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Nos. 21-4059, 21-4143

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

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

BRIEF OF APPELLANT

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GLOSSARY

FCA: False Claim Act
SDWA: Safe Drinking Water Act of 1974
SRF-Loan: State Revolving Fund Loan

STATEMENT OF RELATED CASES

This case was previously before this Court in four (4) related appeals: *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.,* Case No.: 0:17-cv-04062, 717 Fed.Appx. 778 (10th Cir. 2017); *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case No.: 0:18-cv-04109, 804 Fed.Appx. 905 (10th Cir. 2020); *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case No.: 0:19-cv-04021, 804 Fed.Appx. 905 (10th Cir. 2020), *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case No.: 0:19-cv-04022, 804 Fed.Appx. 905 (10th Cir. 2020).

Cases *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case Nos. 21-4059 and 21-4143 are consolidated for briefing and oral argument.

JURISDICTION

Regarding Case No. 21-4059, the district court had subject matter jurisdiction under 28 U.S.C. § 1331, as this case involves the federal False Claims Act ("FCA" or "Act"), 31 U.S.C. § 3729 *et seq*. This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court's judgment of dismissal was entered April 14, 2021. Appellant's notice of appeal was filed April 30, 2021. This appeal is from a final judgment disposing of all claims.

Regarding Case No. 21-4143, the district court had subject matter jurisdiction under 31 U.S.C. § 3730(d)(4) because this case involves an award of attorneys' fees under the FCA 31 U.S.C. § 3729 et seq. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court's order awarding attorneys' fees is a final decision. The district court entered its Order Granting in Part and Denying in Part Defendants' Motion for Attorneys' Fees and Costs on October 29, 2021. Appellant filed his notice of appeal on November 18, 2021.

This appeal is from a final judgment.

STATEMENT OF THE ISSUES ON APPEAL

1. Does the release of construction retainage funds from a state-controlled escrow account on September 29, 2004, or improper certification of project completion on May 3, 2005, or loan default on June 1, 2013, or misrepresentation of the date of loan closure on January 13, 2015, trigger the statute of limitation per 31 U.S.C. § 3731(b)(2) when recovering yet outstanding federally-backed loan proceeds and unjust enrichment attained in violation of the Safe Drinking Water Act of 1974 ("SDWA")?

Standard of Review: This Court "review[s] [a] district court's interpretation of a federal statute de novo." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield,* 472 F.3d 702, 710 (10th Cir. 2006). This Court also reviews de novo a

"district court's determination that [a] plaintiff's claims are barred by the statute of limitations." *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1194 (10th Cir. 1998).

Preservation: This issue was raised at Aplt.App. 212-235

2. Did the district court erroneously award $92,665 in attorney fees and costs against a federal whistleblower per 31 U.S.C. § 3731(b)(1) based upon an "estimate" of costs without requiring a fee affidavit or other admissible evidence of the costs, and a finding that Appellant's actions were clearly vexatious and brought for the purpose of harassment, notwithstanding that the operative complaint previously survived appeal and was filed with the ten-year statute of repose as interpreted by *Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998)?

Standard of Review: An attorneys' fee award is reviewed for abuse of discretion. Under this standard, this Court may reverse a district court's underlying factual findings only if they are clearly erroneous, but it reviews the District Court's statutory interpretation or other legal conclusions de novo. *Robinson v. City of Edmond,* 160 F.3d 1275, 1280 (10th Cir. 1998).

Preservation: This issue was raised at Aplt.App., 289-296.

STATEMENT OF THE CASE

For the past seven (7) years, at extraordinary private expense *qui tam* Relator Mark Christopher Tracy ("Appellant," "Relator Tracy," or "Mr. Tracy,) has collected and reviewed thousands of pages of public and private documents spanning

a period of over 113 years, secured hundreds of hours of voice recordings, and documented extensive ground-water contamination in what has alleged to be the longest, most lucrative, and likely most economically destructive[1] water grabs in the history of the State of Utah.

This ongoing and perpetual scheme was financed with proceeds of a yet outstanding federal loan distributed from a state escrow account administered by engineers of the Utah Division of Drinking Water ("DDW") under regulatory authority of the Safe Drinking Water Act ("SDWA") and expended for the continuing and sole benefit of Utah state's most influential political donors and private land developers under known duplicitous water claims.

The resulting damage from the misuse of federal funds to Emigration Canyon's aquifers, currently provide culinary drinking water to over 600 homes, may be permanent and irreversible.

STATEMENT OF FACTS

As this case was dismissed under Federal Rule Civil Procedure 12(b)(6), the statement of facts is derived primarily from Relator Tracy's Third Amended

[1] During pendency of second appeal and the second remand by this Court, Relator Tracy documented massive ground collapse and a 700-foot fissure consist with groundwater depletion in the Canyon's Twin Creek drainage predicted in expert hydrology reports either withheld and/or misrepresented to the Government by EID and Utah state officials.

Complaint (the "Complaint") and are assumed true for the purpose of the present appeal. (Aplt.App. 43-130.)

I. The Construction of Private Luxury Estates in Emigration Canyon, Utah Using Federal Funds Intended for Economically Disadvantaged Communities.

This case details the use of federally-backed loans intended for economically disadvantaged communities. (Aplt.App., 43) The water system at issue in this case is located in the Emigration Canyon area of Salt Lake County, Utah "Emigration Oaks PUD Water System." (Aplt.App., 43-125)

Relator Tracy's Complaint alleges that Appellee Emigration Improvement District ("EID") is a special service district organized under the laws of Utah to provide water and sewage services to residents of Emigration Canyon. (Aplt.App., 57) The Complaint alleges that EID was provided a $1.846 million loan by the U.S. Government through the federal DWSRF program to provide clean drinking water to 67 households within the canyon when in fact EID actually intended to use and actually used the funds to build massive overcapacity for future growth and land development, specifically the luxurious Emigration Oaks Private Urban Development ("Emigration Oaks PUD") on the north slopes of Emigration Canyon. (Aplt.App., 46-47; 61-64). EID received the final disbursement of the $1.846 million loan on September 29. 2004. The loan carried a below-market interest rate

of 2.1 percent and was to be paid over the twenty years until 2023. (Aplt.App., 44, 62, 64)

To secure the loan and obtain disbursement of federally-backed funds, EID represented, among other things, that 67 residents of Emigration Canyon needed access to the Emigration Oaks Water System because their individual private domestic wells had problems with bacterial contamination, chemical composition, and low water supply. (Aplt.App., 45) It represented that it would use part of the money received to build three water lines to connect these 67 residents to its then existing community water system. (Aplt.App., 45, 64-65) The 67 residents lived in Killyon Canyon, Burr Fork, and Young Oak neighborhoods in Emigration Canyon, and at the time of the loan application, were obtaining drinking water from individual private wells. (Aplt.App., 45, 64)

EID also represented that it would use the remainder of the $1.846 million to build a large-diameter commercial well (the "Brigham Fork Well")[2] and a 1-millon gallon reservoir (the "Wildflower Reservoir") to ensure that it had capacity to provide water to those 67 new customers. (Aplt.App., 45, 63) To obtain the loan, EID had to certify that it obtained "firm commitments" from at least 57 of the 67 homeowners that they

[2] Sometime in September 2018, during the pendency of the second appeal and second remand by this Court, EID secretly decommissioned the Brigham Fork Well due to drinking water contamination and removed the water source from the DDW inventory.

would participate in the project. (Aplt.App. 49, 64-65) The SWDA defined firm commitment as "actual payment of a connection fee and a signed contract to pay water utility bills." (Aplt.App., 49). EID also had to certify that it had sufficient water rights to operate the system. (Aplt.App., 49, 65)

However, EID did not intend to and did not provide safe drinking water to these 67 residents under a legal water right. To be sure, fourteen years later, no more than 30 households from these neighborhoods have connected to the system. (Aplt.App., 48) EID and its co-conspirators made additional misrepresentations as well that influenced the government's decision to provide funding. Among other things, although the District represented that the 67 homeowners were struggling with water contamination, there was only one private well in Emigration Canyon that

actually had contamination issues. (Aplt.App., 49) Moreover, EID withheld material information about the ability of Emigration Canyon to sustain the operation of large-diameter commercial wells. In 1996, EID's hydrologist published a master's thesis concerning Emigration Canyon's hydrology. (Aplt.App. 51-52) This thesis concluded that the Canyon could not sustain large-diameter commercial wells and, even if such wells were to successfully draw large quantities of water from the canyon's riparian system, impairment of private wells within the canyon would be "almost a certainty." (*Id.*) The failure to disclose this information was significant.

Most of the households within Emigration obtain their water from private wells. If commercial wells decrease the water supply, these private wells become more susceptible to contamination because wells with low water flows are prone to bacterial contamination and chemical imbalances. (*Id.*) Thus, instead of providing clean, safe drinking water to the existing residents of Emigration Canyon, EID's project actually would contaminate the groundwater system thereby reducing clean drinking water available to all Canyon residents. (*Id.*)

EID also misrepresented that its water rights had priority over all other water rights in the Canyon. (Aplt.App. 52) To operate the Brigham Fork Well, EID was required to change the point of diversion, thereby making groundwater extraction legally inferior to that of all existing canyon residents. (Aplt.App., 53) Thus, if EID's government-funded project interfered with any of these resident's superior and perfected water rights, these residents could shut down the entire Emigration Oaks Water System. (Aplt.App. 52-53) Consistent with its intended purpose and contrary to its representations to the government, EID did not supply clean drinking water to the 67 residents identified in its project. (Aplt.App., 51) Instead, EID used federally-backed funds as a means to both remedy and provide massively oversized infrastructure to support the development of over 500 new high-end luxury homes in the Canyon. (Aplt.App. 50)

Specially, although EID represented to the Government that federal monies would not be used to remedy the defunct Emigration Oaks Water System, the projected consisted of a "preposterously" oversized water tank, and two (2) large-diameter commercial wells, which as warned by expert hydrology reports misrepresented to the Government as both ill-suited to the Canyon's unique aquifer system and predicted to dewater both the historic Emigration Canyon Stream and existing single-family domestic wells operated under senior perfected water rights "*with almost certainty*" (emphasis added). (Aplt.App., 51-52.)

EID submitted the final of six draw requests on the $1.846 million loan on September 13, 2004.[3] DDW released the final retainage funds to EID on or after September 29, 2004. On May 3, 2005, DDW engineer Maculey closed SRF-Loan despite not having completed the mandatory post construction inspection and with no permanent operating permit issued to operate a public drinking water system under the Safe Drinking Water Act.[4] (Aplt.App., 74)

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[3] Contrary to the language of the district court, the six (6) draw requests submitted by EID for disbursement of escrow account funds were not "claims for payment" under the FCA, as EID provided no goods or service to the Government.

[4] The temporary operating permit issued for the Wildflower Reservoir by DDW engineer Brown due to "construction defects responsible for substantial leakage from the tank" expired on February 1, 2004. To date, EID continues operation of the Wildflower Water system without a valid operating permit in violation of the SDWR loan requirements.

As such, EID and DDW engineers intended and did disperse unfeasible SRF-Loan proceeds for the sole benefit of private wealthy land developers to facilitate future development of over 500 new homes of the defunct Emigration Oaks Water System at public expense and private profit. (*See* Aplt.App., 70-75,81-84, 89)

Relator Tracy filed this *qui tam* suit under the FCA in the U.S. District Court for the District of Utah on September 26, 2014, alleging claims under § 3729 (a)(1)(A) and § 3729 (a)(1)(B) that EID, DDW engineers and politically influential private land developers "knowingly presented or caused to be presented a false or fraudulent claim to an officer or employee of the United States Government" in order to secure and avoid recovery of federally-backed funds.

After this Court vacated and remanded the district court's prior ruling that a six-year statute of limitations under 31 U.S.C. § 3731(b)(1) barred Mr. Tracy's claims, the district court granted Defendants' motion to dismiss, ruling that Relator Tracy's claim is time barred by 31 U.S.C. § 3731(b)(2)'s ten-year statute of repose. (Aplt.App. 263-275) The district court held the ten-year limitations period began to run on September 13, 2004, when EID made the final draw request, rather than on September 29, 2004, when EID received the final draw on the $1,846 million loan from the state-controlled escrow account in violation of SDWA funding requirements. (*Id*.)

The district court later awarded EID $92,665 in attorney fees and costs against Relator Tracy purporting that present legal action was "clearly vexatious" and commenced "primarily for the purpose of harassment" intended to "air personal grievances" and not recovery of federal funds to the United States of America under 31 U.S.C. §3730(d)(4). (Aplt.App. 304-312) The district court based this ruling largely on an earlier ruling that Mr. Tracy and his former counsel had recorded a wrongful lis pendens on EID's water right, while ignoring Mr. Tracy's successful appeal on legal grounds that were resolved by the Supreme Court. (*Id.*)

This consolidated appeal followed.

SUMMARY OF ARGUMENT

The Supreme Court recently resolved a circuit split and held that the ten-year statute of repose applies to private relators under the FCA. *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019). Based on this guidance, the Tenth Circuit vacated and remanded for a second time the district court's Memorandum Decision and Order [Dkt. No. 226] to determine whether Relator Tracy's original complaint dated September 26, 2014, was filed more than ten years after the alleged FCA violations occurred [Dkt. No. 261].

Without oral argument or an evidentiary hearing, The district court revised is previous determination that "almost ten years had past" since filing, determined

Relator Tracy of "either purposely or recklessly" withholding documents from the court and refused to strike EID's overlength motion for attorney fees and costs.

Therefore, if September 29, 2004, when EID received the last retainage payment, or a later date, is the last possible date and FCA violation could have occurred, then the original complaint was timely filed, and this case must go forward.

ARGUMENT

I. The District Court Erred In Holding That FCA Claims Are Time Barred Under the SDWA.

In considering a motion to dismiss under Rule 12(b)(6), the district court must accept all well-pleaded facts as true and viewed in the light most favorable to the non-moving party. *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002). To survive a motion to dismiss, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007). The Court's function on a Rule 12 (b)(6) motion is not to weight potential evidence that the parties might present at trial, but to assess whether there is reason to believe that the plaintiff has a reasonable likelihood of factual support for these claims. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

A violation of the FCA occurs when one does any of the following: "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval (31 U.S.C. § 3729(a)(1)(A)); "knowingly makes, uses, or

causes to be made or used, a false record or statement material to a false or fraudulent claim" (31 U.S.C. § 3729(a)(1)(B)); "conspires to commit a violation of subparagraphs (A), (B) or (G)" (31 U.S.C. § 3729(a)(1)(C)); "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government" (31 U.S.C.S. § 3729(a)(1)(G)).

Moreover "[a]n *express* false certification theory applies when a government payee falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment (emphasis added). *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008).

Importantly, conspiracy liability is actionable under the FCA for any violation of § 3729. To establish a conspiracy, the complaint must show that (1) a defendant knowingly agreed with another person to defraud the Government; and (2) at least one act was performed in furtherance of the conspiracy. *See e.g. United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 343 (5th Cir. Tex. 2008); *United States v. Hill*, 676 F. Supp. 1158, 1173 (N.D. Fla. 1987).

It is well-established that the government may recover damages incurred during the limitations period even if the fraudulent acts or misrepresentations giving

rise to the damages occurred outside the limitations period. *See United States ex rel. Brooks v. Stevens-Henager Coll., Inc.*, No. 2:15-cv-00119-JNP-DJF, 2018 WL 296088 (D. Utah Jan. 4, 2018) (recognizing promissory fraud as a viable theory of recovery under the FCA); *see also United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006) (noting FCA "liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct"); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 468 (5th Cir. 2009) ("Under a fraudulent inducement theory, although the Defendants' 'subsequent claims for payment made under the contract were not literally false, [because] they derived from the original fraudulent misrepresentation, they, too, became actionable false claims'") (alteration in original) (quoting *United States ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 491 F.3d 254, 259 (5th Cir. 2007)); *Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 787 (4th Cir. 1999) ("In [fraudulent inducement] cases, courts, including the Supreme Court, found False Claims Act liability for each claim submitted to the government under a contract, when the contact or *extension of government benefit* was obtained originally through false statements or fraudulent conduct" (emphasis added) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379 (1943)).

Consistent with this reasoning, the United States Court of Federal Claims has held that the limitations period does not begin to run on a claim for actual damages until the government actually suffers damages. *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998); *see also United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157, (2nd Cir. 1993) (quoting *Blusal Meats v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (the statute of limitations "begins to run on the date the claim is made or, if the claim is paid, on the date of the payment").

The *Jana* court reasoned that where a suit seeks actual damages, as Relator Tracy seeks here, the period runs from the date the government makes payment because "all the events necessary to state the government's claim do not occur until the government has made full payment on the claim, since the government does not incur actual damages until then." *Jana* at 743. Indeed, under *Jana* since the FCA provides for actual damages, a violation of the FCA "encompasses not only the false claim but also the payments on that claim." *Id.* The reasoning in Jana is straightforward. A violation under the FCA when the false claim is made, even when the claim is not paid. *Id.* Therefore it makes sense for the ten-year limitations period to run, and to allow for recovery, based on when the damages occur.

The district court held that the ten-year period begins to run when the violation is committed, rather than when the government is damaged by paying a false claim, relying on the Supreme Court's dicta in *Graham County Soil & Water Conservation*

District v. United States ex rel. Wilson, 545 U.S. 409 (2005). However, in *Graham*, the Court was not asked to decide whether the limitations periods in the FCA are also triggered upon payment of a claim. Instead, the Court simply decided whether § 3731(b) applies to § 3730(h) retaliation claims under the FCA. In dicta the Court stated under § 3731(b), "the time limit begins to run on the date the defendant submitted a false claim for payment." *Id* at 415. That statement is consistent with *Jana*'s sound reasoning. The *Jana* court expressly stated that the submission of a false claim triggers the statute of limitations. The *Jana* court also recognized that actual damages, in addition to statutory damages, are available under the FCA when a payment is made, and a violation under the act also occurs at that time. *Graham* does not address this issue.

As the district court noted in its decision, the Tenth Circuit has not directly confronted this issue, but noted in *Armstrong v. Wyo. Dep't of Envtl. Quality*, 674 F. App'x 842, 846 (10th Cir. 2017) that the plaintiff did not directly argue or cite any authority that the limitations period begins to run when a payment is made. (Aplt.App. 266) Mr. Tracy has set forth direct argument and authority on this issue. Accordingly, the statute of repose on the instant claims accrues when the government incurs actual damages. It logically follows that the payment of funds, and all elements of 31 U.S.C. § 3729 are not met, until EID received the final payment of just over $188,000. Here, the government incurred tangible damages

when EID received this last installment payment and release of previously withheld retainage funds on or after September 29, 2004.

This reasoning is consistent with long-standing federal law governing statutes of limitation where "'a cause of action accrues when all events necessary to state a claim have occurred.'" *Sikorsky Aircraft Corp. v. United States*, 110 Fed. Cl. 210, 220 (2013) (quoting *Chevron U.S.A. Inc. v. United States*, 923 F.2d 820, 834 (Fed. Cir. 1991)). In order to claim actual damages, those damages have to occur before the claim can be decided. Here, Relator Tracy has made a claim for actual damages. Accordingly, the ten-year limitations period under § 3731(b) should begin to run when the government incurs actual damages. Mr. Tracy asks the Court to reverse the district court's decision that his claim is time barred and allow this case to move forward.

II. The District Court's Award of Attorney Fees in the Amount of $92,665 Against a Federal Whistleblower Is Clearly Erroneous.

The district court ordered remuneration for attorney fees and costs EID incurred in defending the present action both prior and subsequent to the latest appeal to this Court, which vacated and remanded the district court's Amended Memorandum Decision and Order to determine whether Mr. Tracy's original complaint dated September 26, 2014 was filed more than ten years after the alleged FCA violation was committed.

Mr. Tracy previously appealed a prior order from the district court, which held that a six-year limitations period under § 3731(a) applied pursuant instead of the ten-year limitations period under § 3731(b) pursuant to earlier Tenth Circuit precedent under *United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 709 (10th Cir. 2006). While Mr. Tracy's appeal was pending, the Supreme Court unanimously overruled *Sikkenga*, and therefore this Court vacated and remanded this case to determine whether Mr. Tracy's initial complaint was filed within the ten-year limitations period.

The district court previously ruled that alleged violations occurred "almost" ten years prior to filing suit, with a retainage payment to EID occurring on or after September 29, 2004, but that the six-year statute of limitations applied rather than the ten year statute of repose.[5]

After the remand and the district court's latest dismissal, the district court entered a $92,665 award of attorney fees, finding that Mr. Tracy's claims were "clearly vexatious" and "brought primarily for the purposes of harassment" to "air personal grievances" (Aplt.App. 304-312).

The district court based its findings on an earlier March 20, 2017 award of fees and costs, where the court found that a *lis pendens* filed by Mr. Tracy and his

[5] Dkt. No. 226.

prior counsel, Christensen & Jensen was wrongful and awarded $29,936 in fees and costs based on Utah's wrongful lien statute, not the FCA. (Aplt.App. 301-309) In awarding the increased amount $92,665 in fees and costs against Mr. Tracy, the district court does not address the successful appeal, nor how EID is entitled to $92,665 instead of the original award related to the *lis pendens*. (*Id.*) The district court simply stated the same ground exists when it awarded fees related to the *lis pendens*, and "the basis for the Court's findings has not changed" without any explanation for the increased amount. (*Id.*)

After EID filed its motion for fees on April 7, 2021,[6] Mr. Tracy's former counsel, Christensen & Jensen, settled with EID and EID subsequently released Mr. Tracy from any fees that occurred after the district court's February 5, 2019 order where the district court originally ordered the $92,665 in fees against Mr. Tracy. This original order was vacated when the Supreme Court overturned *Sikkenga*, and held that the ten-year limitations period applied to private FCA claims.

The Court should reverse the district court's attorney fee award for the following reason. Mr. Tracy commenced the present litigation under the weight of authority of numerous federal circuit courts and the United States Court of Federal

[6] Dkt. No. 300.

Claims's holding in *Jana* that his *qui-tam* claim was timely under the ten-year statute of repose.

The Supreme Court has now resolved the circuit split in accordance with Mr. Tracy's position. The district court did not mention the reversal, simply that his earlier conduct related to the *lis pendens* supported its ruling and entered an attorney fee award more than three times the amount of the award related to the *lis pendens*.

A. Statutory Requirement of an Award of Attorney Fees Against a Federal Whistleblower.

The False Claims Act provides:

> "If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

31 U.S.C.S. § 3730(d)(4). The standard for an award of fees under 31 U.S.C.S. § 3730(d)(4) is "'a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1203 (10th Cir. 2000). "[T]he plaintiff's action must be meritless in the sense that it is groundless or without foundation." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). "The fact that a plaintiff may ultimately lose his case is not in itself a sufficient

justification forth the assessment of fees." *Id*. Accordingly, fees and costs are appropriate only if the plaintiff's claim "was frivolous, unreasonable, or groundless" or the plaintiff "continued to litigate after it clearly became so." *Id*.

Under both 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927, "[a]n action is not frivolous if existing law or a reasonable suggestion for its extension, modification, or reversal supports the action." *United States ex rel. Rafizadeh v. Cont'l Common, Inc.*, 553 F.3d 869, 875 (5th Cir. 2008). Accordingly, a party who makes a reasonable argument for "extending, modifying, or reversing existing law" is not subject to sanction under 28 U.S.C. § 1927,[7] nor is the party who advances such a position subject to fees and costs under 31 U.S.C. § 3730(d)(4). *Id*. at 857. The Supreme Court agreed unanimously with Mr. Tracy's position, that the ten-year rather than the six-year limitations period applied, therefore, sanctions are inappropriate.

B. Relator Tracy's *qui tam* claims are neither frivolous nor groundless.

The sole basis for the Court's earlier dismissal of Mr. Tracy's *qui tam* claims was the distinction between a statute of repose and a statute of limitations, time barring an FCA violation of the SDWA after September 13, 2004, and rejecting the holding in *Jana*. The district court had previously stated that the applicable date to

[7] *Nelson v. Csajaghy*, 2015 U.S. Dist. LEXIS 84926, at *14 (D. Colo. June 30, 2015) (holding that, though "unpersuasive," a reasonable argument for the extension, modification or reversal of existing law was not sanctionable).

calculate the FCA ten-year limitations period was September 29, 2004, but in the most recent dismissal held that it was a statute of repose and the applicable date was September 13, 2004.

Accordingly, even according to the district court's own unaltered decision, Mr. Tracy had a reasonable argument that his *qui tam* claims were not barred by the statute of limitations, those claims were not vexatious or harassing.

C. The Supreme Court Agreed with Tracy and Struck Down *United States ex rel. Sikkenga v. Regence Bluecross Blueshield*.

Though the Tenth Circuit had previously held that a relator only has six years to bring a claim under *Sikkenga*, the Supreme Court unanimously agreed with Mr. Tracy's position, resolved the circuit split, and reversed earlier Tenth Circuit precedent. This reversal eliminates the reasoning from the prior sanctions order, that Mr. Tracy was in conflict with prior Tenth Circuit controlling law from *Sikkenga* and the six-year statute of limitations.

D. There is a reasonable, case-law-supported argument that the FCA claims accrued on the date of payment and release of retainage funds from escrow, which fell within ten years of the filing of the complaint.

In *Jana*, the government brought counterclaims under the False Claims Act against a contractor on May 17, 1995. *Jana,* at 743. The contractor had submitted vouchers to the government for payment before May 17, 1985, and the government presumably paid the vouchers after May 17, 1985. *Id*. Under these facts, the court

held that the ten-year limitations period set forth in section 3731(b) did not bar the government's claims because "the limitations periods of section 3731(b) begin to run from the date of payment." *Id.* In so ruling, the *Jana* court relied on the principle that, "'under federal law governing statutes of limitation, a cause of action accrues when all events necessary to state a claim have occurred.'" *Id.* (quoting *Chevron U.S.A., Inc. V. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991). Because the False Claims Act expressly provides for recovery of "actual damages," the *Jana* court reasoned, a claim for actual damages does not accrue until the government suffers the damages via payment of a claim. *Id.*

Like the defendant in *Jana*, EID received final payment and release of all funds held as retainer from escrow within the ten-year limitations period. Under the reasoning in *Jana* and multiple other courts that have held that the clock begins to run from the date of payment,[8] were Relator Tracy to obtain the benefit of section 3731(b)'s ten-year window, his claims would not be time-barred. It was not unreasonable for Mr. Tracy and his prior attorneys to rely on the reasoning of *Jana* and similar cases when deciding to continue to pursue the claims. Therefore, Mr. Tracy's claims were not frivolous or brought merely to harass Defendants as the

[8] *United States ex rel. McGee v. IBM Corp.*, No. 11-C-3482, 2017 U.S. Dist. LEXIS 165739, at *15 (N.D. Ill. Oct. 6, 2017).

district court held and a reversal of the attorney fees order is appropriate, even in this Court does not overrule the district court's dismissal of Mr. Tracy's claim.

STATEMENT REGARDING ORAL ARGUMENT

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

CONCLUSION

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

DATED this 4th day of February, 2022.

PRICE PARKINSON & KERR, PLLC

/s/ Alan Dunaway
Jason M. Kerr
Alan W. Dunaway

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Date: February 4, 2022 *<u>/s/ Alan Dunaway</u>*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF OF APPELLANT** and the **APPELLANT'S APPENDIX** was sent to all counsel of record, by way of the Court's CM/ECF Filing System. To my knowledge, all counsel of record are registered users of this Court's CM/ECF Filing System, therefore, no further service is required under 10th Cir. R. 25.4:

Date: February 4, 2022 *<u>/s/ Alan Dunaway</u>*

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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

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

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

Date: February 4, 2022 *<u>/s/ Alan Dunaway</u>*

Attachment 1

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U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.,* Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS** Case No. 2:14-cv-00701-JNP District Judge Jill N. Parrish

INTRODUCTION

Before the court are three motions to dismiss (ECF Nos. 281, 282, 283) filed by Carollo Engineers, Inc., Emigration Improvement District, Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Lynn Hales, Eric Hawkes, and Steve Creamer (collectively "Defendants"). Relator Mark Tracy ("Tracy") brings this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733, against 22 named defendants and 145 unnamed "Doe" defendants.[1] The above-named defendants move to dismiss Tracy's sole surviving claim. For the reasons set forth below, the court GRANTS Defendants' motions.

[1] The twenty-two named defendants are Emigration Improvement District; Barnett Intermountain Water Consulting; Carollo Engineers, Inc.; Aqua Environmental Services, Inc.; Aqua Engineering, Inc.; R. Steve Creamer; Fred A. Smolka; Michael Hughes; Mark Stevens; David Bradford; Lynn Hales; Eric Hawkes; Don A. Barnett; Joe Smolka; Ronald R. Rash; Kenneth Wilde; Michael B. Georgeson; Kevin W. Brown; Robert Rousselle; Larry Hall; The Boyer Company, L.C.; and City Development, Inc.

BACKGROUND AND PROCEDURAL HISTORY

Defendant Emigration Improvement District (the "District") is a special service district organized under the laws of the State of Utah. The District was created to provide water and sewer services to the residents of Emigration Canyon, a township in Salt Lake County, Utah. The District has the power to issue bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon.

On September 29, 2004, the District received the final disbursement of a $1.846 million loan. The loan came from Utah's Drinking Water State Revolving Fund, which uses federal funds to finance the construction of water systems for drinking or culinary water. Importantly, the District had submitted its last claim for payment 16 days earlier on September 13, 2004.

Tracy filed his initial complaint on September 26, 2014. His current complaint, the third amended complaint, alleges two causes of action under the FCA. First, he alleges that the District and its co-conspirators made false statements that induced the Government to disburse the proceeds of the $1.846 million loan. Second, he alleges that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government.

On June 22, 2018, the court dismissed both of Tracy's claims. It dismissed the first because it concluded that it was time-barred. In dismissing Tracy's first claim, the court applied Tenth Circuit precedent that relator-initiated FCA suits are subject to the six-year repose period found in 31 U.S.C. § 3731(b)(1), not the ten-year repose period found in 31 U.S.C. § 3731(b)(2). *See United*

Tracy voluntarily dismissed his claims against Aqua Environmental Services, Inc.; Aqua Engineering, Inc.; Robert Rouselle; and Larry Hall. And Tracy has not served The Boyer Company, L.C. and City Development, Inc.

States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 725 (10th Cir. 2006), *abrogated by Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019). Because Tracy initiated his suit long after the six-year period had expired, the court dismissed it as time-barred, but did not evaluate the timeliness of his claim relative to the ten-year period. The court dismissed Tracy's second cause of action because it contained allegations that were both conclusory and contradicted by evidence that Tracy incorporated by reference into his third amended complaint.

Tracy appealed only the dismissal of his first claim to the Tenth Circuit Court of Appeals. While that appeal was pending, the Supreme Court agreed to hear *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019), a case involving the statutory repose periods contained in the FCA. The Tenth Circuit stayed Tracy's appeal pending the outcome of *Cochise.* In May 2019, the Supreme Court issued its decision in *Cochise*, abrogating the Tenth Circuit's decision in *Sikkenga*, which, as explained above, this court had applied in dismissing Tracy's first claim. In *Cochise*, the Supreme Court ruled that FCA actions initiated by private relators are subject to the ten-year repose period found in 31 U.S.C. § 3731(b)(2), even where the government declines to intervene (as is the case here). 139 S. Ct. at 1511–14.

In light of the *Cochise* decision, the Tenth Circuit vacated this court's dismissal of Tracy's first claim. It stated:

> [T]he district court did not evaluate the timeliness of Tracy's complaint under § 3731(b)(2) because at the time of its decision, it was bound by *Sikkenga*. And in so doing, it only assumed without deciding that September 29, 2004, was the "the last possible date" that an FCA violation could have occurred. 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 10 years after the date on which the violation [wa]s committed." § 3731(b)(2).

United States ex. rel. Tracy v. Emigration Improvement Dist., 804 F. App'x 905, 909 (10th Cir. Feb. 28, 2020). Upon remand, Defendants filed the present motions to dismiss, asking the court to dismiss Tracy's remaining claim under Federal Rule of Civil Procedure 12(b)(6). Defendants argue that Tracy's claim is time-barred by the FCA's ten-year repose period. [2]

LEGAL STANDARD

Dismissal of a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is appropriate when the plaintiff fails to state a claim upon which relief can be granted. When considering a motion to dismiss for failure to state a claim, a court "accept[s] as true all well-pleaded factual allegations in the complaint and view[s] them in the light most favorable to the plaintiff." *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The complaint must allege more than labels or legal conclusions and its factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Moreover, "[a] complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007). "If the allegations, for example, show that relief is barred by the statute of limitations, the complaint is subject to dismissal for failure to state a claim . . . ." *Id.*; *see also Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) ("While the statute of limitations is an affirmative defense,

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[2] Defendants offer other arguments why Tracy's claim should be dismissed, but the court need not reach them because it concludes that the claim is time-barred.

when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute.").

DISCUSSION

Defendants move to dismiss Tracy's sole surviving claim on the ground that it is barred by Section 3731(b)(2)'s ten-year statute of repose. They argue that the relevant date for determining when the statute begins to run is the last date on which Defendants submitted a false claim to the government. Here, that date is September 13, 2004, the date on which the District submitted to the government its final request for payment. *See* ECF No. 281-1 at 4. Because Tracy filed suit on September 26, 2014, Defendants argue that his claim is time-barred. Tracy responds that the repose period does not begin to run until the government actually suffers damages—in other words, the date on which the government made the payment induced by the false claim. Because the government did not remit its final payment to the District until September 29, 2004, he argues that this action was timely filed.

The survival of Tracy's claim turns on whether Section 3731(b)(2)'s ten-year period begins to run on the date the District made its last claim for payment or on the date the government last remitted payment to the District. In other words, the survival of the claim depends on whether Section 3731(b)(2) is a statute of repose or a statute of limitations. As the court explained previously, "[a] statute of repose 'bars[s] any suit that is brought after a specified time since the defendant acted . . . , even if this period ends before the plaintiff has suffered resulting injury.'" ECF No. 226 at 6 n.5 (quoting *CTS Corp. v Waldburger*, 573 U.S. 1, 8 (2014) (citation omitted) (second alteration in original)). In other words, a statute of repose creates a limit that "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *CTS Corp.*, 573 U.S. at 8. In contrast, a statute of limitations does not

begin to run until a claim accrues. *Id.* at 7. A claim accrues "when the injury occurred or was discovered." *Id.* at 8 (citation omitted). Further, statues of limitations are subject to equitable tolling where some hardship prevents a plaintiff from bringing a claim; statutes of repose are not. *Id.* at 9–10.

In short, courts calculate statutes of repose and statutes of limitations based on different events. A statute of repose begins to run at the time the defendant commits the last relevant culpable act (here, the request for payment on September 13, 2004), whereas a statute of limitations begins to run at the time the plaintiff last suffers injury (here, the final payment issued by the federal government on September 29, 2004). If the ten-year period in Section 3731(b)(2) is a statute of repose, Tracy's surviving claim is time-barred and must be dismissed. If, however, the period is a statute of limitations, then his claim is not time-barred.

Based on the plain language of the statute, the weight of the authority, including Supreme Court precedent, and on Tracy's own prior argument in this matter, the court concludes that Section 3731(b)(2) creates a statute of repose and not a statute of limitations. 31 U.S.C. § 3731(b) provides:

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

(emphasis added). The plain language of the statute states that the ten-year period begins to run on the date when the "violation is committed." This is opposed to the three-year period described immediately prior, which only begins to run when "facts material to the right of action" are known to the government. The ten-year period places an upper limit on the otherwise applicable

limitations period, clearly indicating that the ten-year limit is a repose provision. And the term "violation," plainly read, refers to the presentation of the false claim to the government, not to the government's payment to the false claimant. *See* 31 U.S.C. § 3729(a)(1)(A) (explaining that any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" is liable under the FCA). Because the ten-year period begins to run on the date the violation occurred and because "violation" refers to the culpable act of the defendant, the court concludes that the ten-year period is a statute of repose.

This conclusion is also consistent with the Supreme Court's observation in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). In that case, the Supreme Court stated that Section 3731(b)(1) "t[ies] the start of the time limit to 'the date on which the violation of section 3729 is committed'"; "[i]n other words the time limit begins to run on the date the defendant submitted a false claim for payment." *Id.* While this statement is dicta, it indicates that the Supreme Court interprets the ten-year period as beginning to run at the time of the violation and not at the time of the government's payment. The Tenth Circuit has similarly referred to the ten-year period as a statute of repose, albeit in dicta. *See Sikkenga*, 472 F.3d at 723.[3]

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[3] The Tenth Circuit has not directly confronted the issue at hand, but it has provided some indication that it reads the ten-year period in Section 3731(b)(2) as beginning to run when the claim for payment is submitted. *See Armstrong v. Wyo. Dep't. of Env't Quality*, 674 Fed. App'x. 842, 845–46 (10th Cir. 2017) ("[The relator] contends that the district court erred in concluding that his FCA claim is time-barred. In support, he points to his allegation that defendants accepted federal funds as late as 2015. But [the relator] doesn'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." (citing 31 U.S.C. § 3129(a)(1)(A))) (emphasis added). Other federal circuit courts recognize that the FCA attaches liability to the claim for payment, not the government's wrongful payment. *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)

And Tracy himself has previously argued that this is the correct interpretation of Section 3731. In a memorandum filed on January 20, 2016 (ECF No. 88), Tracy stated, "Based upon the plain language of the statute, when a 'violation' occurs determines when the statute of limitations begins, and not the 'payment.'" *See* ECF No. 88 at 7. Tracy may not argue for one purpose that the statutory period begins to run at the time of the violation and for another purpose that it begins to run at the time of payment.

In contrast to his prior position, Tracy now argues that the limitations period begins to run from the date of payment. In so arguing, he relies on *Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998). The *Jana* court reasoned that because Section 3729 provides that the false claimant may be liable for civil penalties and for actual damages, the ten-year period begins to run at different times depending on what damages the United states (or relator) is seeking. *Id.* at 743. Where a suit seeks only civil penalties, the period begins to run on the date the false claim for payment was submitted. *Id.* Where a suit seeks actual damages, however, the period begins to run from the date the government makes payment because "all the events necessary to state the government's claim do not occur until the government has made full payment on the claim, since the government does not incur actual damages until then." *Id.* Relying on *Jana*, Tracy argues that because he seeks

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("[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (same). Other federal district courts faced with this issue have concluded that the period begins to run at the time the claim for payment was submitted. *See, e.g.*, *United States ex rel. Bauchwitz v. Holloman*, 671 F. Supp. 2d 674, 687–88 (E.D. Pa. 2009); *United States ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 816 (E.D. Tex. 2008). Thus, the weight of the authority supports the conclusion that the ten-year period is one of repose.

actual damages, Section 3731(b)(2)'s ten-year period did not begin to run until the government made payment to the District on September 29, 2004.

But this court is not bound by the *Jana* court's decision, nor is it persuaded by its reasoning. As explained by another federal court faced with this issue:

> In effect, [the *Jana* court] 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 FCA 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. . .
>
> Waiting for damages to start accumulating before starting the FCA clock ticking is inconsistent with established legal principles and the purpose of the FCA.

United States ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674, 688 (E.D. Pa. 2009).[4] Moreover, *Jana* was decided before the Supreme Court's decision in *Graham County Soil*, which stated, albeit in dicta, that the relevant date is the date on which the false claim is submitted. 545 U.S. at 415. The court therefore concludes that Tracy's surviving claim is time-barred and must be dismissed.[5]

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[4] In addition, the *Jana* court acknowledged that Section 3731(b)(2) creates a statute of repose. 41 Fed. Cl. at 741. This presents a conflict with its reasoning because, as explained above, a statute of repose focuses on the date of the last culpable act by the defendant, not on the date the claim accrues. *CTS Corp.*, 573 U.S. at 8.

[5] Tracy also argues that this court agreed with his interpretation of Section 3731(b)(2) because in its prior decision dismissing this action, it stated that "the alleged violations occurred almost ten years before [ ] Tracy filed suit." ECF No. 226 at 1. Tracy's characterization of this court's prior statement is wrong for at least two reasons. First, in its prior decision, this court recognized, without explicitly holding, that a violation of the FCA occurs at the time a defendant makes a false

Finally, Tracy requests that his claim be denied without prejudice. He argues that the District has not paid back the full loan amount, and that it may therefore default in the future. If this happens, Tracy contends, there could be a renewed basis for a *qui tam* action. But this argument fails in light of the court's holding that the ten-year repose period is measured from the time the District submitted its last claim for payment, not from the time the government incurs damages. Any future default by the District is irrelevant to the court's determination because it cannot change the fact that Tracy brought this action more than ten years after the District submitted the last claim for payment submitted by the District. Because granting leave to amend would be "futile," the court dismisses Tracy's claim with prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim . . . and granting leave to amend would be futile.").

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statement to the government. *See id.* at 7. Second, the court's observation that the violation occurred "almost" ten years before Tracy filed suit was made in reliance on what amounted to a misrepresentation by Tracy. Tracy attached to his Third Amended Complaint a letter dated September 29, 2004, which was prepared by the Utah Department of Environmental Quality (not the District) and entitled "Payment Request for Construction of SRF Project." *See* ECF No. 204-1 at 2. But that letter was not a request for payment by the District; rather, the request for payment was apparently attached to the letter and was dated over two weeks earlier on September 13, 2004. *Id.* ("Attached is the final Pay Request (#6) for the [District's] project."). Tracy either strategically or recklessly failed to include the attachment to the letter, leaving the court with the mistaken and unquestionably incorrect impression that the District's final request for payment had occurred almost ten years before Tracy filed suit. The District did attach the final payment request, dated September 13, 2004, to its Motion to Dismiss. *See* ECF No. 282-1 at 2–5; *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (explaining that when evaluation Rule 12(b)(6) motions to dismiss, district courts "may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." (citation omitted)).

CONCLUSION AND ORDER

For the foregoing reasons, the court GRANTS Defendants' motions to dismiss. Tracy's sole surviving claim is DISMISSED WITH PREJUDICE as to the moving Defendants (Carollo Engineers, Inc., Emigration Improvement District, Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Lynn Hales, Eric Hawkes, and Steve Creamer).

Tracy is HEREBY ORDERED to show cause why his third amended complaint should not be dismissed with prejudice as to the remaining defendants: Barnett Intermountain Water Consulting; Don A. Barnett; Joe Smolka; Ronald R. Rash; Kenneth Wilde; Michael B. Georgeson; Kevin W. Brown; The Boyer Company, L.C.; and City Development, Inc. Alternatively, Tracy may voluntarily dismiss his remaining claims. Tracy shall respond accordingly on or before **April 14, 2021.**

DATED March 30, 2021.

BY THE COURT

Jill N. Parrish
United States District Court Judge

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Sent: Tuesday, March 30, 2021 12:15 PM
To: ecf_notice@utd.uscourts.gov
Subject: Activity in Case 2:14-cv-00701-JNP-JCB USA ex rel Mark Christopher Tracy v. Emigration Improvement District et al Order on Motion to Dismiss for Failure to State a Claim

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District of Utah

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Case Name: USA ex rel Mark Christopher Tracy v. Emigration Improvement District et al
Case Number: 2:14-cv-00701-JNP-JCB
Filer:
Document Number: 298

Docket Text:
MEMORANDUM DECISION granting [281] Motion to Dismiss for Failure to State a Claim ; granting [282] Motion to Dismiss ; granting [283] Motion to Dismiss for Failure to State a Claim - all with prejudice. Tracy is HEREBY ORDERED to show cause why his third amended complaint should not be dismissed with prejudice as to the remaining defendants: Barnett Intermountain Water Consulting; Don A. Barnett; Joe Smolka; Ronald R. Rash; Kenneth Wilde; Michael B. Georgeson; Kevin W. Brown; The Boyer Company, L.C.; and City Development, Inc. Alternatively, Tracy may voluntarily dismiss his remaining claims. Tracy shall respond accordingly on or before April 14, 2021. Signed by Judge Jill N. Parrish on 3/30/21. (alf)

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Attachment 2

FILED
2021 APR 14
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**ORDER DISMISSING WITH PREJUDICE RELATOR'S CLAIMS AGAINST REMAINING DEFENDANTS** Case No. 2:14-cv-00701-JNP District Judge Jill N. Parrish

In its prior Memorandum Decision and Order (ECF No. 300), the court dismissed all claims brought by Relator Mark Christopher Tracy ("Tracy" or "Relator") against Defendants Carollo Engineers, Inc., Emigration Improvement District, Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Lynn Hales, Eric Hawkes, and Steve Creamer.

The court ordered Tracy to show cause why his claims against the remaining Defendants, Barnett Intermountain Water Consulting; Don A. Barnett; Joe Smolka; Ronald R. Rash; Kenneth Wilde; Michael B. Georgeson; Kevin W. Brown; The Boyer Company, L.C.; and City Development, Inc.; should not also be dismissed with prejudice.

On April 14, 2021, Tracy responded and conceded that his claims against the remaining Defendants should be dismissed with prejudice. Accordingly, the court DISMISSES WITH PREJUDICE Tracy's claims against all remaining Defendants.

DATED April 14, 2021.

BY THE COURT

Jill N. Parrish
United States District Court Judge

Attachment 3

FILED
2021 APR 14
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**JUDGMENT** Case No. 2:14-cv-00701-JNP District Judge Jill N. Parrish

IT IS ORDERED AND ADJUDGED that Relator Mark Christopher Tracy's action is dismissed with prejudice.

DATED April 14, 2021.

BY THE COURT:

JILL N. PARRISH
United States District Judge

Attachment 4

FILED
2021 OCT 29 AM 10:02
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS AND GRANTING DEFENDANTS' MOTION TO AMEND** Case No. 2:14-cv-701-JNP District Judge Jill N. Parrish

Defendants Emigration Improvement District ("the District"), Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka (deceased), Eric Hawkes, and Lynn Hales (collectively, "Defendants") filed a motion for attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927 against *qui tam* relator Mark Christopher Tracy ("Tracy") and his counsel, Christensen and Jensen, P.C. ("Christensen & Jensen"). Defendants subsequently moved to amend the motion to withdraw claims against Christensen & Jensen. For the reasons stated below, the court awards attorneys' fees and costs against Tracy.

BACKGROUND AND PROCEDURAL HISTORY

The District is organized under Utah law as a special service district to provide water and sewer services to Emigration Canyon residents. The District can issue bonds, charge fees and assessments, and levy taxes on Emigration Canyon residents. The District received a $1.846 million loan from Utah's Drinking Water State Revolving Fund, which uses federal funds to

finance the construction of water systems for drinking or culinary water. The District received the final disbursement on the loan around September 2004.

Tracy, acting as a relator, filed a *qui tam* complaint against Defendants under the False Claims Act, 31 U.S.C. §§ 3729 *et seq*., on September 26, 2014. Tracy amended his complaint three times. He filed his First Amended Complaint on May 1, 2015, his Second Amended Complaint on August 18, 2015, and his Third Amended Complaint on April 16, 2018. Tracy also recorded a *lis pendens* against a portion of the District's water rights on August 20, 2015, claiming that they were the subject of the present litigation.[1] The United States declined to intervene in the matter on three separate occasions: (1) after reviewing the First Amended Complaint on May 8, 2015 (ECF No. 11); (2) after reviewing the Second Amended Complaint on November 20, 2015 (ECF No. 69); and (3) after reviewing the Third Amended Complaint on March 20, 2018 (ECF No. 199).

The final operative complaint alleged two causes of action. First, Tracy alleged that the District and its supposed co-conspirators made false statements that induced the government to disburse the proceeds of the $1.846 million loan. Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government.

On June 22, 2018, the court dismissed Tracy's Third Amended Complaint as to defendants as Smolka, Hughes, Stevens, Bradford, Hales, Hawkes, Creamar, Carollo Engineers, and the District. The court also ordered Tracy to show cause as to why the court should not also dismiss his claims as to the remaining defendants. After considering Tracy's response, the court dismissed with prejudice all remaining claims as to all remaining defendants on June 25, 2018.

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[1] On May 25, 2016, the court heard oral argument on Defendants' motion to release the *lis pendens*. The court granted the motion from the bench, ruling that the *lis pendens* was a wrongful lien and awarding statutory damages and attorneys' fees.

Following the June 22, 2018 dismissal of both claims, Tracy appealed the dismissal of his first cause of action to the Tenth Circuit. This court had dismissed Tracy's first claim as time barred, applying then-binding Tenth Circuit precedent that required this court to enforce the six-year repose period found in 31 U.S.C. § 3731(b)(1), not the ten-year repose period found in 31 U.S.C. § 3731(b)(2). *See U.S. ex rel. Tracy v. Emigration Improvement Dist.*, No. 2:14-cv-00701, 2018 WL 3111687, at *3 (D. Utah June 22, 2018) (citing *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 725 (10th Cir. 2006), *abrogated by Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507 (2019)), *vacated and remanded*, 804 F. App'x 905 (10th Cir. 2020). This court found that Tracy clearly failed to meet the six-year period but did not evaluate the timeliness of his claim relative to the ten-year period. While Tracy's appeal was pending in the Tenth Circuit, the Supreme Court ruled that False Claims Act actions initiated by private relators are subject to the ten-year repose period found in 31 U.S.C. § 3731(b)(2), even where the government declines to intervene (as was the case in Tracy's lawsuit). *Cochise*, 139 S.Ct. at 1511-14. In light of the *Cochise* decision, the Tenth Circuit vacated this court's dismissal of Tracy's first claim and remanded the case for this court to determine whether Tracy filed his complaint within the ten-year repose period. On March 30, 2021, this court found that Tracy did not meet the ten-year repose period and again dismissed his complaint.

The court has previously awarded attorneys' fees and costs against both Tracy and Christensen & Jensen. On March 20, 2017, the court entered a joint and several judgment against Christensen & Jensen and Tracy for Defendants' attorneys' fees and costs in the amount of $29,936 related to the wrongfully filed *lis pendens*. On February 5, 2019, after dismissing both of Tracy's claims, the court awarded attorneys' fees and costs in the amount of $92,665 against Tracy ("Initial Attorneys' Fees Order"). The court declined to hold Christensen & Jensen jointly and severally

liable because it found no evidence that Christensen & Jensen had acted unreasonably or vexatiously beyond the wrongfully filed *lis pendens*, for which it had already been billed pursuant to the court's March 20, 2017 order. When the Tenth Circuit vacated this court's June 22, 2018 dismissal order, it also vacated the court's Initial Attorneys' Fees Order and remanded for this court to reconsider whether Defendants prevailed and thus were entitled to attorneys' fees and costs.

After the court found that Defendants indeed prevailed on remand, Defendants filed another motion for attorneys' fees and costs against Tracy and Christensen & Jensen on April 7, 2021. Following the motion, the parties began to discuss a potential settlement conference. Tracy declined to participate. On June 29, 2021, Christensen & Jensen and Defendants reached a settlement wherein Christensen & Jensen paid the Defendants $87,500 in consideration for releasing it from all suits and obligations related to its representation of Tracy. Following Tracy's motion for access to the settlement agreement, Christensen & Jensen filed the written settlement agreement with the court.

In light of the settlement with Christensen & Jensen, Defendants filed a motion to amend their motion for attorneys' fees and costs. The motion to amend sought two changes to the requested relief. First, Defendants moved to withdraw their claims against Christensen & Jensen. Second, Defendants moved to release Tracy from any fees and costs awarded by the Court for the period of time between the court's February 5, 2019 order granting in part and denying in part Defendants' motion for attorneys' fees and costs (ECF No. 243) and the court's order granting Defendants' motion to dismiss on March 30, 2021 (ECF No. 298) ("the Release Period"). On July

19, 2021, the court acknowledged that Defendants had withdrawn their claim for attorneys' fees as to Christensen & Jensen. [2]

LEGAL STANDARD

Although Defendants' motion for attorneys' fees and costs cites both 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927, the motion as to Tracy relies solely on 31 U.S.C. § 3730(d)(4). Therefore, the court relies only on 31 U.S.C. § 3730(d)(4) in resolving Defendants' motion. Pursuant to 31 U.S.C. § 3730(d)(4), a court may award attorneys' fees to Defendants if (1) the government elects not to proceed with the action; (2) the Defendants prevail; and (3) the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The False Claims Act "does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment,'" but the Tenth Circuit has found that the § 3730(d)(4) standard is "analogous" to the standard applied to claims for attorneys' fees under 42 U.S.C. § 1988. *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004).

ANALYSIS

I. BASIS FOR AWARD OF ATTORNEYS' FEES AGAINST TRACY

In this case, the government declined to intervene three times (ECF Nos. 11, 69, 199) and Defendants prevailed (ECF No. 298). Therefore, the only element in dispute is whether Tracy's action was clearly frivolous, vexatious, or brought primarily for purposes of harassment. Although courts often analyze all three elements of the third prong, each element can independently sustain an award of attorney's fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017-18

[2] Tracy also filed an objection to the court's docket text order, which stated that the court would consider Defendants' motion for attorneys' fees only insofar as it sought fees from Tracy, as specified in Defendants' motion to amend. Tracy objected that he was unaware of the settlement terms between Defendants and Christensen & Jensen. Because the settlement is now filed on the docket, the court finds this objection to be moot.

(10th Cir. 2017) (upholding attorneys' fees solely because relator's claim was clearly frivolous without reaching the two other elements).

The court previously found that Tracy's behavior satisfied all three elements. ECF No. 243. And, when remanding the case, the Tenth Circuit noted that if this court determined that Defendants prevailed, this court "may again find Tracy's claims clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *U.S. ex rel. Tracy v. Emigration Improvement Dist.*, 804 F. App'x 905, 909 (10th Cir. 2020) (citation and alteration omitted). For the reasons stated below, the court so finds.

A. Clearly Vexatious

Vexatious refers to actions that are taken "without reasonable or probable cause or excuse." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999) (quoting *Vexatious*, BLACK'S LAW DICTIONARY 1559 (7th ed. 1999)). The court need not find bad faith on the part of the plaintiff-relator in order to find vexatiousness. *See Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 421 (1978) ("[T]he term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."). In its order on Defendants' first motion for attorneys' fees and costs, this court found that Tracy's actions related to this litigation were vexatious. *See* ECF No. 243. Subsequent litigation has not disturbed the basis for the court's decision in that order.

On August 20, 2015, Tracy filed a *lis pendens* against certain water rights in the district that Tracy claimed were the subject of the present lawsuit. Tracy's wrongful *lis pendens* led the court to find that Tracy's behavior was clearly vexatious. As the court previously wrote, "there was no good faith basis for suggesting that Tracy's lawsuit for damages under the False Claims Act had any bearing at all on the ownership of Defendants' water rights." ECF No. 243, p. 11.

And, when pressed, Tracy's counsel could not identify a single case supporting the *lis pendens* nor any language in Tracy's prayer for relief that would affect the District's property interest in the subject matter of the *lis pendens*. Hr'g Mot. Release Lis Pendens Tr. 21:1-25:8. Despite the fact that Tracy made no serious effort to defend filing the lien, he continued to send out letters to clients referencing the *lis pendens*, even after the government declined to intervene in this case. *Id.* at 36:9-40:8. The court's finding that the *lis pendens* was unreasonable and without foundation stands independent from any disagreements between the parties as to whether the lawsuit as a whole was frivolous because of the ten-year repose period. As such, the court found Tracy's behavior clearly vexatious when it first occurred, and no subsequent developments change that finding.

B. Brought Primarily for the Purposes of Harassment

In its original order on attorneys' fees, the court also found that Tracy's actions indicated bad faith and a clear intent to harass. *U.S. ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Grp., Inc.*, 422 F. Supp. 2d 225, 238 n.19 (D.D.C. 2006) ("[T]he word 'harassment' suggests bad faith on the part of the plaintiff . . . ."). The court noted that Tracy wrote letters and emails to the residents of Emigration Canyon repeating specious allegations he made in his filings with the court. For example, Tracy used allegations he levied in court against two of the individual defendants in one of his letters at a time when the two defendants were running for reelection to the District's board. Tracy's letters to residents usually immediately followed new filings with the court, further bolstering the court's view that Tracy acted in bad faith in pursuing this lawsuit. Tracy's communications led the court to conclude that Tracy brought this case to air personal grievances against Defendants in pursuit of his own ulterior motives, rather than to seek money damages for the United States. *See U.S. ex rel. Herbert v. Nat'l Acad. of Scis.*, No. Civ. A. 90-2568, 1992 WL 247587, at *9 (D.D.C. Sept. 15, 1992) ("Plaintiff uses the *qui* tam provisions for

the purposes of harassment . . . [when] the Plaintiff has done little more than dress up his personal grievance[s] . . . as a *qui tam* claim."). Again, none of the subsequent developments in this case alters the court's conclusion regarding Tracy's harassing behavior.

Tellingly, although Tracy argues vehemently that his claims were not frivolous, he never addresses the court's reasoning in the Initial Attorneys' Fees Order that he acted vexatiously and with the primary purpose to harass by filing a wrongful *lis pendens* and using the present lawsuit to air his own personal grievances. But the court need only find that a party acted vexatiously, with the purpose to harass, *or* frivolously to award attorneys' fees and costs. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017-18 (10th Cir. 2017). Thus, having found that Tracy's actions were both clearly vexatious and brought for the purpose of harassment, the court need not reach the question of whether Tracy's claim was clearly frivolous.

II. REASONABLE ATTORNEYS' FEES

Under 31 U.S.C. § 3730(d)(4) any fees awarded to Defendants must be "reasonable." This court has already determined that Defendants are entitled to $92,665 in attorneys' fees and costs for expenses related to this litigation prior to the court's Initial Attorneys' Fees Order on February 5, 2019. And the court need not gather evidence to determine the proper amount of attorneys' fees for expenses following the Initial Attorneys' Fees Order because Defendants and Christensen & Jensen have reached a settlement agreement that appears to roughly cover Defendants' fees for that period of time and have released Tracy from any fees and costs incurred by Defendants during that period.

Awarding $92,665 in attorneys' fees and costs against Tracy raises no concern about double recovery for Defendants. Defendants estimate that they incurred approximately $100,000 in fees and costs related to the litigation after the initial attorneys' fees order on February 5, 2019.

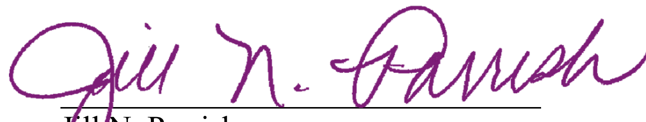
Therefore, Defendants would be entitled to approximately $193,000 in fees and costs—the costs adjudicated by the court in its Initial Attorneys' Fees Order plus the costs accrued by Defendants following that order. In consideration for an $87,500 settlement payment from Christensen & Jensen, Defendants released Tracy from any obligations for the period following the court's Initial Attorneys' Fees Order. Thus, Christensen & Jensen's payment went towards the Defendants' fees and costs that postdated the Initial Attorneys' Fees Order whereas the present judgment against Tracy accounts for Defendants' reasonable fees and costs that preceded the Initial Attorneys' Fees Order.

ORDER

The court GRANTS Defendants' motion for an award of attorneys' fees and costs against relator Tracy pursuant to 31 U.S.C. § 3730(d)(4) in the amount of $92,665.00 for 384.8 hours billed. The court DENIES the motion to hold plaintiff's counsel jointly and severally liable and instead GRANTS Defendants' motion to amend the motion for attorneys' fees and costs to withdraw all claims against Christensen & Jensen and to release Tracy from any claims for fees incurred between February 5, 2019, and March 30, 2021. The court shall enter Judgment for Defendants against Mark Christopher Tracy in the amount of $92,665.

Signed October 29, 2021.

BY THE COURT



Jill N. Parrish
United States District Court Judge