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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.	**REPLY BRIEF IN SUPPORT OF 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 reply brief in support of Defendants' *Amended Motion to Dismiss the Third Amended Complaint* (the "**Motion**").

ARGUMENT

I. TRACY'S CLAIMS ARE BARRED BY THE TEN-YEAR STATUTE OF REPOSE IN THE FALSE CLAIMS ACT.

Tracy's argument is that the statute of repose should run from date of the final release of the retainage, as opposed to the date of violation. Tracy bases his argument almost exclusively on the holding in the 1998 federal claims court case *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 742 (1998). However, as set forth below, *Jana* is not good law. Furthermore, the holding in *Jana* is directly contradicted by Tracy's prior interpretation of the "plain language of the statute."

A. The Court's Prior Order Does Not Support Tracy's Statute of Repose Argument.

Tracy begins his Opposition by suggesting that that Court previously decided this issue in his favor based the Court's statement in the *Amended Memorandum Decision and Order Granting Motions to Dismiss* [Docket No. 226] (the "**Amended Decision**") that "the alleged violations occurred *almost* ten years before Mr. Tracy filed suit." *Opposition*, p. 2. However, later in the Amended Decision, the Court stated: "Second, Mr. Tracy filed this action on September 26, 2014—almost ten years after the last possible date on which the defendants allegedly violated § 3729(a)(1)(A) or § 3729(a)(1)(B) by making false statements to the Government." (emphasis added). Thus, the Amended Decision appears to recognize that the last

possible date of an alleged violation was based on the date of the alleged false statement, and not the date of payment.

The Amended Decision was also likely based upon on a blatant misrepresentation to the Court by Mr. Tracy (or his former counsel). Tracy attached as Exhibit A to the Third Amended Complaint a copy of the *Payment Request for Construction of SRF Project*, dated September 29, 2014, which was prepared by DDW (not Defendants) and begins "Attached is the final Pay Request (#6) for the Emigration Improvement District project." Tracy conveniently did not include the attachment, which is the actual pay request submitted by EID. The full document with the exhibits is attached to Defendants' Motion to Dismiss as Exhibit A. The actual pay request #6 submitted by Emigration Improvement District was on **September 13, 2004**, and outside the ten-year statute of repose.

Nevertheless, in *Mr. Tracy's Response to the Court's June 15, 2018 Order to Show Cause* [Docket No. 225], Mr. Tracy stated that the "fact that a request for final disbursement of the $1.846 million and final disbursement of the $1.846 million both occurred within ten years . . . ." *Id.*, at p. 3 (emphasis added). The Court issued the Amended Decision almost immediately after receiving Tracy's Response.[1] Thus, if Mr. Tracy had included the full document as part of his Complaint, or if Mr. Tracy had not misrepresented that the final pay request from EID was within the ten-year statute of repose, the Court likely would have clarified in the Amended Decision that the action was filed more than ten year after the last possible date of a false statement to the Government, and was therefore barred under both the six-year and ten-year statute of repose.

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[1] As the Court has previously noted, this is not the first time Tracy has taken liberty with the facts.

B. The Promissory Fraud Theory is Not Applicable.

In his Opposition, Tracy spends almost an entire page citing promissory fraud cases, but the promissory fraud theory has no relevance to his statute of repose argument.

As the Court is aware, "[p]romissory fraud, which is also referred to as fraudulent inducement, is a theory that attaches liability to each and every claim submitted under a contract obtained through fraudulent statements." *United States ex rel. Brooks v. Stephens-Henager College*, 305 F. Supp. 3d 1279, 1293 (D. Utah 2018) (emphasis added). Tracy does not allege that any claim was submitted within the ten-year statute of repose, so promissory fraud is not applicable to Tracy's argument that his action was timely based on the last "payment."

Instead, Tracy asserts "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 the damages." How Tracy jumps to the conclusion that the promissory fraud theory is "consistent" with the reasoning in *Jana* is baffling. If anything, the promissory fraud theory is consistent with plain language of the statute that states that a violation occurs, and the statute of repose runs, from the date of a claim, and not the date of payment.

In summary, the promissory fraud theory is not applicable, and simply listing a bunch of promissory fraud cases doesn't somehow magically make Tracy's arguments persuasive.

C. Tracy Acknowledges That the Ten-Year Limitation Period Is a Statute of Repose, But Simply Ignores *CTS Corp*.

In *CTS Corp. v. Waldburger*, the United States Supreme Court 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." 134 S. Ct. 2175, 2182 (2014) ("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 statute of repose limit is "not related to the accrual of any cause of action . . . ." *Id*.

Tracy acknowledges that the ten-year limitation period in the FCA is a statute of repose. Nevertheless, instead of even attempting to distinguish *CTS Corp*., Tracy just completely ignores it, and instead continues to rely on *Jana* and the argument that "the statute of repose on Mr. Tracy's claims accrues when the government incurs actual damages." *Opposition*, p. 8.

It is impossible to reconcile Tracy's argument with *CTS Corp*., and based on the Supreme Court's holdings in *CTS Corp*. and *Graham County*[2], the holding in *Jana* is clearly not good law. The ten-year statute of repose in the FCA is measured from the date a party violates the FCA by submitting a false claim or making a false statement, not from the date the government incurs actual damages. Accordingly, Tracy's claims are time-barred, and the Court should dismiss the case with prejudice.

D. Tracy Completely Ignores His Prior Interpretation of the "Plain Language" of the Statute.

Not surprisingly, although Tracy now argues that the Court should follow the holding in *Jana,* Tracy fails to acknowledge or address his prior arguments that directly conflict with *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*

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[2] *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415–16 (2005) ("In other words, the time limit [under§ 3731(b)(1)] begins to run on the date the defendant submitted a false claim for payment.")

Memorandum in Support of Plaintiff's Motion for Leave to File Second Amended Complaint [Doc. 88], p. 3. Tracy further argued that "the statute of limitations was triggered by EID Defendants' false statement to the Government on May 3, 2005, <u>and not the actual payment of federally-backed funds</u>." *Id*., p. 4 (emphasis added).

Tracy was correct. The plain language of the statute clearly and unequivocally bars his claims based on the undisputed fact that no false statement or false claim for payment occurred within the ten-year statute of repose.[3] *See In re Rich Global, LLC*, 652 Fed.Appx. 625 (2016), fn. 1 ("[c]ourts generally disfavor parties' changing positions as it may suit them."). The plain language of the statute doesn't change simply because Tracy's alleged facts were proven wrong when the Court admitted the bond documents.

Furthermore, Tracy was making the argument that the statute of repose is not determined by "payment" because he recognized that for purposes of this matter, the government would have incurred actual damages, and the claims would have accrued, in conjunction with bond closing on November 21, 2002 when DDW purchased the bonds from EID and paid the money into escrow with the State Treasurer.[4] Thus, in order for Tracy's claim to not be time barred, the Court would also have to find that the date of "payment" (i.e. the date the government incurred damages) was the date of the release the final retainage from the escrow account held by the State Treasurer, and not the date of the actual bond closing (November 21, 2002) as Tracy had

[3] The Tenth Circuit has held that "judicial estoppel only applies when the position to be estopped is one of fact, not one of law." *BancInsure, Inc. v. FDIC*, 796 F.3d 1226, 1240 (10th Cir. 2015). Accordingly, although Defendants are not asking the Court to invoke judicial estoppel, Defendants do reserve for appeal whether judicial estoppel should apply.

[4] In accordance with the Escrow Agreement executed as part of the bond documents, the State Treasure could only release the money if authorized by both DDW and EID.

previously alleged in his Second Amended Complaint. *See Second Amended Complaint*, ¶ 88 ("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.").

In summary, *Jana* is not good law and the Court should find that Tracy's claims are barred by the ten-year statute of repose.

II. TRACY DOES NOT SATISFY THE SCIENTER REQUIREMENT.

In his Opposition, Tracy asserts two basis for his claim that Defendants acted with scienter. First, Tracy argues that "Mr. Tracy's claim is based on Defendants' violations of federal and state regulations that prohibit use of the funds for development. See 40 C.F.R. § 35.3520(e)(3) and (e)(5); 40 C.F.R. 35.3520(b)(2)(vi); Utah Admin. Code § 309-705-4(3)(c)." *Opposition*, p.12. Those sections state (in part with respect to 40 C.F.R. 35.3520(b)(2)):

> **40 C.F.R. § 35.3520(e)** Ineligible projects. The following projects are ineligible for assistance from the Fund:
> (3) Reservoirs or rehabilitation of reservoirs, except for finished water reservoirs and those reservoirs that are part of the treatment process and are on the property where the treatment facility is located.[5]
> (5) Projects needed primarily to serve future population growth. Projects must be sized only to accommodate a reasonable amount of population growth expected to occur over the useful life of the facility.
>
> **40 C.F.R. 35.3520(b)(2)** Only the following project categories are eligible for assistance from the Fund:
> (vi) Creation of new systems. Eligible projects are those that . . . . Capacity to serve future population growth cannot be a substantial portion of a project.
>
> **Utah Admin. Code § 309-705-4(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

[5] EID only constructed water tanks, which not unfinished water reservoirs, so 40 C.F.R. § 35.3520(e)(3) is not applicable.

designed and funded at a level which will serve the population that a system expects to serve over the useful life of the facility.

In contrast to Tracy's argument that the regulations "prohibit use of the funds for development," the regulations clearly allow projects to be sized to accommodate reasonable population growth over the useful life of the project.

The Utah Division of Drinking Water and the Utah Drinking Water Board, which has statutory authority to administer the funds, specifically found that the project met the regulations.[6] Accordingly, Tracy's position that EID had notice it was violating the federal regulations because Steve Onysko "notified EID that the planned reservoir was larger than three times the needed capacity, and therefore, 'preposterously oversized'" is directly contradicted by the decision of DDW and the Drinking Water Board.[7] *See United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542 (7th Cir. 1999) ("[I]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA."). The evidence clearly shows that DDW knew the specifics of the project; DDW had the engineering expertise to evaluate the project design and capacities; DDW considered the concerns of its own engineer,

[6] *See* Motion, Exhibit B ("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.).")

[7] Plaintiff does not allege that EID actually received a copy of the Speedy Memorandum. Instead, Plaintiff's alleges that EID's attorney, Gerald Kinghorn, had a meeting with some of the Defendants where they discussed "recommendation for smaller reservoir, economics of project and related issues." *See* Complaint, Exhibit D.

Mr. Onysko; and DDW made a legal and factual determination that the project complied with the regulations. The false claims act is not a mechanism to dispute an agency's interpretation of its own regulations. *See U.S. ex rel Burlbaw v. Orenduff*, 548 F.3d 931, 959 (10th Cir. 2008) ("The FCA is not an appropriate vehicle for policing technical compliance with administrative regulations." (*quoting U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999))).

In summary, Tracy does not provide any evidence to establish that Defendants somehow "knew" the loan allegedly violated the state and federal regulations notwithstanding DDW's approval of the project over the concerns expressed by Mr. Onysko.[8]

Tracy also alleges that EID knowing submitted a false claim because it built pipelines that dead end at vacant developable land. *See Opposition*, p. 13 ("Due to the size of the water system and the dead-end pipelines to developable land, the Defendants knew, or were deliberately ignorant that it would spur growth and benefit wealthy developers, rather than serve the population it could be expected to serve without significant development and growth."). However, in the Third Amended Complaint, Tracy alleges:

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[8] The Court could also find that the claim was not false based on DDW's determination that the project complied with the regulations. *See United States v. St. Mark's Hosp.*, No. 216CV00304JNPEJF, 2017 WL 237615, at *8 (D. Utah Jan. 19, 2017), *rev'd and remanded sub nom. United States ex rel. Polukoff v. St. Mark's Hosp.,* 895 F.3d 730 (10th Cir. 2018) *citing United States v. Southland Mgmt. Corp*., 326 F.3d 669, 684 (5th Cir. 2003) (en banc) (Jones, J., concurring) ("Where there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant's actions are in good faith, the claimant cannot be said to have knowingly presented a false claim."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA."); *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996) (holding that where an FCA claim was based upon an alleged violation of a "statute's imprecise and discretionary language[,] ... Even viewing [the relator's] evidence in the most favorable light, that evidence shows only a disputed legal issue; that is not enough to support a reasonable inference that the allocation was *false* within the meaning of the False Claims Act.").

> After having exhausted all funds once EID had completed construction of the Brigham Fork Well and Wildflower Reservoir with the $1.846 million in DWSFR funds, it completed the remainder of the project with additional funds from the State of Utah in 2007, 2013 and 2015 that it used to finance a second large-diameter commercial well called the "Upper Freeze Creek Well" on property owned by Mr. Creamer, and a pipeline connecting the Upper Freeze Creek Well to a 3-mile section along the Emigration Canyon Road. EID also used the 2007 and 2013 funds to finance oversized pipelines that run from the Wildflower Reservoir to the vacant, developable land owned by Mr. Creamer, the Gillmors and Mr. Neuscheler, where the pipelines, curiously, dead-end.

Complaint, p. 7. (emphasis added).[9]

In other words, for Tracy to succeed, the Court would have to accept the argument that Defendants "knowingly" submitted a false claim in 2002 because they allegedly used 2007 and 2013 bond funds (which are not from the revolving loan fund originally established with federal funds) to install pipelines that allegedly dead-end at land that may be potentially developable in the future.

III. THE COMPLAINT DOES NOT STATE WITH PARTICULARITY THE CIRCUMSTANCES CONSTITUTING FRAUD.

Rule 9(b) provides that a plaintiff must "state with particularity the circumstances constituting fraud." To satisfy this standard, a plaintiff must allege the "`who, what, when, where, and how' of the alleged fraud." U.*S. ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006). Tracy's argument can be broken down into two categories, neither of which comply with Rule 9(b) requirements.

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[9] Tracy asserts that Mr. Creamer, the Gillmors and Mr. Neuscheler are the owners of the land that benefitted from the alleged development scheme, but Tracy inexplicably did not name the Gillmors or Mr. Neuscheler as defendants. In contrast, Tracy never explains why elected officials who are not significant landowners or developers would have conspired to defraud the government.

First, Tracy alleges that Defendants made "false claims . . . when EID applied for the loan." For example, Tracy argues that "[i]n applying for the loans, EID represented that it [sic] use the funds to build a reservoir, two large-diameter commercial wells, and three water lines. EID also represented that it intended to use the planned Brigham Fork Well and the Wildflower Reservoir to bring clean water to 67 existing residents of the Canyon. *Id* at ¶¶ 54-55." *Opposition*, p. 15.[10] (emphasis added). Likewise, Tracy argues that "[a]s a condition of receiving the funds, EID agreed . . . that it would obtain "firm commitments" from 57 of the 67 Canyon residents that would participate in the project, that it had sufficient water rights to operate the system, that it would adopt a water management and conservation plan, and that it would comply with a variety of related federal statutes. Id. at ¶¶ 57-62." *Id*. (emphasis added).

The problem with Tracy's argument is simple. By intentionally avoiding any reference to the bond documents, Tracy is not able to plead the allegation with particularity. For example, Tracy suggest that EID falsely certified it has sufficient water rights to operate the system, but Tracy does not allege when the alleged false certification was made, the context of the statement, or why it was false.

Likewise, Tracy argues that as a condition to receiving funds, EID agreed that it would adopt a water management plan. *Id*. The implication appears to be that EID had an obligation to adopt a plan but didn't. However, in the Complaint, Tracy references the Water Conservation and Management Plan, dated November 14, 2002. *Complaint*, p. 14,

[10] It is unclear what portion of these statements were even allegedly false.

fn. 21. Thus, not only does Tracy fail to the meet the Rule 9(b) pleading requirements with respect to when EID made the alleged false representation, but his own allegations in the Complaint contradict the implication that EID did not adopt a water conservation and management plan.

In the Amended Decision, the Court recognized: "Indeed, nowhere in the third amended complaint does Mr. Tracy allege *facts* showing that the District was obligated to transmit money or property to the Government in the event of default." Docket No. 226, p. 9. The same is true for Tracy's conclusory allegations in with respect to the alleged false statements when EID applied for the loan. Vague terms such as "when applying for the loan" and "as a condition to receiving funds" don't meet the Rule 9(b) pleading requirements. Tracy made the decision not to reference the loan documents in the Complaint (which in this case is the "claim"), but in doing so Tracy is not able to meet the requirements that he plead fraud with particularity.

Second, Tracy argues that Carollo "falsely certified the project as completed and in compliance with the pre-construction plans on September 22, 2004. *Id* at ¶¶ 76, 117, 334, 386." *Opposition*, p. 17. However, once again, Tracy just makes conclusory statement without any specific information to meet Rule 9(b) pleading requirement.

For example, in paragraph 114 of the Complaint, Tracy alleges: "On August 22, 2003, Carollo Engineering issued a change order to Condie Construction Co. for '2-inch waterline used in Killyon Canyon and Muddy Hallow,' despite the fact that construction drawings in these areas required the installation of 8-inch water lines." At first blush, this allegation appears to be specific. However, in the September 22, 2004 certification,

Carollo indicated that "copies of the final payment requests, WBE/MBE forms and change orders are included in the correspondence attached to this letter." Docket No 281-2, Exhibit B. Thus, Carollo's certification was clearly not false just because of a change order, and Tracy does not allege where Carollo represented that the project had been completed in strict compliance with the pre-construction plans. Likewise, Tracy fails to allege how or where Carollo misrepresented to DDW to size of specific water lines as part of the September 22, 2004 certification. Tracy simply states a fact (i.e. that Carollo issued a change order) and then concludes that Carollo falsely certified completion of the project without any specific allegation as to when or how Carollo falsely represented that the project was not completed in accordance with the change order.

Tracy also alleges that Carollo falsely certified the project as complete despite "multiple active leaks in the reservoir." *Opposition*, p. 17. However, even if the Court accepted that there were leaks in the water tank, it is unclear how that possibly relates to an alleged scheme to benefit developers. EID would obviously not want leaks in its water tank even if the project was primarily to benefit developers, as Tracy alleges.

In summary, the allegations in the Complaint do not plead fraud with particularity, and the Court should dismiss the Complaint with prejudice.

IV. THE COMPLAINT IS BARRED BY THE PUBLIC DISCLOSURE BAR.

Tracy argues that the public disclosure bar is not applicable because the disclosures were not made through one of the enumerated sources, and because some of the information was independently discovered by Tracy.

The enumerated sources through which public information can be disclosed include "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party." 31 U.S.C. § 3730(e)(4)(A)(i). Congress created the Drinking Water State Revolving Fund (the "DWSRS") program in 1996 via amendments to the Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (the "SDWA"). *Complaint*, p. 3. Pursuant to the DWSRS program, the Environmental Protection Agency provided grant money to states to be loaned for drinking water projects. Accordingly, DDW and the Utah Drinking Water Board are agents of the Government for purposes of administering the grant funds. *See Motion*, Exhibit B. [Docket No. 282-2].

Tracy acknowledges that his Complaint is based on information obtained primarily from DDW records, including records of public meetings of the Drinking Water Board. In fact, in its letter approving the project, the Drinking Water Board acknowledged the central issue in the Complaint (i.e. the project has additional capacity that may be used by future development) and approved the project over the concerns of DDW engineer, Mr. Onysko. *Id*. Because the basis of Tracy's complaint was previously stated during DDW's public loan approval process, and DDW specifically considered the issue as part of the loan approval process, Tracy's Complaint is barred by the FCA's public disclosure bar.

Likewise, Tracy's position that he independently discovered the Barnett Thesis and Speedy Memorandum is not sufficient to qualify for the original source exception. Neither of the documents substantially add to the theory that there was a vast conspiracy to construct capacity in EID's system to benefit developers.

In summary, Tracy's claims are barred by the public disclosure bar.

CONCLUSION

The Court should dismiss the Complaint with prejudice.

DATED this 13th day of October 2020.

COHNE KINGHORN

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

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 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

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