a statute of limitations "so as to maintain consistency with the Tenth Circuit." *See* Am. Order Granting Mot. to Dismiss, at 6 n.5 (differentiating between statutes of repose and statutes of limitations).

occurred before [that] date," and (3) Tracy filed this action on September 26, 2014, "almost ten years" after the alleged "date of final disbursement." *Id.* at 7.

The Court dismissed the second claim as inconsistent, implausible, and improperly pleaded. *See id.* at 7–11. The theory underlying Tracy's second claim depended on the idea that EID "knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government." *Id.* at 8–9 (citing 31 U.S.C. § 3729(a)(1)(G)). But Tracy failed to plausibly allege that such an obligation even existed. *Id.* at 9. Moreover, Tracy's conclusory allegations were at odds with the terms of the loan described in the pleadings. *Id.* at 9–11.

Tracy appealed from that order of dismissal. But in doing so, Tracy appealed only the Court's dismissal of his first claim, not the second. While that appeal was pending, the Supreme Court agreed to hear a case called *Cochise Consultancy*, which dealt with the application of the statutory limitations periods contained in the False Claims Act. The Tenth Circuit stayed Tracy's appeal to await the result. And in May 2019, the Supreme Court issued its decision in *Cochise Consultancy*, abrogating the Tenth Circuit precedent that this Court had applied in dismissing Tracy's first claim. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

In light of the *Cochise Consultancy* decision, the Tenth Circuit vacated this Court's dismissal of Tracy's first claim. The Tenth Circuit provided some measure of instruction on remand:

> In [dismissing Tracy's first claim, this Court] only assumed without deciding that September 29, 2004, was . . . 'the last possible date' than an FCA violation could have occurred. [Citation.] Now that § 3731(b)(2)'s ten-year period applies to Tracy's allegations, we remand for the district court to decide in the first instance whether Tracy filed his complaint 'more than ten years after the date on which the violation [wa]s committed.' [31 U.S.C.] § 3731(b)(2).

Tracy v. EID, --- F. App'x ----, 2020 WL 974886, at *2 (10th Cir. Feb. 28, 2020). After remand, the Court ordered the defendants to file new motions to dismiss directed at Tracy's Third Amended Complaint. *See* July 20, 2020 Docket Text Order [ECF 280].

ARGUMENT

I. Tracy's Action Depends on "the Submission of a False Claim to the Government."

In pleading his False Claims Act claim, Tracy must satisfy the heightened pleading standard of Rule 9(b). *United States ex rel. Brooks v. Stevens–Henager Coll., Inc.*, 359 F. Supp. 3d 1088, 1103 (D. Utah 2019). As explained in Section IV below, that means that Tracy must state with particularity how each defendant—including Carollo—was involved in scheme he alleges. *See id.*

But there's an even more fundamental problem with Tracy's Third Amended Complaint. Any liability stemming from an FCA violation attaches to *the alleged false claim itself*, not to "the government's [allegedly] wrongful payment," or even to the alleged "underlying fraudulent activity." *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995); *see also, e.g., United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (same).

That, then, is the first question Tracy faces, with all other analysis flowing from his answer: What *false claim* is his FCA claim based on?[5] Tracy's Third Amended Complaint appears to deliberately avoid answering that question. And if the answer to that question isn't discernible from the face of Tracy's pleading, the Court should dismiss his Third Amended Complaint for failing to meet the heightened pleading standard of Rule 9(b). Simply put, "allegations of violations of federal regulations or laws" aren't enough to sustain Tracy's FCA claim; if he "cannot identify with particularity any actual false claim submitted . . . to the government," his claim fails. *United States ex rel. Smith v. Yale Univ.*, 415 F. Supp. 2d 58, 85 (D. Conn. 2006).[6] It should not be the

[5] Identifying the "false claim" at issue is critical no matter whether Tracy proceeds under 31 U.S.C. § 3729(a)(1)(A) or 31 U.S.C. § 3729(a)(1)(B). The elements of a § 3729(a)(1)(A) claim are: "(1) the defendant submits *a claim for payment* to the Government; (2) the claim is *false*; and (3) the defendants knows the claim is false." *Brooks*, 305 F. Supp. 3d at 1293 (emphasis added). The elements of a § 3729(a)(1)(B) claim are: "(1) the defendant makes a false statement; (2) the defendant acts knowing that the statement is false; and (3) the false statement is material *to a false claim for payment*." *Id.* at 1293–94 (emphasis added).

[6] *See also, e.g., United States ex rel. Grant v. United Airlines, Inc.*, No. 2:15-cv-794, 2016 WL 6823321, at *4 (D.S.C. Nov. 18, 2016) (dismissing plaintiff's complaint because it failed to "tether any of the broad allegations of a fraudulent scheme to an actual claim that [defendant] submitted

defendants' job—or the Court's—to identify the "false claim" that sits at the heart of Tracy's case. Because Tracy shirks that responsibility, his remaining claim should be dismissed.

That said, if Tracy's Third Amended Complaint is not dismissed for this failure, further evaluation of Tracy's FCA claim depends on identifying the false claim (or claims) at issue. Therefore, to support the sections that follow, Carollo makes an attempt to identify the "false claim" that, in Tracy's view, creates liability for Carollo. Tracy alleges first that defendants "presented a false or fraudulent claim" to the government "in order to *induce disbursement* of $1.846 million in federal funds." Third Am. Compl. ¶ 502 (emphasis added). But Tracy appears to stop short of alleging that Carollo actually participated in the submission of a false *claim*—that is, in the submission of a request for payment. Tracy then alleges, broadly, that the defendants made a false statement "to get a false or fraudulent claim paid or approved," again for the purpose of "induc[ing] disbursement of $1.846 million in federal funds." *Id.* ¶ 507. Tracy alleges specifically that "Defendants falsely certified that the Brigham Fork Well, Wildflower Reservoir, and water pipelines had been build according to the plans and specifications." *Id.* ¶ 508.

As best Carollo can tell from the face of the Third Amended Complaint, that's Tracy's basis for naming Carollo as a defendant: that Carollo "certified successful project completion" on September 22, 2004, *id.* ¶¶ 76, 117, 386, and that when it did so, it certified that the project was "completed in compliance with the pre-construction plans," *id.* ¶¶ 117, 334, 342. That statement was false, Tracy says, because in 2003 Carollo "downsized" several sets of water lines and "supervis[ed]" construction of a water tank that was wider and shorter than initially planned. *See id.*

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to the government"); *United States v. Kernan Hosp.*, 880 F. Supp. 2d 676, 686 (D. Md. 2012) (dismissing plaintiff's complaint due to "its lack of specificity as to the precise false claims at issue in th[e] litigation"); *United States ex rel. Sammarco v. Ludeman*, Civ. No. 09-880, 2010 WL 681454, at *9 (D. Minn. Feb. 25, 2010) (dismissing plaintiff's complaint because plaintiff failed to properly allege that "a claim for payment or approval" was ever submitted to the government).

¶¶ 94–95, 114–115.[7] Given the timing of that statement, Carollo is left to guess—though Tracy doesn't actually make this allegation, *see supra* Section IV—that Tracy believes that those allegedly false statements about "compliance with pre-construction plans" played a role in "induc[ing] disbursement" of the final round of funds for the $1.846 million loan at issue, as described in the September 29, 2004 "Payment Request" memo that Tracy attaches to his pleading.

II. Tracy's Claim Is Time-Barred.

Because "the *sine qua non* of a False Claims Act violation is the submission of a false claim to the [G]overnment," *see Brooks*, 305 F. Supp. 3d at 1306, it's the submission of the allegedly false claim that triggers the statute for a False Claims Act claim, *see* Scott K. Zesch, Annotation, *When Does Statute of Limitations Begin to Run in Action Under False Claims Act (31 U.S.C.A. §§ 3729–3733)*, 139 A.L.R. Fed. 645 (1997) (collecting cases).[8] Tracy has described the "false claim" at issue as the "claim" designed "to induce disbursement of [a] $1.846 million" loan. *See* Third Am. Compl. ¶¶ 502, 507; *id.* at 3. The timeliness of Tracy's claim, then, depends on that date that alleged "false claim" was submitted.

Up until May 2019, the Tenth Circuit applied a six-year statute of repose to claims like Tracy's. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725–26 (10th Cir. 2006), *abrogated by Cochise Consultancy*, 139 S.Ct. 1507 (2019). (That

[7] With respect to both the allegedly "downsized" water lines and the allegedly oversized water tank, Tracy does not explain the significance of these discrepancies or how they figure into the alleged scheme to misappropriate government funds.

[8] In 1986, a district court within the Tenth Circuit recognized this majority rule. *See United States v. Stillwater Cmty. Bank*, 645 F. Supp. 18, 19 (W.D. Okla. 1986). The Tenth Circuit itself has not yet taken a clear position on this issue, but appears to have endorsed this approach. *See, e.g., Armstrong v. Wyo. Dept. of Envtl. Quality*, 674 F. App'x 842, 845–46 (10th Cir. 2017) (affirming 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"). Other notable decisions addressing this issue include *Rivera*, 55 F.3d at 703, and *Bauchwitz*, 671 F. Supp. 2d 674 (E.D. Pa. 2009).

is, the statute ran six years from the date of the alleged FCA violation.)[9] Now, however, the same statutory periods apply to Tracy's claim as would apply to a False Claims Act in which the government intervened:

> The first period requires that the action be brought within 6 years after the statutory violation occurred. The second period requires that the action be brought within 3 years after the United States official charged with the responsibility to act knew or should have known the relevant facts, *but not more than 10 years after the violation*. Whichever period provides the later date serves as the limitations period.

Cochise Consultancy, 139 S.Ct. at 1510 (emphasis added). The current state of the law, then, is this: a False Claims Act claim brought more than ten years after "the date on which the violation . . . is committed" is barred under section 3731(b)(1).

Tracy filed this suit on September 26, 2014. For his FCA claim to be timely, then, the alleged violation on which his claim is based—the "false claim" that "induce[d] disbursement" of the loan at issue—must have occurred on or after September 26, 2004. Put differently, an FCA claim based on any alleged violation that took place *before* September 26, 2004, is time-barred.

Tracy appears to appreciate the significance of that date. In the introduction to his Third Amended Complaint, he takes pains to note that it was "[o]n or about September 29, 2004" that "EID received the final disbursement of a twenty-year, $1.846 million loan." Third Am. Compl., at 3. Tracy offers the following additional details about that September 29 "final disbursement":

> The September 29, 2004 payment was a "retainage release" payment. The government disbursed funds for the construction of the well, reservoir and water lines via five progress payments. However, the government retained a portion of each progress payment to assure that EID would satisfy its obligations and successfully complete the construction of the well, reservoir and water lines. Once EID certified that the project

[9] Again, though cases refer broadly to 31 U.S.C. § 3731(b) containing several interlocking "statutes of limitations," section 3731(b)(2) states that even if the statute's internal tolling provision is invoked, an FCA claim must be brought "not more than 10 years after the violation" at issue. Given that language, the 10-year period described in section 3731(b)(2) is a statute of *repose*, not a statute of limitations. *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); *cf.* Am. Order Granting Mot. to Dismiss, at 6 n.5 (differentiating between statutes of repose and statutes of limitations).

> was complete, the government disbursed the "retainage." Accordingly, the September 29, 2004 payment constituted final payment for all work done on the project.

Id. at 3 n.4.[10]

In a June 22, 2018 filing, Tracy referred to this Court's initial order dismissing his Third Amended Complaint and characterized the first exhibit to that pleading this way:

> [T]he Court's [Order] appears to contain a factual error. The order states that final disbursement of the $1.846 million occurred on September 24, 2004. That date is incorrect. According to the documents attached to Mr. Tracy's Third Amended Complaint, a *request* for final payment ($188,650.10) of the $1.846 million total *occurred on September 29, 2004* (within ten years of the filing of Mr. Tracy's complaint) . . . .

Tracy's Resp. to June 15, 2018 Order to Show Cause, at 2–3 [ECF 225] (emphasis added).

It's not clear why Tracy made that representation, or whether Tracy appreciated at the time that that representation was contradicted by the very documents he referred to. But by at least as early as June 25, 2018, the EID Defendants had identified—and filed with the Court—a full copy of the "Payment Request" that Tracy attaches to his Third Amended Complaint. *See* Ex. G to EID Mot. for Fees [ECF 227-7]. And that document, which Carollo attaches again here as Exhibit A, shows that the "Request for Payment" that prompted the "final loan disbursement" actually occurred on September 13, 2004, through a document signed by Fred Smolka in his capacity as EID's

[10] Even this analysis is a very generous reading of Tracy's theory of the case. The "original sin" that Tracy complains of is the allegation that EID misrepresented—from the start—its intentions in applying for a government loan. As Tracy sees it, EID represented that it would use the funds to provide clean drinking water to canyon residents, while in truth it intended to use that money to build new water-system infrastructure to benefit developers.

The problem, of course, is that all of the allegedly "false claims" or allegedly "false statements" associated with the loan application occurred far too early to now be actionable. EID's application for DWSRF funds, and the allegedly "false statement" by EID that it "intended to use Brigham Fork Well and the Wildflower Reservoir to bring clean water to 67 residents . . . of Emigration Canyon," must have occurred prior to October 13, 2000, when EID secured the loan commitment. *Id.* ¶¶ 49–55; *see also id.* at 5 (alleging that EID falsely represented that it intended "to bring clean water to 67 existing households within Emigration Canyon" when its true intent was "to use federal funds for the benefit of wealthy developers . . . with whom it had conspired"). Any such statements or claims occurred more than 13 years before Tracy filed this suit.

"Treasurer and General Manager," and titled, "Written Authorization and Request for Reimbursement from Escrow Fund." *See* Ex. A, Full Sept. 2004 "Payment Request" File, at 3–4.

Given the details of that September 13 "Request for Reimbursement" submitted by EID, it's not clear what Tracy alleges is actually *false* about that claim. But whatever Tracy's theory may be, there's no question that the alleged "false claim" upon which Tracy's FCA claim rests was submitted on September 13, 2004. Because Tracy did not file this action until September 26, 2004, it was filed more than ten years after the date of the alleged violation.

What's more, the Carollo-related allegations in the Third Amended Complaint are all dated prior to September 26, 2004.[11] In the paragraphs most critical to Tracy's claim against Carollo, Tracy argues that "[d]espite [alleged construction] deficiencies, on September 22, 2004, Mr. Rash of Carollo Engineering falsely certified that the Wildflower Reservoir and Brigham Fork Well had been constructed according to plans and specifications submitted as part of the loan application process and NEPA review." *See* Third Am. Compl. ¶¶ 334, 342 [Dkt. 204].[12] Even if the "violation" that triggered the statute was an alleged "false statement" made by Carollo—and not the alleged "false claims" submitted by EID—then the statute of repose on Tracy's claim ran on September 22, 2004.

Whether Tracy's FCA claim is based on the allegedly false claim for payment by EID, or the allegedly false statement by Carollo material to a claim for payment, Tracy's FCA claim is time-barred, and it should be dismissed.

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[11] *See* Third Am. Compl. ¶¶ 102, 150, 160, 239 (alleged participation on reports prepared in the late 1990s); *id.* ¶¶ 69–71 (alleged participation in an environmental-assessment process in 2002); *id.* ¶¶ 16, 93 (alleged survey-related errors in 2002); *id.* ¶ 116 (alleged refusal to consider upsizing water lines in 2002); *id.* ¶¶ 114–115 (alleged downsizing of water lines in August 2003); *id.* ¶¶ 94–95 (alleged improper supervision of water-tank construction in 2003); *id.* ¶¶ 76, 117, 334 (allegedly inaccurate certification of completed work, occurring on September 22, 2004).

[12] Tracy does not attach that "certification letter" to his pleading, but he attached it to his opposition to the defendants' motions to dismiss his *Second* Amended Complaint. *See* Sept. 22, 2004 Rash Letter [ECF 117-7]. For convenience, Carollo re-attaches that document here as Exhibit B.

III. Carollo's Alleged Conduct Did Not Cause Presentation of a False Claim.

The FCA was passed to "clamp down" on the number of "inflated invoices" and "faulty goods" sent to the government. *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995). For that reason, it "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment," but to the "claim or demand for payment" itself. *Id.*

To preserve that feature of FCA liability, there must be some way to distinguish between sweeping allegations of "fraudulent activity" and targeted allegations that a particular defendant participated in a false "claim or demand for payment." Or, as the Tenth Circuit has put it, there must be a "test" that "separates the wheat from the chaff" in the context of the FCA. *See Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 715 (10th Cir. 2006), *abrogated on other grounds by Cochise Consultancy*, 139 S.Ct. 1507 (2019). To create such a test, the Tenth Circuit has followed at least one other circuit in "borrowing traditional principles of tort law to analyze causation of damages under the FCA." *Id.* (citing *United States v. Hibbs*, 568 F.2d 347, 349 (3d Cir. 1977)). That "familiar test" is proximate causation.

The Tenth Circuit explained that to impose liability for an FCA violation, there must be "a sufficient nexus between the conduct of the party and the ultimate *presentation* of the false claim." *Id.* (emphasis added). That is, FCA claims can proceed against a party only if that party "can fairly be said to have *caused a claim to be presented to the government*." *Id.* (emphasis added). If, in stating a claim, a pleading provides "only attenuated links between [a defendant's] specific actions and the presentation of the false claim," a court should "winnow[] out" that claim. *Id.*

Tracy's Third Amended Complaint wholly fails to describe a "sufficient nexus" between Carollo's conduct and the "ultimate presentation" of any false claim. Tracy's failure emerges in two ways, one conceptual and one practical.

Tracy's claim against Carollo makes no sense conceptually because the Third Amended Complaint fails to answer the most obvious question regarding Carollo: Why would Carollo ever

agree to participate in a scheme like this? Tracy alleges that EID would profit from the increased taxes and fees paid by new residents. *See* Third Am. Compl., at 15. Tracy further alleges that "land developers like Mr. Creamer and Boyer Company" would profit from increased property values stemming from new infrastructure. *Id.* at 10. However, Tracy makes no attempt to explain how Carollo would derive any benefit from its alleged participation in this "masterclass in public corruption." *Id.* at 16. Carollo was hired to provide engineering work on the project on a fee basis, and it was paid for that work. How would Carollo benefit from an illicit "upsizing" of water lines, an illicit *downsizing* of other water lines, or the construction of a "preposterously oversized" water tank? Tracy never says. Without even attempting to allege such a benefit, Tracy cannot show any "nexus" between Carollo's specific actions and the presentation of a false claim.

The second, more practical problem with Tracy's causation theory is even starker. As the "Pay Request" documentation that Tracy relies on shows, the "Request for Reimbursement" that "induced disbursement" of the final round of loan funds was submitted by EID on September 13, 2004. However, in Tracy's account, Carollo's liability arises from an inaccurate certification of completion that occurred on September 22, 2004—nine days *after* the alleged "false claim" by EID that induced the final disbursement of loan funds. Given that Carollo's alleged false statement occurring *after* the "Request for Reimbursement" at issue, there can be no "nexus" at all between Carollo's conduct and "the ultimate presentation of the false claim." *See Sikkenga*, 472 F.3d at 715, *abrogated on other grounds by Cochise Consultancy*, 139 S.Ct. 1507 (2019).

Because Tracy's Third Amended Complaint fails to plead facts necessary to show that Carollo "caused a [false] claim to be presented to the government," his claim against Carollo should be dismissed. *See id.*

IV. Tracy Fails to Plead Facts Sufficient to State a Claim Against Carollo.

Even if Tracy's claim were timely, and even if the Third Amended Complaint could be read to create a nexus between Carollo's conduct and the presentation of a false claim, Tracy's remaining FCA claim would nevertheless fail with respect to Carollo, because the Carollo-related allegations contained in Tracy's Third Amended Complaint fall well short of the applicable pleading standard.

Tracy's theory of Carollo's liability depends on the allegation that Carollo *knowingly* made a *material* false statement. *See United States ex rel. Brooks v. Stevens–Henager Coll.*, 305 F. Supp. 3d 1279, 1293–94 (D. Utah 2018). Tracy's Third Amended Complaint fails to allege facts sufficient to support that any false statement by Carollo was knowing or that any false statement by Carollo was material. Absent allegations of such facts, Tracy fails to state a claim against Carollo.

A. FCA Claims Must Be Pled with Particularity.

To avoid dismissal on a 12(b)(6) motion, Tracy must "state a claim to relief that is plausible on its face." *See Bell Atl. Corp v. Twombly*, 550 U.S. 544, 547 (2007). Any "mere labels [or] conclusions" contained in the Third Amended Complaint do not bring Tracy any closer to this goal, because courts disregard such allegations in ruling on a motion to dismiss. *See Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Nor has Tracy done enough if he only "pleads facts that are merely *consistent* with [Carollo's] liability," because a pleading of that sort still "stops short of the line between possibility and plausibility." *See id.* (emphasis added). Instead, Tracy must "offer specific factual allegations to support each claim" against Carollo—allegations that "raise a right to relief above the speculative level." *Id.* at 1214.

To succeed on a False Claims Act claim, Tracy must go further still. As claims based on the False Claims Act are "fraud-based," they must be pled with particularity under Rule 9(b). *See United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1171–72 (10th Cir. 2010). In other words, to survive Carollo's motion to dismiss, Tracy's Third Amended Complaint

must "state with particularity the circumstances constituting" Carollo's alleged fraud, *see* Fed. R. Civ. P. 9(b), including "the time, place, content, and consequences of [any] fraudulent conduct," *Lemmon*, 614 F.3d at 1171.

What's more, given the significant legal and professional implications of the alleged scheme, Carollo's participation in such a scheme defies logic. *See supra* Section III. With that in mind, the Rule 9(b) particularity standard should be applied here with special bite, and Tracy's pleading failures described below should carry particular weight.

Tracy's Third Amended Complaint must contend not only with Rule 9(b)'s heightened pleading requirement, but also with Rule 8(a)(2)'s requirement that his pleading provide a "short and plain statement of the claim showing that [he] is entitled to relief." One critical aspect of a Rule 8(a)(2)-satisfying pleading is that it describe *who* did *what*:

> [A] complaint must explain what each defendant did . . . ; when the defendant did it; how the defendant's action [caused harm]; and what specific legal right the plaintiff believes the defendant violated. After all, these are, very basically put, the elements that enable the legal system to get weaving—permitting the defendant sufficient notice to begin preparing its defense and the court sufficient clarity to adjudicate the merits.

Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158, 1163 (10th Cir. 2007).

This Court took up a similar problem in *Brooks*, where relators brought a False Claims Act claim against a long list of named defendants. The Court summarized some of the problems with the pleading this way:

> Relators' complaint is not a "short and plain statements" of their claims showing that they are entitled to relief. Fed. R. Civ. P. 8(a)(2). Rather, Relators have taken a shotgun approach to pleading. Realtors' complaint spans 162 pages and contains over 130 pages of factual allegations. After setting forth over 130 pages of factual allegations, Relators allege in conclusory paragraphs that the "Defendant Schools" are liable under the False Claims Act because they made false statements regarding [various requirements and standards].
>
> Relators do not distinguish between individual defendants in their claims for relief, nor do they state separate claims for relief based on the distinct sets of false statements. In short, Realtors leave it to the court to piece together 130 pages of facts to create causes of action as to each individual defendant based on four distinct sets of false

> statements. But it is not the court's job to construct causes of action for plaintiffs that are unwilling to do so themselves.

Brooks, 305 F. Supp. 3d at 1307–08 (citations omitted).

Tracy's Third Amended Complaint is no different. It weighs in at 93 pages, beginning with a fifteen-page narrative introduction,[13] followed by 500 numbered paragraphs of factual allegations before Tracy even reaches his claims for relief. *See generally* Third Am. Compl. Within those claims themselves, Tracy does not describe any false claim or false statement with requisite detail, much less match the alleged false claims and statements with the defendant he alleges is responsible. *See id.* ¶¶ 501–514.

Simply put, Tracy's Third Amended Complaint should be dismissed both for its failure to meet Rule 9(b)'s heightened pleading standard (as described in more detail below), but also for its failure to comply with the even more basic requirements of Rule 8(a)(2).

B. Tracy's Allegations Regarding Carollo's Knowledge Are Insufficient.

For a person to be liable under the FCA for a false record or statement, that person must have made or used that record or statement *knowingly*. *See* 31 U.S.C. § 3729(a)(1)(B).[14] The act defines "knowing" and "knowingly" to mean "that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b)(1); *see also United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 945 & n.12 (10th

[13] "Something labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness, and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint." *Mann v. Boatright*, 477 F.3d 1140, 1148 (10th Cir. 2007) (citation omitted).

[14] *See also United States ex rel. Dye v. ATK Launch Sys., Inc.*, No. 1:06-cv-39, 2008 WL 2074099, at *3 (D. Utah May 14, 2008) ("Knowledge is one of the elements necessary to state a cause of action under the False Claims Act."); *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) ("A defendant acts 'knowingly' when he has 'actual knowledge of the information'; or when he acts 'in deliberate ignorance of the truth or falsity of the information'; or when he acts in 'reckless disregard of the truth or falsity of the information.'").

Cir. 2008). Put differently, a claim under the False Claim Act has a scienter requirement: the defendant must have acted with actual knowledge of the fraud or have acted with "deliberate ignorance" or "reckless disregard" with respect to the truthfulness of defendant's statements. *Burlbaw*, 548 F.3d at 945 & n.12. The Tenth Circuit has referred to this requisite level of knowledge as "an aggravated form of gross negligence." *Id.* at 945 n.12.

Even after accepting the Third Amended Complaint's allegations as true and drawing all reasonable inferences in Tracy's favor, Tracy has not pleaded sufficient facts related to Carollo's mental state. Tracy does not provide any facts to support a reasonable inference that Carollo knew any statement it made was false, he does not provide any facts to support a reasonable inference that Carollo acted with deliberate indifference regarding the truth of its statements, and he does not provide any facts to support a reasonable inference that Carollo acted with reckless disregard with respect to the truth of its statements.[15] As many courts have noted, without this mental-state requirement, the False Claims Act would become a strict-liability statute—any mistake or inaccuracy in a government claim would create liability and subject the claimant to statutory penalties.[16]

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[15] The only potential reference in the Complaint to Carollo's mental state comes in Tracy's recitation of the causes of action, where he states that the defendants generally either "*knowingly* presented or caused to be presented" false claims and "*knowingly* made, used, or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the United States Government." *See id.* ¶¶ 502, 507. But this is nothing more than a "formulaic recitation of [an] element[] of a cause of action"—a mere label or conclusion—which fails to satisfy even the "middle ground" imposed by the *Twombly*/*Iqbal* standard, *see Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012), much less the heightened pleading standard applicable to FCA claims.

[16] *See, e.g.*, *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1303 (10th Cir. 2010) (emphasizing that the False Claims act was not meant to impose "a strict liability standard"); *see also United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 987 (E.D. Wis. 1998) (stating that the False Claim Act's "intent standard . . . was not meant to set a trap for the unwary or change the fundamental FCA goal of identifying truly fraudulent conduct"); *United States ex rel. Crenshaw v. Degayner*, 622 F. Supp. 2d 1258, 1274–75 (M.D. Fla. 2008) ("The False Claims Act is not a strict liability statute. . . . Furthermore, the Act is not designed to punish honest mistakes or incorrect claims submitted through negligence." (citation omitted) (internal quotation marks omitted)).

This is not the statute's function: "[T]he purpose of the False Claims Act is to discourage fraud against the government." *See 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). Thus, a relator who pleads no facts regarding the mental state of a defendant has failed to state a claim upon which relief may be granted. The Court should grant Carollo's motion and dismiss Tracy's claim accordingly.

C. Tracy's "Materiality" Allegations Are Also Insufficient.

Even if Tracy had pleaded facts establishing Carollo's knowledge, "mere knowledge of the submission of claims and knowledge of the falsity of those claims is insufficient to establish liability under the [False Claims Act.]" *Sikkenga*, 472 F.3d at 714, *abrogated on other grounds by Cochise Consultancy*, 139 S.Ct. 1507 (2019). Rather, as described above in Section III, "the appropriate inquiry under § 3729(a)(1) is whether that specific conduct *causes* the presentment of a false claim." *Id.*

Thus, for Carollo to be liable under the False Claims Act, any allegedly false statements that it made must be *material* to a false or fraudulent claim. *See* 31 U.S.C. § 3729(a)(1)(B). The act defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id.* § 3729(b)(4). To adequately "connect" a false statement to a false claim, a relator "must prove that the defendant intended that the false record or statement 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).

Simply put, even if Carollo had made a false statement of some sort, if it did "not intend the Government to rely on that false statement as a condition of payment," that statement "is not made with the purpose of inducing payment of a false claim 'by the Government.'" *See Allison Engine*, 553 U.S. at 672. "In such a situation, the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability." *Id.*

Again, Tracy has failed to plead facts supporting a reasonable inference that any false statement made by Carollo was material.[17] Tracy's Third Amended Complaint does not clearly describe the role Carollo's statements played in "the fraudulent acquisition of public funds." The closest Tracy comes is in his assertion that in September 2004, Carollo allegedly provided a "false certification" that the projects at issue had been successfully completed. *See* Third Am. Compl. ¶ 76. Tracy does not clearly describe what was misleading about that "certification," particularly given that on its face, the certification explicitly refers to "change orders" included with the certification. *See* Ex. B, Sept. 22, 2004 Certificate of Completion.

As the Supreme Court has explained, a False Claims Act defendant "is not answerable for anything beyond the natural, ordinary, and reasonable consequences of his conduct." *See Allison Engine*, 553 U.S. at 672. Without pleading facts supporting a reasonable inference of materiality, Tracy cannot establish that any statement made by Carollo led to the improper disbursement of federal funds. Without those facts, Tracy has failed to state a claim on which relief may be granted, and his remaining claim against Carollo should be dismissed.

CONCLUSION

Pleading rules exist not only to ensure that defendants receive notice of the specific conduct against which they must defend, but also to deter the filing of pretextual complaints, to protect defendants from being subject to unsupported charges, and to "prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996).

[17] In his narrative introduction to his Third Amended Complaint, Tracy alleges that certain statements made by *EID* were material. *See* Third Am. Compl., at 10–11. And early in the complaint, Relator alleges that in preparing its own environmental assessment, DDW "*relied on* plans, reports, data, and representation[s] created or made by EID *or* Carollo." *Id.* ¶ 71 (emphasis added). Again, these are nothing more than formulaic recitations of an element of a cause of action, which fail to satisfy even the *Twombly*/*Iqbal* standard. *See Khalik*, 671 F.3d at 1191.

Tracy's claims are time-barred, even under a ten-year statute of repose. Even if Tracy's claims against EID could go forward, Tracy's Third Amended Complaint fails to allege facts sufficient to state a claim against Carollo—either by creating a proper "nexus" between Carollo's conduct and any alleged "false claim," or by pleading sufficient facts related to the knowledge and materiality requirements of a False Claims Act claim. Carollo therefore asks the Court to dismiss Tracy's remaining claim against Carollo with prejudice.

Dated: August 10, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I electronically filed this *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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