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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, vs. EMIGRATION IMPROVEMENT DISTRICT, a Utah Special Service District; CAROLLO ENGINEERS Inc., a California professional corporation; AQUA ENVIRONMENTAL SERVICES, INC., a Utah corporation; AQUA ENGINEERING, INC., a Utah corporation, R. STEVE CREAMER, an individual; FRED A. SMOLKA, an individual; MICHAEL HUGHES (AKA MICHAEL SCOTT HUGHES) an individual; MARK STEVENS, an individual; DAVID BRADFORD, an individual; LYNN HALES, an individual; ERIC HAWKES, an individual; DON A. BARNETT, an individual; JOE SMOLKA, an individual, RONALD R. RASH, an individual; KENNETH WILDE, an individual; MICHAEL B. GEORGESON, an individual; KEVIN W. BROWN, an individual; ROBERT ROUSSELLE, an individual; LARRY HALL, an individual; and DOES 1-145, Defendants.	**AMENDED MOTION TO DISMISS THIRD AMENDED COMPLAINT ON BEHALF OF DEFENDANTS EMIGRATION IMPROVEMENT DISTRICT, FRED A. SMOLKA, MICHAEL HUGHES, MARK STEVENS, DAVID BRADFORD, LYNN HALES AND ERIC HAWKES** **Case No.: 2:14-cv-00701 JNP-JCB** **Judge: Jill N. Parrish** **Magistrate Judge: Jared C. Bennett**

Defendants Emigration Improvement District ("**EID**"), Michael Hughes ("**Hughes**"), Mark Stevens ("**Stevens**"), David Bradford ("**Bradford**"), Fred R. Smolka (deceased) ("**Smolka**"), Lynn Hales ("**Hales**") and Eric Hawkes ("**Hawkes**") (collectively "**Defendants**") through counsel, submit this Amended Motion to Dismiss the Third Amended Complaint (the "**Complaint**" [Docket No. 204] filed by *qui tam* relator, Mark Christopher Tracy ("**Tracy**").

RELIEF SOUGHT AND GROUNDS FOR THE MOTION

Defendants move the Court, pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), for an Order dismissing the Complaint with prejudice against the Defendants for all the following reasons[1]:

1) The First Cause of Action is barred by a ten-year statute of repose found at 31 U.S.C. § 3731(b)(1);
2) The First Cause of Action is barred by the public disclosure bar;
3) The First Cause of Action fails to satisfy the False Claim Act's scienter requirements; and
4) The First Cause of Action fails to allege the purported false claims or purported material false statements with particularly as required by Fed. R. Civ. P. 9(b).

INTRODUCTION

This case has been pending for approximately six years, and Tracy's alleged facts and legal theory have morphed substantially over the years. Nevertheless, Tracy's claims remain completely frivolous; and clearly barred by the statute of repose, the public disclosure doctrine, and the undisputed facts.

[1] In accordance with footnote 1 of the Appellate Order, Tracy did not appeal his Second Cause of Action pursuant to § 3729(a)(1)(G), and that cause of action has therefore been dismissed. Accordingly, this Motion only addresses Tracy's First Cause of Action.

EID is a limited purpose local district that provides water service to residents in Emigration Canyon. EID is governed by a three-member board of trustees who are elected by residents within EID's boundaries. Defendants Hughes, Stevens, Bradford, Hales, Smolka (deceased) and Hawkes are current or former board members or managers of EID. In contrast, Tracy is not a resident in Emigration Canyon, and Tracy never had any direct involvement with EID or any of the defendants in this matter prior to filing this action.

Tracy filed this *qui tam* case against Defendants pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "**FCA**") on September 26, 2014. Tracy's claims are based on a lending transaction (referred to in the Complaint as the "loan") pursuant to which EID issued $1,400,000 worth of bonds[2] that were purchased by the Utah Division of Drinking Water ("**DDW**") to construct improvements to its public drinking water system.

Amazingly, although the Complaint is over 90 pages, and Tracy has presumably obtained all the loan documents, the Third Amended Complaint does not make any allegations regarding the actual date of the bond closing, or any of the actual loan closing documents. The Court has previously admitted the loan documents at the request of Defendants, which loan documents show that the loan closed in November 2002. *See Motion to Dismiss Third Amended Complaint* [Docket No. 207], Exhibit A. In addition, as set forth below, EID's final Pay Request #6 was made on September 13, 2004, outside the ten-year statute of repose.

Tracy's First Cause of Action (which is his only remaining cause of action) is based on the theory that Defendants presented or caused to be presented a false or fraudulent claim to an officer or employee of the United States Government – or to a contractor, grantee, or other recipient – in order to induce disbursement of $1.846 million in federal funds. Complaint, ¶ 502. The plain language of the FCA clearly states that the cause of action accrues on the date of the violation of section 3729, which is the date the alleged false or fraudulent claim for payment is

[2] Tracy alleges the loans was $1,846,000, but that it contradicted by the bond documents.

presented or the false record of false statement is made. In fact, when seeking leave to file his Second Amended Complaint, Tracy argued that "[b]ased upon the plain language of the statute [31 U.S.C. § 3731(b)(1 and 2)], when a 'violation' occurs determines when the statute of limitations begins, and not the 'payment.'" *See Reply Memorandum in Support of Plaintiff's Motion for Leave to File Second Amended Complaint* [Doc. 88], p. 3.

Nevertheless, Tracy is now taking the exact opposite legal position, and arguing that the plain language of the statute states that the statute of repose begins to run at "payment." Tracy's legal position is contrary to both Tenth Circuit precedent and Supreme Court precedent. In addition, even if the Court were to accept his payment theory, for purpose of this matter the payment (i.e. the date that the government incurred actual damages) would have been in November 2002 when DDW purchased the bonds and paid the money into escrow with the Utah State Treasurer.

Tracy's claims are also barred by the public disclosure bar. In response to the Defendant's last motion for attorney fees, Tracy argued that "Mr. Tracy is an outsider, who has had to build his case via review of public documents and speaking with people who have insider knowledge." Likewise, a Speedy Memorandum prepared by Mr. Onysko in 2002 states: "I previously communicated to you that an allegation has been made by a citizen of the Emigration Improvement District that there is a secret agenda to construct excess water storage capacity in Emigration Canyon. This is allegedly for the benefit of developers who wish to promote growth in the Canyon." Based on Tracy's admission and the fact that the alleged conspiracy had already been communicated to DDW, Tracy's claim is barred by the public disclosure bar.

Finally, the Complaint fails to satisfy the FCA's scienter requirement and Fed. R. Civ. P. 9(b) requirement to plead fraud with particularity.

For these reasons, Defendants respectfully request that the Court grant the Motion to Dismiss, dismiss all causes of action in the Complaint against Defendants with prejudice, and grant fees against Mr. Tracy and his attorneys in the soon to be re-filed motion for fees.

ARGUMENT

I. TRACY'S FIRST CAUSE OF ACTION IS BARRED BY THE TEN-YEAR STATUTE OF REPOSE.

A. The Ten-Year Statute of Repose Runs from the Date of Submission of a False Claim or False Statement, Not the Date of Payment.

As recently noted by this Court, the "*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., No*. 2:15-CV-119-JNP-EJF, 2018 WL 1614336, at *18 (D. Utah Mar. 30, 2018); *see also Harrison v. Westinghouse Savannah* River Co., 176 F.3d 776, 785 (4th Cir.1999) (*quoting United States v. Rivera*, 55 F.3d 703, 709 (1st Cir.1995) ("the statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment."). The term "claim" is defined in the FCA to mean any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that is presented to an officer, employee, or agent of the United States . . .. 31 U.S.C. § 3729(b)(2).

Tracy attached to the Complaint a letter from DDW to the Utah State Treasurer authorizing the final release of all retainage from the escrow account (the "**Retainage Release Letter**"). *See Complaint*, Exhibit A. The first sentence of the Retainage Release Letter states: "Attached is the final Pay Request (#6) for the Emigration Improvement District project." Tracy

conveniently failed to include the full document with Pay Request #6, but a copy is attached hereto as Exhibit A. Pay Request #6 shows that the final request for payment by EID was made on September 13, 2004, outside the ten-year statute of repose. Because EID did not submit a false claim or make a false statement within the ten-year statute of response, Tracy instead argues that "if Mr. Tracy's claims accrued upon distribution of the $1.846 million and if Mr. Tracy can avail himself of the ten-year limitations period, at least one payment occurred within the statutory window." *Memorandum in Opposition to Defendant's Motion to Dismiss* [Docket No. 211], p. 16,

However, in contrast to Tracy's argument, the False Claims Act's statute of repose is triggered on "the date on which the violation of section 3729 is committed" not the date of payment. *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415–16 (2005). In *Graham County*, the Supreme Court considered whether § 3731(b)(1)'s six-year limitations period applied to an employee's retaliation claim brought under § 3730(h). In addressing that issue, the Court stated that § 3731(b)(1)'s limitations period was triggered by the defendant's submission of a false claim. It stated, "In other words, the time limit [under § 3731(b)(1)] begins to run on the date the defendant submitted a false claim for payment." *Id.*

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

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

> The *Jana* court relied on dictum in *United States ex rel. Kreindler & Kreindler v. United Technologies, Corp.*, 985 F.2d 1148, 1157 (2d Cir.1993). In a discussion that was not necessary to its decision in *Kreindler*, the Second Circuit sought to correct the district court's comments with respect to the relator's continuing fraud theory. It pointed out that where there are multiple false claims in connection with a single contract, the statute of limitations for each claim runs from the date each claim accrued. Then, without analysis, it quoted the district court's holding that "the six-year limitation period of § 3731(b)(1) 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.'" *Id.* at 1157 (quoting *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2d Cir.1987)).
>
> To reconcile its conclusion with the fact that it is the false claim itself that constitutes the violation of the FCA, the *Jana* court distinguished between cases seeking civil penalties and those seeking damages. It concluded that in the former cases, the cause of action accrues upon presentation of the false claim; and, in the latter, it occurs upon payment because it is not until then that the government suffers damage. *Id.* at 743. In effect, it established two statutes of limitations, one for civil penalty cases and another for damages cases.
>
> There is no justification for importing an optional statute of limitations into the statute. Nowhere in the 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.
>
> Relying on the *Jana* decision, the government and Bauchwitz argue that until payment is made, there are no damages. Consequently, so they reason, the cause of action cannot accrue until then. This argument ignores the language of § 3731(b)(1) that refers to "the date on which the violation is committed" as the trigger date. Waiting for damages to start accumulating before starting the FCA clock ticking is inconsistent with established legal principles and the purpose of the FCA.

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

It appears the *Bauchwitz* Court had the benefit of the *Graham County* decision. Alternatively, the Court understood the clear dictate of § 3731(b)(1). Numerous other courts read § 3731(b)(1) the same way. *See U.S. ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F.

Supp. 2d 805, 816 (E.D. Tex. 2008) ("In an FCA suit, the limitations period is computed from 'the date on which the violation of [the FCA] is committed.'" (citing 31 U.S.C. § 3731(b)(1) and *Smith v. United States*, 287 F.2d 299, 303 (5th Cir. 1961)); *see also Smith*, 287 F.2d at 303 (concluding that he "violation" is the filing of a false claim); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("Some courts have asserted that there is an additional element that the United States must have suffered some damages as a result of the false or fraudulent claim. There is no requirement that the government have suffered damages as a result of the fraud." (citing, in turn, *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 827 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2nd Cir.1987), *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.*, 984 F. Supp. 374, 383 (D. Md. 1997), and *United States ex rel. Pogue v. American Healthcorp., Inc.*, 914 F. Supp. 1507, 1508–09 (M.D.Tenn.1996).

The rational in *Jana* is also contradicted the Supreme Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014). As previously noted by this Court in its *Amended Memorandum Decision and Order Granting Motion to Dismiss* [Docket No. 226], fn. 5, the Supreme Court in *CTS Corp* recognized that "[a] statute of repose 'bar[s] any suit that is brought after a specified time since the defendant acted . . . , even if this period ends before the plaintiff has suffered a resulting injury." *Id.* at 2182 ("A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit 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.").

The Tenth Circuit has recognized that the ten-year limitation period is a statute of repose. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 723

(10th Cir. 2006) ("Under this interpretation, the three year statute of limitations begins running when the relator gains knowledge of the wrongdoing, limited by the ten-year statute of repose in § 3731(b)(2)"). Accordingly, because the ten-year period is a statute of repose, the limitation period runs from the date of the alleged false or fraudulent claim and not from the date the government suffers damages (i.e. the "payment" date).

Finally, even Tracy has previously recognized that the plain language of the statute contradicts his argument and the holding in *Jana*. When seeking leave to file his Second Amended Complaint, Tracy argued that "[b]ased upon the plain language of the statute [31 U.S.C. § 3731(b)(1 and 2)], when a 'violation' occurs determines when the statute of limitations begins, and not the 'payment.'" *See Reply Memorandum in Support of Plaintiff's Motion for Leave to File Second Amended Complaint* [Doc. 88], p. 3. Tracy went on to argue that "for the purpose of Relator's First and Second Causes of Action, there must be a "false statement" made to the Government for the statute of limitations to begin and not merely a transfer of public funds." *Id*. at 4. It is difficult to imagine a more frivolous and disingenuous argument than for a party to completely reverse their interpretation of the "plain language" of a statute once their facts are proven wrong and the "plain language" of the statute no longer supports their argument.

In summary, Tracy's First Cause of Action is time barred because the statute of repose began to run at the latest on September 13, 2004 when EID submitted its final request for release of retainage from the escrow account, which was outside the ten-year statute of repose.

B. Even if the Court Ruled That the Statute of Repose Didn't Run Until the Government Incurred Damages, Tracy's First Cause of Action is Still Time Barred Because the Government Would Have Incurred Damages at the Time of the Bond Closing.

As set forth above, the plain language of the statute clearly states that the statute of repose begins to run at the time of the false claim for payment, and not when the government incurs damages (i.e. "payment"). However, even if Tracy could prevail on his payment theory, the damages in this case would have occurred in November 2002 when DDW purchased the bonds and paid the money into escrow with the Utah State Treasurer.[3]

In accordance with terms of the Escrow Agreement, once the funds were paid into escrow, the funds could only be released with approval of both DDW and EID.[4] Thus, even if this Court were to accept that the rational in *Jana*, the statute of repose would have began to run in November 2002 at the time of the bond closing; and not after the project was fully complete and the DDW authorized the final release of the retainage from the escrow account held by the Utah State Treasurer.

In summary, Tracy's First Cause of Action is time barred even if the Court finds that the statute of repose began to run at the time of payment.

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[3] As the Court may recall, in the Second Amended Complaint, Tracy specifically alleged: "Under the terms of the 2005 Bond Agreement, the statute of limitation under the False Claim Act was triggered by the bond closing on May 3, 2005." [Docket No. 77-1], ¶ 88.

[4] A copy of the Escrow Agreement is included in the bond documents that have been previously admitted by the Court. *See Motion to Dismiss Third Amended Complaint* [Docket No. 207-3], p. 12.

II. THE FIRST CAUSE OF ACTION IS BARRED BY THE PUBLIC DISCLOSURE BAR.

A qui tam suit cannot proceed if "the basis of the lawsuit" has been publicly disclosed unless the relator "establish[es] [her]self as the original source of the information." *United States ex rel. Antoon v. Cleveland Clinic Found.*, 788 F.3d 605, 614 (6th Cir. 2015). This so-called "public-disclosure bar `provides a broad sweep' and is `wide-reaching.'" *United States ex rel. Armes v. Garman*, 719 Fed.App'x 459, 462-63 (*quoting Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408, 131 S.Ct. 1885, 179 L.Ed.2d 825 (2011). In *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 766 (10th Cir. 2019), the Tenth Circuit recognized:

> The public disclosure bar aims to strike "the golden mean between" encouraging "whistle-blowing insiders with genuinely valuable information" to come forward while discouraging "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (*quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

In *Schindler Elevator Corp. v. United States ex rel. Kirk*,131 S.Ct. 1885, 1892, 179 L.Ed.2d 825 (2011), the Supreme Court recognized: “In Graham County, we rejected several arguments for construing the statute narrowly, twice emphasizing that the sole "touchstone" in the statutory text is "public disclosure." 559 U.S., at 292, 301, 130 S.Ct., at 1410, 1418.

Mr. Tracy is the epitome of the opportunistic plaintiff that has no significant information of his own to contribute. Mr. Tracy has never had any direct involvement with EID or any of other the Defendants, and Mr. Tracy’s entire case is based on public documents and minutes of EID’s public meetings. In fact, in *Plaintiff’s Memorandum in Opposition to EID’s Motion for Costs and Attorney Fees* [Docket No. 223], p. 13, Tracy acknowledged that he “is an outsider, who has had to build his case via review of public documents and speaking with people who have insider knowledge.”

Moreover, Tracy's own allegations establish the basis of his lawsuit was publicly disclosed prior to Tracy beginning his purported investigation of the claims. For example, the crux of Tracy's entire complaint is that EID constructed a "preposterously oversized" water system to benefit wealthy land developers in violation of state and federal regulations. However, Tracy was certainly not the original source of this theory. In the Complaint, Tracy alleges that "[d]uring the subsequent plan review, DDW staff engineer Steve Onysko in a memorandum dated October 18, 2002, informed Mr. Georgeson that the planned 1-million gallon Wildflower Reservoir was "preposterously oversized" beyond the 300,000 gallon capacity needed to fulfill the federal requirements and once again repeated that the Safe Drinking Water Act "prohibit[s] the use of State Revolving Funds (SFR) monies for construction of water system infrastructure for future growth." *Complaint*, ¶ 97. Thus, the "basis of the lawsuit" was already publicly disclosed.

Likewise, Mr. Onysko stated in the memorandum: "I previously communicated to you that an allegation has been made by a citizen of the Emigration Improvement District that there is a secret agenda to construct excess water storage capacity in Emigration Canyon. This is allegedly for the benefit of developers who wish to promote growth in the Canyon." Again, the fact that residents were complaining to DDW staff about this alleged "secret agenda" is indicative of the fact that is was already an issue that had been publicly disclosed.

In the *Declaration of William R. Bowen*, ¶ 15 [Docket No. 233-1], Mr. Bowen, who was a previous member of the EID's Board of Trustees, stated: "While one of the trustees, Lynn Hale, argued for the economies of scale for building the 1,000,000 gallon Wildflower Reservoir, I argued throughout the process that this was facilitating new development and was contrary to federal law and contrary to the purpose and requirements of the federal funds." In other words, not only were the theories that form the basis of Tracy's Complaint publicly disclosed, but they

were extensively argued and debated in public meeting by EID board members throughout the approval process.

Finally, in response to assertions that the water system had excess capacity that could potentially benefit future development, on November 15, 2002, DDW Director Kevin Brown, on behalf of the Drinking Water Board, provided an approval letter to EID that stated:

> The storage tank seems to have excess capacity but we understand the desire for sufficient capacity to meet any emergency that may arise with Emigration's drinking water system and to meet future demands since building additional storage would be extremely difficult given the sensitive nature of the canyon environment.
>
> . . .
>
> **Therefore, we have concluded that the plans and specifications for the subject project basically comply with Rules R309-500, 505, 510, 204, 540, 545 and 550 and they are hereby approved.**

See Exhibit B.[5] (emphasis added).

In summary, Mr. Tracy has utilized public documents and EID's public meeting minutes to compile a Complaint that simply rehashes issues that were raised and publicly debated when EID was applying for the loan. None of the issues raised by Mr. Tracy are novel or new; and Mr. Tracy has no personal or insider knowledge of any of the issues. Accordingly, the Complaint is barred by the public disclosure bar.

[5] Tracy references the letter in paragraph 76 of the Complaint, which states: "Mr. Brown subsequently approved issuance of the $1.846 million loan, despite the fact that Environmental Protection Agency Rule 62-552.370 provided for construction grants only for "Financially Disadvantaged Communities" and not the multi-million dollar homes of Emigration Oaks, Young Oak, Pinecrest PUD and Killyon Canyon. EID through Carollo Engineering certified successful project completion on September 2004."

III. THE FIRST CAUSE OF ACTION FAILS TO SATISFY THE FALSE CLAIM ACT'S SCIENTER REQUIREMENT.

The FCA imposes liability when a person knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval or 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)(A) and (B). An FCA claim must satisfy materiality and scienter requirements, both of which are "rigorous" and strictly enforced. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016). "[K]nowingly . . . mean[s] that a person, with respect to information": (1) "has actual knowledge of the information"; (2) "acts in deliberate ignorance of the truth or falsity of the information"; or (3) "acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1)(A) (internal quotation marks omitted). Accordingly, "[t]he proper focus of the scienter inquiry under § 3729(a) must always rest on the defendant's `knowledge' of whether the claim is false . . . ." *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952-53 (10th Cir. 2008). Tracy "must prove scienter as an element; it cannot be presumed." " U*.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 955 (10th Cir. 2008).

The crux of Tracy's complaint is that the Defendants' claim (i.e. request for the loan) was false because Defendants knew they were not supposed to use the $1.846 million to build water infrastructure for land development.[6] However, Tracy doesn't even remotely establish that Defendants "knew" the loan application was allegedly false or fraudulent.

[6] The Introduction of the Complaint begins: "This lawsuit is simple. Mr. Tracy seeks to recover federal funds intended for economically disadvantaged communities suffering from unsafe drinking water – like Flint, Michigan – that Emigration Improvement District ("EID") and other conspirators fraudulently acquired to build a "preposterously oversized" water system for the benefit millionaire land developers while simultaneously endangering public health and safety and the habitat of a federally protected species."

First, Tracy's argument is based on the inaccurate assertion that the regulations prohibit any use of the infrastructure for "land development." *See* Footnote 6 above. In contrast to Tracy's reference to the Florida Administrative Code, the Utah regulation states:

> **R309-705-4. Financial Assistance Methods.**
>
> (3) Ineligible Projects.
> Projects which are ineligible for financial assistance include:
>
> (c) Any project meant to finance the expansion of a drinking water system to supply or attract future population growth. Eligible projects, however, can be designed and funded at a level which will serve the population that a system expects to serve over the useful life of the facility.

Utah Admin. Code § 309-7054(3)(c).

Thus, Tracy's assertion that EID knew it was not supposed to use the $1.846 million to build water infrastructure for land development is not even consistent with the statutory limitations which allow projects to be sized to serve the population that a system expects to serve over the useful life of the facility.

Second, Tracy argues that EID had notice it was not supposed to use the $1.846 million for infrastructure for future development based on the "Speedy Memorandum" written by DDW employee Steve Onysko. However, as set forth above, the concerns of Mr. Onysko were considered, and overruled, by DDW Director Kevin Brown. It is simply not fraud to receive approval of a project based on legitimate arguments that the project meets the regulations.

In summary, Tracy fails to even remotely establish that Defendants "knew" the loan application was false or fraudulent based on the theory that the regulations governing the loan prohibited use of the funds for land development.

IV. THE FIRST CAUSE OF ACTION FAILS TO ALLEGE THE PURPORTED FALSE CLAIMS OR PURPORTED MATERIAL FALSE STATEMENTS WITH PARTICULARLY AS REQUIRED BY FED. R. CIV. P. 9(B).

For a claim to proceed under the FCA, the plaintiff must satisfy the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. *See United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1167 (10th Cir. 2010). Rule 9(b) demands that when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9.* In the context of the FCA, the Tenth Circuit has held, "Rule 9(b) requires that a plaintiff set forth the `who, what, when, where and how' of the alleged fraud." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006) (citations omitted); *Lemmon*, 614 F.3d at 1172 (finding the plaintiff satisfied Rule 9(b) by alleging the who, what, when, and where of the defendant's alleged fraud); *United States ex rel. Blyn v. Triumph Group, Inc.*, Case No. 2:12-cv-922, 2015 WL 5593893, at *9 (D. Utah Sept. 22, 2015). Mere reference to a "general scheme or methodology" is insufficient to satisfy Rule 9(b). *United States ex rel. Schwartz v. Costal Healthcare Group, Inc.*, No. No. 99-3105, 2000 WL 1595976, at * 6 (10th Cir. 2000) (unpublished). An FCA claim should be dismissed if the relator fails to identify “any person, place or time when an actual false claim or other illegal activity occurred.” *Id.* Likewise, in *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC,* Case No. 2:12-cv-00381 (Dist. Court, Utah 2015), the Court recognized:

> Rule 9(b) also requires [plaintiff] to provide the Court "well-pleaded facts" alleging fraudulent conduct that goes beyond "conclusory allegations." *Sikkenga*, 472 F.3d at 726; *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 5, 2011). Specifically, [plaintiff] "must provide [the Court] details regarding *how* the alleged conduct was fraudulent and the *content* of the fraudulent conduct...." *Ellsworth*, 2011 WL 1871225, at *3 (emphasis in original). In *Ellsworth*, this Court dismissed an FCA claim where the plaintiff failed to allege the "content" of the false statements allegedly submitted to the government. *Id.* The Court noted that merely reciting that the defendant submitted a "false statement" was insufficient under Rule 9(b). *Id.*

With respect to Rule 9(b), there are two facts that are particularly relevant in this matter. First, as set forth above, Mr. Tracy is an outsider with no direct knowledge of any of the allegations in the Complaint. Accordingly, at a minimum, in order to meet Rule 9(b)'s pleading requirement, Mr. Tracy would have to specifically allege the context of the allegation and how Mr. Tracy purportedly knew the information in the allegation. Second, in order to avoid admitting that his claims were barred by the statute of limitations, Tracy made the decision to avoid any reference to the actual bond closing documents. However, by failing to make any reference to the actual bond documents, Tracy cannot meet the pleading requirements of Rule 9(b).

For example, in paragraph 505 of the Complaint, Tracy alleges that Defendants falsely claimed that Emigration Canyon's hydrological system could support large-diameter commercial wells. In paragraphs 253-256 of the Complaint, Tracy alleges that in a 1966 Master's Thesis, Jack Barnett concluded that the hydrology in Emigration Canyon is not conducive to large-diameter wells. However, Tracy does not include any specific allegation with respect to when or how Defendants made the alleged false claim to the government. At best, the allegations could be construed as supporting some type of implicit claim, but without some details regarding how or when Defendants made the claim, it is impossible to determine if DDW relied on the alleged claim or if the claim was false when it was allegedly made.

In paragraph 505 of the Complaint, Tracy alleges that Defendants falsely certified that EID had sufficient water rights to operate the Brigham Fork Well. This allegation appears to be based on the condition in the Commitment of Funds Letter that the District's attorney certify that the "Applicant has established the ownership of water rights to any and all water used in the system . . .." Complaint, ¶ 60. However, without any specific information, the allegation certainly does not meet the pleading requirements of Rule 9(b).

In paragraph 505 of the Complaint, Tracy alleges that Defendants falsely certified that the Brigham Fork Well, Wildflower Reservoir, and water pipelines had been built according to the plans and specifications. Again, Tracy provides no specific information regarding when Defendants made this claim, how they made the claim, or who made the claim. In addition, the allegation is that Defendants falsely certified that the water pipelines had been built according to the plans and specifications, but Tracy provides to details on why the water pipelines didn't comply with the plans. The conclusory statement is certainly not sufficient to support a finding of fraud.

In paragraph 503 of the Complaint, Tracy alleges Defendants falsely claimed that they intended to use the funds to bring clean water to 67 canyon residents, when in fact they always intended to use the funds to build water infrastructure for the benefit of wealthy land developers. This is the ultimate conclusory statement. What is the possible basis for Tracy's assertion that Defendants "always intended to use the funds to build water infrastructure for the benefit of wealthy land developers."

In summary, Tracy's conclusory allegations fail to meet Fed. R. Civ. P. 9(b) requirement to plead fraud with particularity.

CONCLUSION

The Court should grant the motion to dismiss based on all the ground set forth herein.

DATED this 10th day of August 2020.

COHNE KINGHORN

/s/ Jeremy R. Cook
Jeremy R. Cook
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August 2020, a true and correct copy of the foregoing document was served by the CMECF system which will send notice of filing to counsel of record.

/s/ Janelle L. Dannenmueller