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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 STATUS REPORT
AND REQUEST TO RESUBMIT FOR
DECISION THE MOTION TO DISMISS
THIRD AMENDED COMPLAINT**

Case No. 2:14-cv-00701 JP-PMW

Judge: Jill N. Parrish

Magistrate: Paul M. Warner

Relator Mark Christopher Tracy (“Mr. Tracy”), through counsel and on behalf of the United States of America, hereby submits this opposition to the Status Report and Request to Resubmit for Decision filed by Defendants Emigration Improvement District, Fred A. Smolka (deceased), Michael Scott Hughes, Mark Stevens, David Bradford, Lynn Hales and Eric Hawkes (collectively “EID Defendants”) [Dkt. No. 262], subsequently joined by Defendant Carollo Engineers Inc. (“Carollo”) [Dkt. No. 263] and Defendant R. Steve Creamer (“Creamer”) [Dkt. No. 264]. The EID Defendants, Carollo, and Creamer have asked the Court to resubmit for decision

the EID Defendants' Motion to Dismiss (the "Motion") filed on April 26, 2018 [Dkt.No. 207]. The EID Defendants and Carollo have also offered additional arguments not found in the original Motion they seek to submit for decision.

ARGUMENT

In its February 28, 2020 Order and Judgment [Dkt. 261, filed March 24, 2020], the Tenth Circuit Court of Appeals vacated and remanded this Court's June 22, 2018 Amended Memorandum Decision and Order [Dkt. 226]. The Tenth Circuit's decision was based on a recent Supreme Court decision abrogating earlier Tenth Circuit precedent in *United States ex rel. Dikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006). See *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019). In the February 28, 2020 Order and Judgment, the Tenth Circuit remanded this case for the Court to decide whether Mr. Tracy's Complaint was filed more than 10 years after the False Claims Act violation was committed ("the district court did not evaluate the timeliness of Tracy's complaint under § 3731(b)(2) because at the time of its decision, it was bound by *Sikkenga*. And in so doing, it only assumed without deciding that September 29, 2004, was the 'last possible date' that an FCA violation could have occurred."). Dkt. No. 226 at 7-8. If September 29, 2004 is the last possible date an FCA violation could have occurred, then the complaint was timely filed less than 10 years after that date.

Now, the EID Defendants, Carollo, and Creamer have resubmitted the Motion for decision. In doing so, the EID Defendants and Carollo have made additional arguments and have introduced additional facts that were not made in the original Motion. Should the Court reconsider the Motion, it should order additional briefing to ensure that the parties hereto have the fully opportunity to fully brief their positions based on the guidance from the Supreme Court and the Tenth Circuit that

the 10-year statute of repose, rather than the 6-year statute of limitations, applies in this matter. *See* 31 U.S.C. § 3731(b)(2). Both the EID Defendants and Carollo, in their requests to resubmit, have alluded that additional briefing may be necessary for the Court to rule on the Motion. Moreover, in light of the new arguments and facts, Mr. Tracy should have the opportunity to fully respond. Therefore, Mr. Tracy asks the Court to order additional briefing to help the Court determine what constitutes a violation, and the date of the violation, for the purposes of 31 U.S.C. § 3731(b)(2).

In the event the Court does not order additional briefing, Mr. Tracy responds as follows that the Complaint in the matter was timely filed within the 10-year statute of repose under 31 U.S.C. § 3731(b)(2).

First, Mr. Tracy's Third Amended Complaint [Dkt. No. 204] specifically alleges that EID Defendants colluded with engineers of the Utah Division of Drinking Water ("DDW") and Defendant Carollo to fraudulently acquire and then fraudulently divert federally-backed funds administered by the State of Utah under the Safe Drinking Water Act for the benefit of private land-developers. *See* Dkt. No. 204 at ¶ 99. In particular, the Third Amended Complaint alleges that DDW released—and the EID Defendants accepted—the final payment from the escrow account on September 29, 2004, even though the original project engineer had refused to certify the project and pointed Defendant Georgeson to federal requirements of the Safe Drinking Water Act prohibiting the use of public funds for future development in Emigration Canyon for the benefit of private land developers. *See id* at ¶ 97.

The Complaint alleges that DDW Engineer Maculey closed the project file in violation of federal funding requirements after Maculey falsely documented on May 3, 2005 that EID Defendants had secured a permanent operating permit for the Wildflower Reservoir although no

operating permit had been issued. The EID Defendants continued to operate without a valid operating permit with the positive knowledge of Maculey.¹ *See id* at ¶ 118.

The Complaint further alleges that during the initial investigation of Mr. Tracy's allegations, Mr. Grange falsely certified to the United States Government in 2015 that the project had closed on December 5, 2002, despite the fact that the DDW database indicated that Mr. Maculay had released all federally-backed retainage payments to EID Defendants from the escrow account on September 29, 2004 and then falsely certified project completion on May 3, 2005 in violation of federal Safe Drinking Water Act requirements. *See id* at ¶¶ 383-393.

Finally, based on the recent guidance from the Supreme Court and the Tenth Circuit, Mr. Tracy informs the Court that he intends to file a motion to amend his complaint with more factual support to show that the Complaint was timely filed within the 10-year statute of repose under 31 U.S.C. § 3731(b)(2). Mr. Tracy intends to file the motion to amend the complaint by the first week of June, 2020. If the Court allows the amendment, the Motion would be mooted.

CONCLUSION

Mr. Tracy informs the Court that he intends to file a motion to amend the complaint, along with a proposed fourth amended complaint, by the first week of June, 2020. If granted, the Motion will be mooted. In the event the Court decides to consider the Motion, Mr. Tracy asks the Court to order additional briefing to give the parties the opportunity to fully address the new standard from the Supreme Court and the Tenth Circuit. Additional briefing would also allow Mr. Tracy to fully respond to additional arguments and facts set forth by the EID Defendants and Carollo in their respective requests to resubmit. Moreover, in the event the Court decides the Motion, Mr.

¹ The temporary permit issued to EID Defendants by Defendant Brown for the operation of the Wildflower Reservoir expired on February 1, 2004.

Tracy respectfully requests that the Court deny the Motion based on the 10-year statute of repose under 31 U.S.C. § 3731(b)(2).

DATED this 14th day of May, 2020.

PRICE PARKINSON & KERR, PLLC

/s/ Jason M. Kerr
Jason M. Kerr
Attorneys for Mark Christopher Tracy

CERTIFICATE OF SERVICE

I hereby certify that on the 14^h day of May, 2020, a true and correct copy of the foregoing **OPPOSITION TO STATUS REPORT AND REQUEST TO RESUBMIT FOR DECISION THE MOTION 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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