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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA Ex. Rel. MARK CHRISTOPHER TRACY, Plaintiff - Appellant, v. EMIGRATION IMPROVEMENT DISTRICT, et al. Defendants - Appellees.	Case Nos. 21-4059 & 21-4143 (D.C. No. 2:14-CV-00701-JNP) (D. Utah)

REPLY IN SUPPORT OF MOTION TO SUBSTITUTE PARTY AND DISMISS APPEAL

Eric Hawkes ("**Mr. Hawkes**"), Jennifer Hawkes ("**Mrs. Hawkes**") and Simplifi Company (collectively, the "**Moving Parties**"), through counsel and pursuant to Rules 27 and 43(b), Federal Rules of Appellate Procedure, respectfully submit this reply brief in support of Moving Parties' *Motion to Substitute Party and Dismiss Appeal*.

ARGUMENT

I. The Judgment is Not Void for Lack of Jurisdiction.

Mr. Tracy's first argument appears to be that the judgment entered by the Utah district court was void because the court lacked jurisdiction to enter the judgment. *See Response*, p. 8.

In support of his argument, Mr. Tracy cites to *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990). In *Burnham*, the United States Supreme Court considered whether the due process clause prohibited the California courts from exercising jurisdiction over the petitioner based solely on in-state service of process. *Id.* at 628. In this case, the judgment issued against Mr. Tracy was for attorneys' fees in an action that Mr. Tracy filed against the Emigration Improvement District related to a denial of a public records request. Thus, not only does the holding in *Burnham* have absolutely no relevance to this matter, but there is no possible argument that the Utah district court lacked jurisdiction to enter the judgment against Mr. Tracy in a case he filed.

Likewise, Mr. Tracy appears to suggest that Utah courts lack jurisdiction to issue a writ of execution for a cause of action in federal court. However, Mr. Tracy fails to provide any legal support for his argument, and his position is contradicted by decisions of this Court. *See RMA Ventures Calif. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1075 (10th Cir., 2009) ("To the contrary, under Utah Rule of Civil Procedure 69(f), '*all choses in action* may ordinarily be acquired by a creditor through attachment and execution.").

In summary, the Utah district court had jurisdiction to enter the judgment against Mr. Tracy based on Judge Kouris' finding that the lawsuit brought by Mr. Tracy was frivolous; and the court had jurisdiction to enter the writ of execution to execute on Mr. Tracy's cause of action and appeal in this matter.

II. Identity of Interest is Not Required to Substitute the Moving Parties for Mr. Tracy.

Mr. Tracy next argues that the substitution of Moving Parties for Mr. Tracy is not allowed under Utah law because the parties lack identity of interest. *Response*, p. 9.

Initially, in contrast to Mr. Tracy's assertion, Moving Parties are not requesting to be substituted as the "personal representative" of Mr. Tracy. Instead, as the purchaser of the cause of action, Moving Parties would step into the shoes of Mr. Tracy and become the qui tam plaintiff. See *RMA Ventures Calif. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1075 (10th Cir., 2009) ("purchaser steps into the shoes of the prior owner and becomes the claimant in the suit."). Because Moving Parties simply step into the shoes of Mr. Tracy, any rights that the United States has in action under the False Claims Act are not extinguished, and Moving Parties are required under the False Claims Act to obtain the consent of the United States to the dismissal, which consent has been given.

Mr. Tracy's position that substitution is invalid because the parties lack identity of interest is also without merit. In support of his argument, Mr. Tracy relies on *Pugh v. Dozzo-Hughes*, 2005 UT App 203. However, in *Pugh*, the Utah Court of Appeals specifically distinguished its decision from situations like this one where a party buys a

monetary claim against it and then moves to dismiss the claim. Specifically, the Court recognized:

> The situation presented here differs from the ostensibly permissible instance when a judgment creditor buys, at a judgment debtor's forced sale, the judgment debtor's cause of action against it. See Applied Med. Techs., Inc. v. Eames, 2002 UT 18,¶21, 44 P.3d 699 (allowing nonlawyer to purchase, at arm's length, "claims against himself at a sheriff's sale."); but cf. Snow, Nuffer, Engstrom & Drake v. Tanasse, 1999 UT 49,¶19, 980 P.2d 208 (holding "it is against the public policy of Utah for a law firm to purchase in an execution sale a legal malpractice cause of action that has been filed against it.").

Id. at ¶15.

The Utah Court of Appeals in *Pugh* also specifically limited its holding to claims in which the relief is in equity, in contrast to claims in a false claims act action in which the relief sought is monetary. *Id*. at ¶16 (“the instant action differs from Utah cases addressing the purchase of causes of action, in that here, the relief sought and granted is equitable—an injunction barring disinterment of Decedent's remains”). Thus, Mr. Tracy’s argument that the substitution of Moving Parties in this matter requires identity of interest is not supported by Utah law.

In summary, Moving Parties are not requesting to be substituted as the personal representative of Mr. Tracy, and identity of interest is not required to substitute Moving Parties for Mr. Tracy.

III. The False Claims Act and Federal Rules of Appellate Procedure Do Not Prohibit the Substitution of Moving Parties for Mr. Tracy.

Mr. Tracy final argument is that the false claims act and the federal rules of appellate procedure prohibit the substitution of Moving Parties for Mr. Tracy. *Response*, p. 10, Section C. However, Mr. Tracy does not cite to any actual provision in the false claims act or the federal rules of appellate procedure to support his position; and Mr. Tracy fails to cite any cases that even remotely support his position that the false claims act and the federal rules of appellate procedure prohibit the substitution of Moving Parties.

Instead, Mr. Tracy suggests that the Court should find that the substitution is against public policy because it would have "catastrophic effects on future federal whistleblowers." Mr. Tracy not only fails to explain what "catastrophic effects" the substitution in this case would have on future whistleblowers, but there are few instances where public policy would weigh more in favor of allowing the substitution of parties and dismissal of an appeal.

Over the last six years, Mr. Tracy has filed six separate lawsuits against EID or Moving Parties, none of which has proceeded past a motion to dismiss. As a result of one of the six frivolous lawsuits, Judge Kouris, who is the presiding judge in Utah's Third District Court, recently deemed Mr. Tracy a vexatious litigant; imposed a pre-filing order against Mr. Tracy; and awarded Moving Parties attorneys' fees (which judgment is the basis of the writ of execution). *See Utah Third District Court Case No.* 200905074.

Likewise, Judge Parrish awarded defendants over $92,665 in attorney fees against Mr. Tracy in the matter below based on Judge Parrish's finding that the action filed by Mr. Tracy against EID was vexatious and harassing. Accordingly, this is certainly not a situation where public policy weighs against the substitution and dismissal.

Likewise, substitution and dismissal of actions under the federal false claims act are less likely to violate public policy because the federal government could intervene in the case and avoid dismissal. In this matter, the federal government not only refused to intervene three times, but the federal government consented to dismissal of the appeal upon substitution of Moving Parties.

CONCLUSION

In summary, the Court should grant the Moving Parties' Motion and dismiss this appeal.

DATED this 14th day of December 2021.

COHNE KINGHORN, P.C.

_/s/ Jeremy R. Cook_____
Jeremy R. Cook
Attorneys for Moving Parties

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December 2021, a true and correct copy of the foregoing document was served by the CM/ECF system which will send notice of filing to counsel of record.

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