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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 ET AL. Defendants.	**OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THIRD AMENDED COMPLAINT** Case No.: 2:14-cv-00701 **Judge: Jill N. Parrish** **Magistrate: Jared C. Bennett**

Mark Christopher Tracy ("Mr. Tracy"), on behalf of the United States of America, hereby submits this Opposition to renewed Motions to Dismiss the Third Amended Complaint ("Complaint")[1] filed by Defendant Emigration Improvement District ("EID"), Michael Scott Hughes ("Hughes"), Mark Stevens ("Stevens"), David Bradford ("Bradford"), Fred A. Smolka (deceased) ("Smolka"), Lynn Hales ("Hales), Eric Hawkes ("Hawkes") (collectively "EID Defendants"),[2] Carollo Engineers, Inc. ("Carollo")[3] and joined by R. Steve Creamer ("Creamer")[4]

[1] Dkt. No. 194.
[2] Dkt. No. 282.
[3] Dkt. No. 281.
[4] Dkt. No. 283.

(collectively the "Motions to Dismiss") (EID, Hughes, Stevens, Bradford, Smolka, Hales, Hawkes, Carollo, and Creamer are collectively referred to herein as the "Defendants") stating as follows.

I. INTRODUCTION

Originally filed on September 26, 2014, the present litigation details the use of federally-backed loans and grants intended for economically disadvantaged communities to build an oversized water system for the benefit of wealthy land owners and developers in Emigration Canyon, Utah (the "Canyon"), and to spur future development in the Canyon where scarce water resources already are depleted. The present Motions to Dismiss will determine whether the lawsuit will move forward and whether unsuspecting Canyon residents and property owners will pay for yet outstanding federally-backed debt acquired by the Defendants under the terms of the Safe Drinking Water Act of 1974 ("SDWA"). Mr. Tracy requests that the Court deny Defendants' motions or in the alternative grant leave to file amendment to incorporate additional factual information unbeknownst to Mr. Tracy at the time of filing the current operative Complaint on April 16, 2018 as outlined herein.

Defendants argue that the Complaint is barred by the ten-year statute of repose, is barred by the public disclosure bar, fails to meet the False Claim Act's ("FCA") scienter requirement, fails allege FCA claims with particularity, fails to identify a false claim by Carollo, and fails to allege that Carollo's conduct caused presentation of a false claim. These arguments fail.

First, Mr. Tracy has pled a cause of action under the FCA, which he filed within the ten-year statute of repose as set forth at 31 U.S.C. § 3731(b)(2) with the improper disbursement of final retainage payment to EID on September 29, 2004. This Court previously stated that "the alleged violations occurred *almost* ten years before Mr. Tracy filed suit."[5] In the Complaint, Mr.

[5] *See* Amended Memorandum Decision and Order [Dkt. 226].

Tracy has identified multiple false claims Defendants made in order to secure $1.846 million in federal funds under the Drinking Water State Revolving Fund ("DWSRS") and the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq* ("SDWA"), culminating in the final retainage payment on September 29, 2004.

Second, Mr. Tracy meets the public disclosure bar. Although some of the information may be public, that information did not come from any federal proceeding or the news media as is required for purposes of the FCA. Most of the information comes from Mr. Tracy's own time consuming investigations of state records, libraries, personal documents, and the EID's records. Moreover, it is undisputed that Mr. Tracy did discover the 1966 Barnett Thesis, which accurately predicted that the Canyon was not conducive to large-diameter commercial wells. But EID withheld this information, and Mr. Tracy was only able to secure a copy of the Barnet Thesis only after he obtained it through his own investigation. Mr. Tracy has also discovered other information, not publicly available, which supports his lawsuit as outlined herein.

Third, Mr. Tracy indeed has to prove scienter under the FCA. This is a burden he will have to meet at later stages of the lawsuit, not in the preliminary stages which require Mr. Tracy only to allege scienter, which he has adequately pled. Mr. Tracy's Complaint alleges that Defendants knowingly made false claims to obtain the $1.846 million in federally-backed funds. These false claims include, without limitation, that the project would be used for existing residents when Defendants intended to build oversized well and tanks for future growth, development, and private profit.

Fourth, Mr. Tracy has identified multiple false claims made by Defendant Carollo. The Complaint shows how these false claims led to contracts and payments from EID to Carollo, using funds from the $1.846 million EID received in the scheme. Therefore, Mr. Tracy has not only

identified Carollo's false claims but also identified a sufficient nexus between Carollo's conduct and the false claim.

Finally, Mr. Tracy has met the heightened pleading standard of Rule 9(b). Throughout the Complaint, Mr. Tracy has alleged the "who, what, when, where, and how" of the false claims made in order to receive $1.846 million in federal funds to build an oversized, unsustainable, and destructive water system in the Canyon. Nevertheless, the heightened pleading standard under Rule 9(b) is relaxed for qui tam relators due to their inherent inability to have all of the information they may need to fully comply with Rule 9(b). Because Mr. Tracy has met the Rule 9(b) standard, he has met the relaxed qui tam standard.

II. ARGUMENT

A. Motion to Dismiss Standard

In considering a motion to dismiss under Rule 12(b)(6), the 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 the complaint 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).

B. Statute of Repose under the False Claims Act.

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 this Court's Amended Memorandum Decision and Order [Dkt. No. 226] to determine whether Mr. Tracy's original complaint dated September 26, 2024 was filed more than ten years after the alleged FCA violation was committed [Dkt. No. 261]. Therefore, if September 29, 2004, the date EID received the final 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 proceed.

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 U.S. Dist. LEXIS 2329 at * 7-12 (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" (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L..Ed. 443 (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 the 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"); *but see Armstrong v. Wyo. Dep't of Envtl. Quality*, 674 F. App'x 842, 846 (10th Cir. 2017) (an unpublished opinion affirming a district court's dismissal of claims on grounds that the plaintiff did not adequately brief whether the statute of limitations runs from the date payment is made).

Defendants have argued that the Supreme Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005) is controlling. 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 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.

Defendants also argue that based on a Pennsylvania district court opinion, the FCA does not specify two separate statute of limitations based on the types of damages requested, and therefore the FCA can only be triggered based on when the false claim is made, not when payment is made. However, this statement ignores the fact that the FCA allows for actual damages, which are not incurred until payment. The other cases Defendants cite for this same idea fail for this same reason.

Here, Mr. Tracy has made a clam for actual damages. Accordingly, the statute of repose on Mr. Tracy's 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 through the release of previously withheld retainage funds on September 29, 2004. Moreover, the government continues to be damaged as its funds are tied up in a loan yielding below-market interest for a project that does not fulfill the purposes of the DWSRF. Under federal law governing statutes of limitation, "'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)).

a. Under a Conspirator Fraud Theory, Carollo Is Liable for Damages Incurred within the Limitations Period even if its Fraudulent Acts Occurred Outside the Limitations Period.

Carollo argues that Mr. Tracy's claims are barred because Carollo's misrepresentations to the Government occurred outside the applicable limitations period. This argument fails. Under conspirator liability, no act of a single defendant may be considered in isolation from the actions of the co-defendants. Moreover, it is well-established that the United States 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 as set forth above. Consistent with this principal is that the statute of limitations does not begin to run on a claim for actual – as opposed to statutory – damages until the government suffers the damages. *See Jana*, 41 Fed. Cl. at 742.

Here, Mr. Tracy has alleged that Defendants made false misrepresentations, as part of EID Defendants' fraudulent scheme, to receive the final payment and disbursement of retainage on $1.846 million on September 29, 2004. These specific false claims are identified below.

C. Mr. Tracy Indeed Identifies False Claims by Carollo and How The False Claims Relate to Payment to EID and In Turn, Carollo.

Defendant Carollo claims that Mr. Tracy has not identified false claims by Carollo and how these false claims relate to the disbursement for $1.846 million in federal funds to complete the water project in the Canyon. However, Mr. Tracy has identified multiple false statements from Carollo and has identified how these false statements relate to the $1.846 million in loans to EID. Generally speaking, Mr. Tracy identified how on September 22, 2004, Carollo certified the water project as complete and relying on this certification, the government approved release of the final disbursement of over $188,000.00 in loan funds to EID. Complaint at ¶¶ 43,76, 334, 342, 386. Mr. Tracy also specifically alleges that Carollo was involved in the project throughout and therefore had knowledge of the plans and requirements. For example, Carollo supervised construction of a tank much larger than approved in the initial plans. *Id* at ¶¶ 94, 95. Carollo refused to engineer a much smaller tank even though it had previously proposed a 500,000 gallon tank and concealed the construction of one much larger than 500,000 in submissions made during the NEPA process. *Id* at ¶¶ 100, 102, 103. Carollo has benefitted financially from these false statements, receiving payment from EID from the $1.846 million, which completed funding on September 29, 2004. These particular allegations are all relevant to Mr. Tracy's first cause of action, including without limitation paragraphs 507 to 510 of the Complaint, which set forth the violations of the False Claims Act.

D. Mr. Tracy's Complaint Is Not Barred By Public Disclosure.

The cases cited by Defendants for the Public Disclosure Bar do not support dismissal. The crux of the defense is, as stated, to bar cases based upon nothing more than information that has been publicly disclosed. *See United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 766 (10th Cir. 2019). Defendants failed to state what qualifies as public information under the FCA, which states the information must have been disclosed in "one of three sources: (1) 'a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party'; (2) 'a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation'; or (3) 'news media.'" *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 301 (3rd Cir. 2016) (citing and quoting 31 U.S.C. § 3730(e)(4)(A)(i)-(iii). The most critical evidence presented by Plaintiff is not found in any of these sources.

Moreover, the bar does not apply to Plaintiffs who, like the Plaintiff in this case, uncover and come forward with information that is not in the public domain, and "materially adds to the publicly disclosed allegations or transactions." *See* 31 U.S.C. § 3730(e)(4)(B); *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 308 (3d Cir. 2016) ("Having alleged information that is independent of and materially adds to the publicly disclosed information, Moore is an original source under the post-PPACA public disclosure bar."). While it is true that Mr. Tracy may have alleged some information in the public record as defined by the FCA, most of what he has alleged comes from his own investigation, personal interviews with many people, EID's own records, and state records.

For example, in 1966 hydrologist Jack Barnett submitted a master's thesis stating that the Canyon is not conducive to operation of large diameter commercial wells. *See* Complaint at 10-11, ¶¶ 253-256. As predicted by Mr. Barnett in his thesis, the wells have depleted the water supply in the Canyon. *See id.* This finding is not discussed in the public discourse described by

Defendants in their brief. Likewise, the Barnett study is not a part of any public record. After several months searching, Mr. Tracy recovered the 1966 Barnett Thesis. *See* Declaration of Mark Christopher Tracy, attached hereto as Exhibit A, at ¶¶ 4-6. Similarly, Dr. Onysko's Speedy Memorandum, referenced extensively in the Complaint as evidence that the Wildflower Reservoir was "preposterously oversized," was not available in the public record. *See* Complaint at Exhibit B, and ¶¶ 97-98, 373-374. Mr. Tracy received the Speedy Memorandum only after Dr. Onysko had learned of the instant litigation in the Salt Lake Tribune and contacted Mr. Tracy's previous legal counsel thereby leading to Dr. Onysko's removal from the DDW office building and termination. *See id* at ¶¶ 7-9. Mr. Tracy's personal investigation uncovered the size of tanks, reservoirs, and pipes in the water system designed and built by Defendants. *See id* at ¶¶ 11-12. This investigation uncovered the location of the tanks, reservoirs, and pipes which dead-ended on vacant, undeveloped property. *Id*.

Very little, if any, of the information alleged in the Complaint comes from the three categories of publicly disclosed information under the FCA, and therefore, Mr. Tracy's Complaint is not barred by Public Disclosure Bar.

E. Mr. Tracy's Complaint Satisfies the False Claims Act's Scienter Requirement.

Defendants have asserted that Mr. Tracy's Complaint fails to meet the False Claims Act's scienter requirement, arguing that Mr. Tracy did not establish that Defendants "knew the loan application was false." The False Claim Act indeed has this scienter requirement, imposing liability when a person knowingly makes a false claim. 31 U.S.C. § 3729(a)(1)(A) and (B). The False Claims Act defines "knowing" as "actual knowledge of the information," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). No proof of a specific intent to defraud is required. *Id*.

Mr. Tracy will have to present sufficient evidence at later stages to prove scienter, but at this stage, Mr. Tracy must merely adequately allege the scienter requirement under the motion to dismiss standards set forth above.

Defendants cite to one Tenth Circuit case, *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008), stating Mr. Tracy must "prove" scienter. However, the *Burlaw* case was based on the district court's grant of summary judgment, not in any way involving a motion to dismiss. *Id* at 934. In *Burlbaw*, the Tenth Circuit affirmed summary judgment against the relators because they failed to introduce evidence sufficient to show that the defendants "knowingly" made false claims. *Id*. This is not the case here, where Mr. Tracy must only adequately allege scienter, rather than prove it, at this stage. *Hendow v. Univ. of Phoenix*, 461 F.3d at 1174 ("relator must *allege* a false or fraudulent course of conduct, made with scienter") (emphasis added).

Mr. Tracy's claim is based 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). These regulations all restrict the use of funds for use on reservoirs and capacity to serve future population growth. Defendants ignore the federal regulations[6] and focus on the Utah regulation, which allows for funding for projects "at a level which will serve the population that a system expects to serve over the useful life of the facility." Dkt. 282 at 14. Defendants argue that Defendants could be allowed to build a water system sized to serve the population over the useful life of the facility. This argument, however, is not consistent with Mr. Tracy's allegations in the Complaint, which allege much more.

Mr. Tracy alleges numerous times that the project includes construction of a "prosperously oversized" reservoir, which is expressly prohibited under the federal regulations. *See* Complaint,

[6] Defendants stated "Florida" but must mean "federal" in the regulations they attempt to contrast.

generally. Mr. Tracy also alleges that the project was built to fuel development, funding oversized pipelines to vacant developable land owned by Creamer and other individuals, where they dead end. *Id* at 7, 9, ¶ 211. As Mr. Tracy sets forth, dead-end water pipelines to undeveloped land are to spur growth and development, not to serve existing or expected population as Defendants argue. Mr. Tracy alleges throughout the Complaint that the project was "preposterously oversized" to fuel development and benefit developers. *See id*, generally. Mr. Tracy discusses at length that Dr. Steve Onysko, staff engineer at the Utah Division of Drinking Water, notified EID that the planned reservoir was larger than three times the needed capacity, and therefore, "preposterously oversized." *Id*; *see also id* at Exhibit B. 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.

Mr. Tracy's allegations meet the scienter requirements under the False Claims Act. Mr. Tracy has alleged that Defendants had "actual knowledge of the information," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). Mr. Tracy's Complaint should not be dismissed.

F. *Qui Tam* Pleading Requirements under Rule 9(b).

"Rule 9(b) joins with Rule 8(a) to form the general pleading requirements for claims under the FCA." *United States ex rel. Lemmon v. Envirocare*, 614 F.3d 1163, 1171 (10th Cir. 2010). Pre-*Twombly* cases required plaintiffs in FCA cases to plead the "who, what, when, where and how of the alleged [claim]." *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 727 (10th Cir. 2006). While the United States Supreme Court clarified Rule 9(b) requirements in *Bell Atlantic Corp. v. Twombly*, U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S.

622 (2009), the Rule's purpose remains unaltered – "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based…." *Lemmon*, 614 F.3d at 1172 (quoting *Farlow v. Peat, Marwick, Mitchell & Co*., 956 F.2d 982, 987 (10th Cir. 1992); *see also* 5A WRIGHT & MILLER § 1298. Rule 9 is flexible and "must remain so to achieve the remedial purpose of the False Claims Act." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

The Tenth Circuit Court has concluded that "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of the scheme." *Lemmon*, 614 F.3d at 1172 (citing *United States ex rel. Duxbury v. Ortho Biotech Prods*., 579 F.3d 13, 29 (1st Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp*., 570 F.3d 849, 854-55 (7th Cir. 2009); *Grubbs*, 565 F.3d at 190). In *Lemmon*, the Tenth Circuit stated:

> The federal rules do not require a plaintiff to provide a factual basis for every allegation. Nor must every allegation, taken in isolation, contain all the necessary information. Rather, to avoid dismissal under Rules 9(b) and 8(a), plaintiffs need only show that, taken as a whole, a complaint entitles them to relief.

Id. at 1173. A relator can survive a motion to dismiss if he shows at least circumstantial evidence of an agreement to defraud the United States. *See, i.e., United States ex rel. Wilkins v. North American Construction Corp*., 173 F. Supp.2d 601, 641 (S.D. Tex. 2001).

The relaxed pleading requirement for *qui tam* claims is understandable. The reality of many FCA cases is that the details of the fraudulent schemes are rarely fully ascertainable before fact discovery. Under the *Twombly* and *Iqbal* pleading standard, a defendant could violate the FCA and evade any claim based on the inability of the Government or a relator to meet the higher pleading requirements.

a. *Qui Tam* Pleadings Against EID Defendants, Carollo and Creamer

Mr. Tracy alleges an ongoing scheme via the fraudulent acquisition and fraudulently diversion of federally-backed funds by EID, individuals affiliated with EID, Carollo, and Creamer in violation of the SDWA and the express requirements of the $1.846 million federally backed loan. Because the Fraud Enforcement Recovery Act of 2009 ("FERA") imposes broad conspirator liability,[7] a single act of each individual defendant may not be considered in isolation from the actions of other defendants.

The Complaint details how Defendants made false claims in order to secure $1.846 million in order to construct an oversized water system to allow for future growth and development, rather than for the existing residents as was represented when EID applied for the loan. Specifically, the Complaint makes the following allegations:

a. In October 2000, EID secured a commitment of federally backed funds at 2.10%, and pursuant to subsequent amendments, the amount of the loans totaled $1.846 million. Complaint at ¶¶ 49-50.

b. In applying for the loans, EID represented that it 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.

c. As a condition of receiving the funds, EID agreed to abide by requirements set forth in a Commitment of Funds Letter, certifying that it would comply with state and federal DWSRF regulations, that it would obtain "firm commitments" from 57 of the 67

[7] *See also United States ex rel. Brooks v. Stevens-Henager Coll.*, No. 2:15-cv-119-JNP-EJF, 2018 U.S. Dist. LEXIS 56440, at *27 (D. Utah Mar. 30, 2018); *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).

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.

d. After receiving approval, EID and the other Defendants proceeded to violate the agreements they made when they secured the funds and began construction. These violations include building an oversized well, much larger than was needed to service the existing residents. Defendants allowed construction of the Brigham Fork Well before the issuance of the FONSI (Finding of No Significant Impact) in violation of the funding requirements of the Safe Drinking Water Act. The Wildflower Reservoir, was also oversized, and Defendants, including Carollo, refused to build an appropriately sized reservoir in compliance with the federal requirements. The Wildflower Reservoir also never received and still lack federally mandated operating permits, while EID previously allowed the temporary operating permits to expire. *Id* at ¶¶ 79-117; 502-513.

The Complaint further details:

a. On October 22, 2002, DDW plan review engineer Dr. Steve Onysko ("Dr. Onysko") documented to DDW Division Director Defendant Georgeson that the proposed 1-million gallon "Wildflower Reservoir"[8] to be constructed on property belonging to Salt Lake City[9] was "preposterously oversized" and the water distribution lines engineered

[8] After completion, DDW recorded the Wildflower Reservoir at 1.3 million gallons but for unknown reasons changed Utah State files to record a capacity of 1.0 million gallons and thus compliant with the SDWSRF-Loan after the present litigation was unsealed on June 18, 2015. To date, EID Defendants refuse to allow inspection and measurement of the Wildflower Reservoir due to purported "safety concerns".

[9] The Complaint alleges that EID Defendants paid Creamer to complete excavation for the construction of the Wildflower Reservoir, water distribution lines and fire hydrants on land-

by Carollo and later constructed by land-developer Creamer were undersized[10] thus violating federal funding guidelines preventing use of federal funds for future population growth as per 42 U.S.C § 300 j-12(3)(B) and (C) and inadequate for a fire emergency in an area prone to wildfire fatalities. *Id* at 109-119; Exhibit B.

b. Carollo falsely certified project completion on September 22, 2004 over the express objections of EID trustee Bowen. *Id* at ¶ 120.

The Complaint also alleges:

a. Despite its duties to supervise and inspect the construction of the Wildflower Reservoir, multiple open and obvious violations of the pre-construction plans, and multiple active leaks in the reservoir, 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.

b. Based upon these allegations, the Complaint alleges that EID Defendants and Creamer through Carollo "actively concealed" information, "falsely certified" the Wildflower Reservoir and water pipelines had been build according to the plans and specifications, "knowingly" made, used, or cause to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government, and conspired to defraud the Government by fraudulently inducing final disbursement of the SDWSRF-Loan on September 29, 2004. *Id* at ¶¶ 507-513.

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developer Creamer's property and not property belonging to Salt Lake City as recorded in the EAR completed by Carollo and approved under the FONSI.

[10] Contrary EID Defendants' argument regarding the "public disclosure bar," Dr. Onysko's Memorandum appears to have been removed from the State Archives by unknown persons and was only provided to Mr. Tracy after Dr. Onysko had learned of the instant litigation in the Salt Lake Tribune and contacted Mr. Tracy's previous legal counsel.

c. Carollo did nothing to correct its false certification. Further, since 2004, EID has designated payments to Carollo for engineering, Carollo has provided additional work for EID, and it can be reasonably inferred that Carollo continues to reap financial benefits for its false certification of the project. *Id* at ¶¶ 404, 415-417.

d. Carollo certified the project was successfully completed and in compliance with the pre-construction plans on September 22, 2004, leading to the final disbursement of funds on September 29, 2004. The allegations of the Complaint clearly describe what facts were false and misleading about this certification and the true nature and condition of the project was concealed from the government.

e. Once Carollo misrepresented that the project was successfully complete, the DDW improperly disbursed the federal loan "retainage" on September 29, 2004, and the payment constituted final payment for all work done on the project although the construction was incomplete and no operating permit for the Wildflower was ever issued; *Id* at ¶¶ 41-43, 76.

Mr. Tracy has adequately pleaded the Complaint in compliance with the Rule 9(b) standards. Therefore, Mr. Tracy's Complaint should not be dismissed.

G. If the Court Dismisses Mr. Tracy's Complaint, It Must Do So Without Prejudice.

To date, EID has not paid back the $1.846 million loan in full. This means that EID could still default in the future. If there is any causal connection between any default and the false claims that EID made when it obtained the loan, there could be a renewed basis for a *qui tam* claim. Given this possibility of a future default, any dismissal should be without prejudice.

III. CONCLUSION

For the foregoing reasons, Mr. Tracy requests that the Court deny Defendants' Motions to Dismiss.

DATED: 29th day of September, 2020.

PRICE PARKINSON & KERR, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2020, a true and correct copy of the foregoing **OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THIRD AMENDED COMPLAINT** was filed using the court's CM/ECF system, which sent notice to the following counsel of record:

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