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IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH

MARK CHRISTOPHER TRACY, DBA EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an individual, and JENNIFER HAWKES, an individual Respondents.	**PETITION FOR:** **(1) JUDICIAL REVIEW OF DENIED REQUEST FOR DISCLOSURE OF PUBLIC RECORDS;** **(2) INJUNCTION FOR VIOLATIONS OF THE GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT;** **(3) AWARD OF ATTORNEY FEES AND COSTS** **RE: LEAD CONTAMINATION LABORATORY TEST RESULTS OF A PUBLIC DRINKING WATER SYSTEM** Case No. 200905123 Judge: Robert Faust

Respondents Simplifi Company ("**Simplifi**"), Eric Hawkes ("**Mr. Hawkes**") and Jennifer Hawkes ("**Mrs. Hawkes**") (collectively "**Respondents**") through counsel, and pursuant to Utah Rule of Civil Procedure 12(b)(6), respectfully move the Court to dismiss the above-captioned petition (the "**Petition**") in its entirety. In addition, Respondents request the Court award Respondents their reasonable attorney fees against Mark Christopher Tracy ("**Petitioner**") because the Petition lacks merit and was not brought in good faith.

RELIEF REQUESTED

The specific grounds for this motion are as follows:

1. There is no basis for Petitioner to sue Simplifi, Mr. Hawkes, and Mrs. Hawkes based on a claim that the Emigration Improvement District ("**EID**") did not respond to a GRAMA request.

2. EID responded to Petitioner's GRAMA request.

3. Petitioner only appealed the denial of an expedited response, not the denial of the records request, which is a prerequisite to a judicial appeal.

4. The Court should dismiss the Petition in its entirety and award Respondents reasonable attorneys' fees and costs because the Petition is clearly without merit and was not brought in good faith.

BACKGROUND

1. EID is a local district created by the Salt Lake County Council in 1968 that has authority to provide water and sewer service to residents within Emigration Canyon.

2. EID has a three-member board of trustees who are elected at-large from residents in Emigration Canyon.

3. In 2014, Mark Christopher Tracy ("**Mr. Tracy**") formed an organization called the Emigration Canyon Home Owners Association ("**ECHO**"), which is registered as a DBA of Mr. Tracy.

4. Mr. Tracy claims to have a law degree but is not licensed to practice law in Utah.

5. Mr. Tracy is not a resident in Emigration Canyon and not a customer of EID.

6. ECHO is not a traditional homeowners' association that governs a specific neighborhood or development or has authority vested through CC&Rs. Instead, ECHO purports to be a "complex-litigation association," the primary purpose of which appears to be filing frivolous litigation against EID and people associated with EID.

7. In 2014, Mr. Tracy filed Case No.: 2:14-cv-00701-JNP-PMW (the "**FCA Action**") against EID and multiple other parties in the United States District Court for the District of Utah.

8. The FCA Action generally alleges that EID violated the federal false claims act as part of a loan that EID obtained in 2002 from the Utah Division of Drinking Water to make improvements to its public drinking water system.

9. On March 9, 2017, the United States District Court for the District of Utah, the Honorable Jill N. Parrish presiding, ordered entry of judgment in the FCA Action against Mr. Tracy awarding EID $29,936.00 in damages based on Mr. Tracy filing a lis pendens against EID's water rights, which the Court found was a wrongful lien.

10. On February 15, 2019, Judge Parrish issued another *Order Granting in Part and Denying in Part Defendant's Motion for Attorneys' Fees and Costs* (the "**FCA Fee Order**") awarding EID $92,665.00 to be paid by Mr. Tracy. A true and correct copy of the FCA Fee Order is attached hereto as Exhibit 1.[1]

[1] After the FCA Action was appealed, the United States Supreme Court overturned Tenth Circuit precedent with respect to the applicable statute of limitations. Accordingly, the case has been remanded back to Judge Parrish and the fee award has been vacated because EID is not the prevailing party at this time.

11. In the FCA Fee Order, Judge Parrish found that: "Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4)." *Id.*, p. 12.

12. On August 19, 2019, Judge Chon issued a *Memorandum Decision and Order* granting EID's motion to dismiss a separate action filed by ECHO against EID (Case No. 190901675) (the "**First State Court Action**"). Mr. Tracy appealed Judge Chon's decision in the First State Court Action, but the matter has been remanded back to Judge Chon for a determination whether Mr. Tracy can represent ECHO *pro se*.

13. On October 15, 2019, Judge Scott issued a *Memorandum Decision and Order* granting EID's motion to dismiss another case filed by ECHO against EID (Case No: 190904621) (the "**Second State Court Action**").

14. In April, 2020, Mr. Tracy filed an Informal Complaint with the Office Professional Conduct against EID's attorney Jeremy R. Cook (the "**Bar Complaint**"). The Office of Professional Conduct ("**OPC**") refused to prosecute the Bar Complaint. See OPC letter dated June 16, 2020, a copy of which is attached hereto as Exhibit 2.

15. On Thursday July 2, 2020, Petitioner sent an email to EID's representative, Mr. Hawkes at the email address "eric@ecid.org" requesting copies of EID's lead testing results (the "**GRAMA Request**"). The GRAMA Request also requested an expedited response to the GRAMA Request.

16. On Thursday, July 9, 2020, Mr. Hawkes sent a timely response email to Petitioner that indicated that the District (EID) had received his GRAMA Request; that EID denied his request for an expedited response; and that EID was "looking at the costs associated with providing this information to you and will get back with you as soon as possible ."[2] The email

[2] In the FCA Order, Judge Parrish found that "Tracy's behavior leads the court to conclude that Tracy brought his *qui tam* suit to air personal grievances against the Defendants in pursuit of an ulterior motive, rather than seek money damages on behalf of the United States." Accordingly, EID does not consider Petitioner's GRAMA requests to be for the benefit of the public. Instead, Mr. Tracy's primary motivation appears to be raising money through ECHO in order to pay himself to continue to attack EID.

also stated: "As an alternative option, you may want to consider contacting DDW (Division of Drinking Water) as they receive all the test results directly from the lab regarding any lead testing. They may be able to provide you this information quicker and with less expense as they have more resources available to them than the District." *Petition*, Exhibit CC.

17. On the same day, July 9, 2020, Petitioner sent an email to EID appealing only the denial of the expedited response. Specifically, the email stated: "We hereby appeal the denial of an expedited response our request for lead contamination laboratory test results to Chief Administrative Officer of Emigration Improvement District ("EID" aka ECID) under Utah Code sec. 63G-2-401 (1)(a)." *Petition*, Exhibit EE.

18. On July 27, 2020, Mr. Hawkes sent Petitioner a response email that stated in part: "I have attached a copy of the results for the latest lead & copper testing. I believe you have already received the previous testing results from DDW as per your GRAMA request." A copy of the email (and attachment) is attached hereto as Exhibit 3.

19. Petitioner signed the Petition on July 31, 2020.

20. On the same day Petitioner filed this action, Petitioner filed a separate, similar action against Respondents that is pending before Judge Kouris (Case No. 200905074).

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) should be granted where, even accepting the factual allegations as true and drawing all reasonable inferences in the plaintiff's favor, the plaintiff is not entitled to relief. *See Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 10, 21 P.3d 198. The sufficiency of the pleadings is determined by the facts pled, not the conclusions stated. *See id*. ¶ 26. "To survive a motion to dismiss, the complaint must allege facts sufficient to satisfy each element of a claim, otherwise the plaintiff has failed to show that she is entitled to relief." *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 2017 UT 75, ¶ 60, 416 P.3d 401; *see also St. Benedict's Dev. Co. v. St. Benedict's*

Hosp., 811 P.2d 194, 201 (Utah 1991) (dismissing complaint for failure to plead facts supporting element of claim alleged).

In evaluating a motion to dismiss, the district court may "consider documents that are referred to in the complaint and [are] central to the plaintiff's claim" and may also "take judicial notice of public records." *BMBT, LLC v. Miller,* 2014 UT App 64, ¶ 6, 322 P.3d 1172 (citations and internal quotation marks omitted). *See also Oakwood Village LLC v. Albertsons, Inc*., 2004 UT 101, ¶ 13, 104 P.3d 1226 (same).

ARGUMENT

The Court should dismiss the case because Mr. Tracy has no basis for suing Respondents based on a claim that EID purportedly failed to respond to a GRAMA request. Moreover, EID provided the requested documents that Petitioner was not able to obtain from the Division of Drinking Water, and Petitioner did not appeal the purported denial of the records request, which is a prerequisite to judicial review. Finally, because Petition is clearly without merit and brought in bad faith, the Court should award Respondents their reasonable attorneys' fees and costs in responding to the Petition.

I. THERE IS NO BASIS FOR SUING RESPONDENTS ON A CLAIM THAT EID ALLEGEDLY FAILED TO RESPOND TO A GRAMA REQUEST.

It is clear that EID is a governmental entity and, as such, EID is subject to Utah's Government Records Access and Management Act ("**GRAMA**"). *See* Utah Code § 63G-2-101 *et seq*. However, EID is not a party to this action and Petitioner is not seeking relief against EID. Rather, Petitioner has named Simplifi, Mr. Hawkes, and Mrs. Hawkes personally. The Respondents are not subject to GRAMA and Petitioner cannot possibly articulate a legal claim under GRAMA which would entitle Petitioner to relief from either of the two individuals or the private corporation he has named in this Petition.

Petitioner's apparent legal basis for suing Simplifi, Mr. Hawkes, and Mrs. Hawkes personally is that Utah Code Ann. § 63G-2-103(11)(b) states that the term "Governmental entity" also means: (i) every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in subsection (11)(a) that is funded or established by the government to carry out the public's business. Mr. Hawkes, Mrs. Hawkes and Simplifi are clearly not governmental entities; not an office or agency of EID; and not "funded or established by the government to carry out the public's business." *Id*.

Furthermore, the statute states that a government entity includes every office or agency of an entity listed in Subsection (11)(a), not that the office, agency, or committee is a separate governmental entity for purpose of GRAMA. For example, Utah Code Ann. § 63G-2-401 states that a requester "may appeal an access denial to the chief administrative officer of the governmental entity." If a City had a cemetery advisory board, the chief administrative officer would be the chief administrative officer of the City, not the chief administrative officer of the cemetery advisory board. Petitioner acknowledges this in his appeal of the denial of his request for expedited response, which states: "We hereby appeal the denial of an expedited response … to the Chief Administrative Officer of Emigration Improvement District." *See Petition*, Exhibit EE (emphasis added). Thus, even if Simplifi and Mr. Hawkes could be considered an office or agency of EID (which they clearly are not), the governmental entity is EID.[3] The records are public records and subject to GRAMA because they are records of EID, not because they are records of Mr. Hawkes, Simplifi or Mrs. Hawkes. Nothing in the statute even remotely suggests

[3] Mrs. Hawkes has absolutely no involvement in EID. Instead, Petitioner appears to name her because she is a member of the Emigration Canyon Metro Township Council.

that a lawsuit can be brought against an employee, individual or private contractor as opposed to the actual governmental entity.[4]

In summary, even when accepting the factual allegations presented in the Petition as true and drawing all reasonable inferences in favor of Petitioner, Petitioner is not entitled to relief from any one of the Respondents. Therefore, the Petition must be dismissed pursuant to Utah R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

II. PETITIONER DOES NOT HAVE STANDING TO APPEAL THE ALLEGED DENIAL OF THE RECORDS REQUEST BECAUSE PETITIONER ONLY APPEALED THE DENIAL OF HIS REQUEST FOR AN EXPEDITED RESPONSE.

Utah law requires that a person appeal the decision of the governmental entity to deny a records request to the Chief Administrative Officer of the governmental entity prior to seeking judicial review. Specifically, Utah Code Ann. § 63G-2-402 states that if "the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may: (ii) petition for judicial review of the decision in district court, as provided in Section 63G-2-404." In this case, Petitioner only appealed the denial of his request for an expedited response, not the alleged denial of the records request.

In accordance with 63G-2-204(4), a governmental entity shall "review each request that seeks an expedited response and notify, within five business days after receiving the request, each requester that has not demonstrated that their record request benefits the public rather than the person that their response will not be expedited." (emphasis added). Petitioner submitted the GRAMA requested on Thursday, July 2, 2020 requesting documents and an expedited response. *See Petition*, Exhibit BB. On July 9, 2020, five business days after Petitioner submitted his

[4] Based on Mr. Tracy's prior course of conduct, it is extremely likely that Mr. Tracy has some ulterior motive for naming Respondents as opposed to EID.

GRAMA request, EID provided a response that stated in part: "Your request for an expedited response has been denied. We are looking at the costs associated with providing this information to you and will get back with you as soon as possible." *See Petition*, Exhibit CC (emphasis added). The email also stated: "As an alternative option, you may want to consider contacting DDW (Division of Drinking Water) as they receive all the test results directly from the lab regarding any lead testing. They may be able to provide you this information quicker and with less expense as they have more resources available to them than the District." *Id.* Nothing in the response could even remotely be construed as a denial of access to the records themselves.

On the same day, July 9, 2020, Petitioner sent an email that stated in part: "We hereby appeal the denial of an expedited response to our request for lead contamination laboratory results . . . ." *Petition*, Exhibit EE (emphasis added).

Notwithstanding that the evidence is undisputed, Petitioner blatantly mischaracterizes the July 9, 2020 response, and alleges that not only did EID deny his request to access to the records, but that he appealed the denial of access to the records to the chief administrative office. *See Petition*, ¶ 44 ("The ECHO-Association appealed Mr. and Mrs. Hawkes apparent denial of the Lead-Contamination GRAMA to the chief administrative officer of EID . . . . See email correspondence dated July 9, 2020.").

EID did not deny the record request and Petitioner never appealed the denial the records request to the Chief Administrative Officer. In fact, as Petitioner acknowledges in paragraph 34 of the Petition, on July 27, 2020, EID responded to the GRAMA request and provided the information that EID reasonably believed was responsive to the GRAMA Request. Although Petitioner argues that the documents provided by EID were not the documents that he was requesting, Petitioner never responded to EID, never informed EID that the documents provided

were not responsive to his request, and never appealed the alleged denial of his records request to the Chief Administrative Officer.[5]

In summary, EID not only suggested to Petitioner in its original response on July 9, 2020 that Division of Drinking Water may be able to more quickly provide the documents he was requesting, but EID did respond to the GRAMA request. In contrast, Petitioner never informed EID that the document provided was not fully responsive, and Petitioner never appealed the purported denial to the Chief Administrative Officer of EID, which is a prerequisite to a petition for judicial review. Accordingly, the Petition is without merit and should be dismissed.

III. THE COURT SHOULD AWARD RESPONDENTS THEIR ATTORNEYS' FEES.

Utah Code Ann. § 78B-5-825(1) calls for an award of attorney fees in civil actions when "the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." This provision requires proof on "two distinct elements." *In re Discipline of Sonnenreich,* 2004 UT 3, ¶ 46, 86 P.3d 712. An award of fees under this provision requires a determination that the losing party's claim was "(1) without merit, and (2) not brought or asserted in good faith." *Id*.

A determination under the first element, as to the merits of a claim, typically will turn on a conclusion of law—as to whether the losing party's claim lacks a "basis in law or fact." *Id*. ¶ 47 (citation omitted) (internal quotation marks omitted). Such a determination is reviewed for correctness. *Id*. ¶ 45. The second element, by contrast, implicates fact-intensive questions about the losing party's "subjective intent." *Id*. ¶ 49. A party's good faith may be established by proof

[5] While Petitioner states in Paragraph 44 of the Petition that he "appealed [the] apparent denial of the [GRAMA Request]…" Petitioner makes it clear that Petitioner is referring to the July 9, 2020 email correspondence wherein Petitioner specifically and clearly appeals the denial of the expedited review. Furthermore, by July 9, 2020 there is no way that the GRAMA Request could have been presumptively, or apparently, denied because the timeframe specified for responding had not yet run.

of "[a]n honest belief in the propriety of the activities in question;" a lack of "intent to take unconscionable advantage of others;" and a lack of "intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *Id.* ¶ 48 (alteration in original) (citation omitted) (internal quotation marks omitted). A lower court's findings on this element typically will be afforded a substantial measure of discretion. *Id.* ¶ 45.

A. The Petition is Without Merit and Not Brought in Good Faith.

As set forth above, there is absolutely no merit to this action. Petitioner clearly could have brought an action against EID, which is the entity from which he requested documents, but instead chose to file the action against Mr. Hawkes, Simplifi and Mrs. Hawkes. Petitioner's claim lacks a basis in law for that reason alone, but also lacks a basis in law because he has not plausibly alleged the necessary statutory elements. Furthermore, Petitioner's claim lacks a basis in fact. Petitioner has twisted and manipulated facts in order to attempt to support the filing of yet another case in a series of litigation, none of which has persisted beyond the motion to dismiss stage.

It also clear that the Petition was not brought in good faith. In another case filed by Mr. Tracy against EID and Mr. Hawkes, Judge Parrish recently found that "Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4)." *See FCA Fee Order,* p. 12. Judge Parrish also found that "Tracy's behavior leads the court to conclude that Tracy brought his *qui tam* suit to air personal grievances against the Defendants in pursuit of an ulterior motive, rather than seek money damages on behalf of the United States." *Id*. Based on her finding that the suit was vexatious and brought primarily for the

purpose of harassment, Judge Parrish awarded defendants, including Mr. Hawkes and EID, $92,665.00 in attorney fees against Mr. Tracy.

This action follows the exact same pattern as the FCA Action. The majority of the allegations in the Petition, and the thirty plus exhibits that Mr. Tracy attached to the Petition, have absolutely nothing to do with a claim that EID failed to respond to a GRAMA Request.[6] Instead, Petitioner's purpose is to try to legitimize his allegations by including them in a court filing, and then to suggest to residents in Emigration Canyon that there is merit to the claims because they are the subject of litigation. Judge Parrish reached this same conclusion in the FCA Action, in which she found:

> Other letters that Tracy sent in 2017 and 2018 repeated the allegations that the District intended to use residents' money and tax dollars to pay the fees and federal debt at issue in the lawsuit. Tracy sent these letters as self-proclaimed president of the Emigration Canyon Homeowner's Association. His letters, immediately following new filings with the court, are evidence of his bad faith in pursing this lawsuit.

FCA Fee Order, p. 12.

> True to form, on August 10, 2020, Mr. Tracy sent an email that stated in part:
>
> As such, this morning The ECHO-Association filed legal action in Utah State Third District Court for the disclosure of public records by the Simplifi Company, Eric Hawkes and Emigration Canyon Metro Township Council member Jennifer Hawkes.
>
> See https://echo-association.com/?page_id=7151.
>
> The lawsuit records that . . . .

See Exhibit 5.

[6] In Judge Parrish's *Amended Memorandum Decision and Order Granting Motion to Dismiss*, Judge Parrish stated: "Mr. Tracy's third amended complaint spans 93 pages. There are twenty-two named defendants and 145 unnamed "Doe" defendants. For the sake of brevity, the court highlights the most salient points, of which there are few:" *See* Exhibit 4.

Mr. Tracy's reference to Mrs. Hawkes as "Emigration Canyon Township Council member Jennifer Hawkes" is indicative of the fact that her inclusion in this lawsuit has nothing to do a claim that EID failed to respond to a GRAMA request, and is instead simply a bad faith attempt to attack and disparage Mr. Hawkes and Mrs. Hawkes.

Finally, in addition to this Petition, the FCA Action, and the constant barrage of letters and emails attacking EID, Petitioner has recently filed two state court actions challenging EID's water rights (both of which were dismissed on motions to dismiss), a bar complaint against EID's legal counsel, and a separate Petition against Respondents with respect to another GRAMA request by Petitioner. Petitioner is clearly just looking for any and every possible excuse to bring litigation against EID and people associated with EID, regardless of whether the litigation has any merit.

In summary, this Petition is without merit and brought in bad faith and the Court should award attorney fees.

CONCLUSION

Mr. Tracy should not be allowed to continue to file frivolous, harassing and bad faith litigation against EID and individuals associated with EID. Accordingly, the Court should find that the Petition was meritless and not asserted in good faith and award EID its reasonable attorney fees in accordance with Utah Code Ann. § 78B-5-825(1).

DATED this 26th day of August, 2020.

COHNE KINGHORN

/s/ Jeremy R. Cook
Jeremy R. Cook
Tim Nielsen

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August 2020, a true and correct copy of the foregoing document was served by email and first-class mail to the following:

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094

/s/ Jeremy Cook

EXHIBIT
1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS** Case No. 2:14-cv-00701 District Judge Jill N. Parrish

This matter comes before the court on the Motion for Attorneys' Fees and Costs Pursuant to 31 U.S.C. § 3730(d)(4) and 28 U.S.C. § 1927 filed by Defendants Emigration Improvement District (the "District"), Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Eric Hawkes, and Lynn Hales (collectively, "Defendants") against *qui tam* relator Mark Christopher Tracy ("Tracy") and his counsel, Christensen and Jensen, P.C. ("Christensen & Jensen").

BACKGROUND

The District is a special service district organized under the laws of the State of Utah. The District was created to provide water and sewer services to the residents of Emigration Canyon, a township in Salt Lake County, Utah. The District has the power to issue bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon. On or about September 29, 2004, the District received the final disbursement of a $1.846 million loan from Utah's Drinking Water State Revolving Fund, which uses federal funds to finance the construction of water systems for drinking or culinary water.

Tracy filed his initial *qui tam* complaint on September 26, 2014. He amended the complaint on May 01, 2015 ("First Amended Complaint") and on August 18, 2015 ("Second Amended

Complaint"). Tracy filed a wrongful *lis pendens* on August 20, 2015.[1] After the court's dismissal of the case and Tracy's successful appeal to the Tenth Circuit, on remand Tracy again amended his complaint ("Third Amended Complaint"). Tracy's Third Amended Complaint asserted two causes of action under the False Claims Act. First, Tracy alleged that the District and its alleged co-conspirators made false statements that induced the Government to disburse the proceeds of the $1.846 million loan. Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government. The United States declined to intervene in the matter on three separate occasions: (1) after reviewing the Amended Complaint on May 7, 2015 (ECF No. 11); (2) after reviewing the Second Amended Complaint on November 20, 2015 (ECF No. 69); and (3) after reviewing the Third Amended Complaint on March 20, 2018 (ECF No. 199). On June 22, 2018, the court dismissed Tracy's Third Amended Complaint as to defendants Emigration Improvement District, Smolka, Hughes, Stevens, Bradford, Hales, Hawkes, Creamar and Carollo Engineers and ordered Tracy to show cause as to why his remaining claims should not also be dismissed. Pursuant to Tracy's response, the court dismissed with prejudice all remaining claims on June 25, 2018. Defendants filed the present motion for attorneys' fees and costs that same day.

[1] In the course of litigating defendants' motion for attorneys' fees and costs due to the wrongful filing of the *lis pendens*, the court disqualified Christensen & Jensen P.C. (ECF No. 159) and denied Tracy's motion to reconsider their disqualification. When Tracy failed to appoint new counsel, the court dismissed the complaint without prejudice on March 28, 2017. Tracy appealed to the Court of Appeals for the Tenth Circuit. The Tenth Circuit upheld the initial disqualification, but reversed the district court's denial of the motion to reconsider and the dismissal of the case. On remand, the court granted the motion to reconsider and reinstated Christensen & Jensen as counsel. ECF No. 187.

ANALYSIS

Defendants' motion for fees relies on two separate fee provisions. First under 31 U.S.C. section 3730(d)(4), the district court may award Defendants their reasonable attorneys' fees and expenses if (1) "the Government does not proceed with the action;" (2) the Defendants prevail in the action; and (3) "the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." In this case, the United States Government declined to intervene three times[2] and Defendants prevailed.[3] Thus, the only element in dispute is whether Tracy's action was clearly frivolous, vexatious, or brought primarily for purposes of harassment.

Additionally, Defendants ask that Tracy's counsel, Christensen & Jensen, be held jointly and severally liable for the award of attorneys' fees and costs. Under 28 U.S.C. section 1927, the court may require "any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously" to "satisfy personally the excess costs, expenses, and attorneys' fees" incurred by the opposing party.

Tracy opposes the motion for attorneys' fees under both provisions on the grounds that he had reasonable arguments supporting his claims, and thus they were not frivolous, vexatious, or brought primarily for purposes of harassment. The court addresses each of the provisions at issue in turn.

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[2] The Government declined to intervene on May 7, 2015 (ECF No. 11), November 20, 2015 (ECF No. 69), and on March 20, 2018 (ECF No. 199).

[3] The court dismissed the case and entered Judgment against plaintiff on June 25, 2018. ECF No. 230.

A. ATTORNEYS' FEES PURSUANT TO 31 U.S.C. § 3730(D)(4)

Pursuant to 31 U.S.C. section 3730(d)(4) the court may award attorneys' fees if the court "finds that the claim of the person bringing the action was [1] clearly frivolous, [2] clearly vexatious, or [3] brought primarily for purposes of harassment." "The FCA does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment,'" but most courts treat the attorney fee provision of 31 U.S.C. section 3730(d)(4) as "analogous to that used for claims for attorney fees brought under 42 U.S.C. § 1988." *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004) (citing *Christiansburg Garment Co. v. EEOC. Grynberg,* 434 U.S. 412, (1978)). Although courts often analyze all three elements, each element can independently sustain an award of attorney fees. *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1017–18 (10th Cir.), *cert. denied sub nom. U.S. ex rel. Grynberg v. Agave Energy Co.*, 138 S. Ct. 84 (2017) (upholding an award of attorneys' fees solely because the relator's claim was clearly frivolous without reaching the other two elements).

1. Clearly Frivolous

The Supreme Court in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978) defined the standard for whether a suit is clearly frivolous. *See ex rel. Grynberg*, 389 F.3d at 1058 (addressing the fee provision analysis under 42 U.S.C. § 1988 as applied to 31 U.S.C. § 3730(d)(4))). Under *Christiansburg*, to be held frivolous, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees . . . ." *Id.* (quoting *Houston v. Norton,* 215 F.3d 1172, 1174 (10th Cir. 2000)). This standard is "a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *Id.* at 1059 (quoting *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1203 (10th Cir. 2000)).

In assessing whether a case is frivolous, "the district court [must] review the entire course of the litigation." *Ex rel. Grynberg*, 389 F.3d at 1059 (citing *Christiansburg Garment Co.*, 434 U.S. at 421–22). "[A] plaintiff should not be assessed his opponent's attorneys' fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so . . . ." *Id.* at 1058 (quoting *Houston v. Norton,* 215 F.3d at 1174). Defendants allege that Tracy's entire complaint was clearly frivolous, if not from the outset, then at least from the point when the United States declined to intervene for a second time.

In Tracy's Third Amended Complaint, he asserted two causes of action. First, Tracy alleged that the District and its co-conspirators made false statements that induced the Government to disburse the proceeds of the $1.846 million loan in violation of 31 U.S.C. § 3729(a)(1)(A) and U.S.C. § 3729(a)(1)(B). These sections of the False Claims Act impose liability on any person who (A) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or (B) "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)–(B). Second, Tracy alleged that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government in violation of 31 U.S.C. § 3729(a)(1)(G).[4] This section imposes liability on any person who (1) "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 (2) "knowingly conceals or knowingly and improperly

[4] Claims brought under § 3729(a)(1)(G) have been referred to as reverse false claims: "instead of creating liability for wrongfully *obtaining* money from the government, the reverse-false-claims provision creates liability for wrongfully *avoiding* payments that should have been made to the government." *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, 878 F.3d 1224, 1226 (10th Cir. 2017).

avoids or decreases an obligation to pay or transmit money or property to the Government." The court addresses each cause of action in turn.

a. First Cause of Action

Defendants allege that Tracy's first cause of action was clearly frivolous because it was barred by the applicable statute of limitations. Two distinct statute of limitations apply in *qui tam* cases. These can be found at 31 U.S.C. section 3731(b), which provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
> whichever occurs last.

Tracy's suit is a private *qui tam* suit. The Tenth Circuit has held repeatedly that the six-year statute of limitations found at subsection 3731(b)(1) "applies to actions pursued by private *qui tam* relators" and that subsection 3731(b)(2) "was not intended to apply. . ." to private *qui tam* relator suits at all. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725-26 (10th Cir. 2006); *see also United States ex rel. Told v. Interwest Const. Co.*, 267 F. App'x 807, 809 (10th Cir. 2008). Because subsection 3731(b)(2) does not apply to private relator suits, neither the ten-year statute of limitations nor the tolling provisions apply. Thus, the six-year statute of limitations runs from the date of the violation, *not* the date of the relator's discovery of the violation.

Tracy filed suit on September 26, 2014. In his initial complaint, Tracy alleged that the bond at issue in this suit closed on May 3, 2005. But the bond actually closed on November 21, 2002, placing the suit well outside both the ten-year and the six-year statute of limitations. Tracy then

amended his suit to allege that the statute of limitations began on the date of the final disbursement of the loan—on September 29, 2004. But even assuming that the final disbursement date is the date on which the statute of limitations began, which is disputed, Tracy's suit was still outside the six-year statute of limitations applicable to private *qui tam* suits. Defendants allege that fact renders Tracy's suit clearly frivolous.

To defend against the motion to dismiss, and to defend against the attorneys' fee motion here, Tracy argued that this court should ignore Tenth Circuit precedent and follow "better-reasoned cases," such as *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996) and *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1088–90 (11th Cir. 2018), that have allowed private *qui tam* relators to rely on the statute of limitations and the tolling provisions of subsection 3731(b)(2). *See* Pl.'s Opp. Mot. Dismiss at 16, ECF No. 211. The tolling provision would allow Tracy ten years from the date of *his* discovery of the violation to file suit, not ten years from the violation itself. But these arguments are clearly contrary to the Tenth Circuit's holding in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (2006).

Arguing that a previous court decision was incorrectly decided is not in and of itself frivolous, but Tracy's entire argument was based upon his request that this court simply ignore Tenth Circuit precedence by which it is bound. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990). And Tracy had no reason to believe that the Tenth Circuit would reconsider its holding because it has already declined at least once to reconsider its interpretation of section 3731(b). *See United States ex rel. Told v. Interwest Const. Co., Inc.*, 267 F. App'x 807, 809 (internal citation and quotation marks omitted) ("Because we are bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme

Court, we decline the relator's novel invitation to revisit our decision in *Sikkenga*."). Moreover, while Tracy may have had a good faith argument as to when the statute of limitations began to run and which statute of limitations should apply at the outset of his suit, his course of conduct suggests that when he recognized the futility of his legal position, he began taking liberty with the facts to avoid the inevitable conclusion that his claim was time-barred. Each time the underlying facts were disproved, Tracy changed the basic factual assertions giving rise to his complaint and made arguments clearly contrary to Tenth Circuit law. The court agrees with the Defendants that Tracy should have known his suit was frivolous at least when the United States declined to intervene for the second time. Alternatively, Tracy should have realized his suit was frivolous when, according to his own representations, twenty-four other law firms refused to take the case after his counsel was disqualified.

Finally, Tracy argued that the government suffered "new, never-before-incurred damages" within the six-year statute of limitations. But Tracy failed to sufficiently allege any "new damages" during the six-year period. He did not allege any in his complaints. The issue was first raised in a memorandum opposing a motion to dismiss and even then, it was alleged without supporting factual assertions. The court does not see how these alleged new damages offer any support for his claims. The court therefore concludes that Tracy litigated his first cause of action past the point when it became frivolous. The court does not reach a conclusion as to when the claim became frivolous because, as discussed below, the court finds that the entire suit was vexatious and brought primarily for purposes of harassment.

b. Plaintiff's Second Cause of Action

Tracy's second cause of action alleged that the District "knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the United States Government, or knowingly concealed or knowingly and

improperly avoided or decreased an obligation to pay or transmit money or property to the United States Government" in violation of 31 U.S.C. section 3729(a)(1)(G). Third Am. Compl. ¶ 516. Specifically, Tracy's complaint alleged that the District defaulted on the loan by failing to comply with certain conditions and, because it was in default, the District was obligated to transmit money to the Government. But the plain language of the loan documents contradicts Tracy's allegation.

To state a claim for relief under the second provision of 31 U.S.C. section 3729(a)(1)(G), Tracy had to plausibly allege that the District knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government. Tracy alleged in a conclusory manner that "[b]ecause [the District] . . . defaulted on the loan, it has an established duty to transmit or pay money to the United States Government." Third Am. Compl. ¶ 530. But nowhere in the Third Amended Complaint did Tracy allege any *facts* showing that the District was obligated to transmit money or property to the Government in the event of default. Even if the court could credit Tracy's conclusory allegations, those allegations are contradicted by the terms of the loan documents, which Tracy did not attach to any of his complaints, but the court considered upon request by Defendants. Upon considering the loan documents, the court found that Tracy failed to allege an event of default and thus failed to establish that the District was required to pay an interest penalty. And even if there were an event of default, the District was not necessarily required to pay an interest penalty. In short, the terms of the loan documents are inconsistent with Tracy's conclusory allegation that the District was in default and was therefore required to pay or transmit money or property to the Government. Tracy had no grounds to bring his second cause of action. Thus, this claim was also frivolous.

2. Clearly Vexatious or Brought Primarily for Purposes of Harassment

The court now turns to the second and third prongs of 31 U.S.C. section 3730(d)(4) under which it must assess whether Tracy's claims were vexatious or brought primarily for purposes of

harassment. The court concludes they were both. Because these two prongs are closely linked and evidence of vexatiousness supplies evidence of intent to harass, the court analyzes these two prongs together:

> Evidence of vexatiousness or an intent to harass on the part of a plaintiff includes, but is not limited to, actions that deliberately delay the proceedings, attempts to relitigate a previously decided claim against the same defendant, the raising of new allegations in an effort to circumvent the arguments in a defendant's motion to dismiss, and the inclusion of counts for which the available evidence defeats any inference of a false claim.

In re Nat. Gas Royalties Qui Tam Litig., 2011 WL 12854134, at *11 (D. Wyo. 2011), *aff'd*, 845 F.3d 1010 (10th Cir. 2017) (quoting *U.S. ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Grp., Inc.*, 422 F. Supp. 2d 225, 238 (D.D.C. 2006)). "The distinction between vexatious conduct and harassment stems from the intentions of the plaintiff." *J. Cooper & Assocs.*, 422 F. Supp. at 238 n19. "[T]he term "vexatious" means that the losing party's actions were 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" *Washington Hosp. Ctr. v. Serv. Employees Int'l Union Local 722, AFL-CIO*, 746 F.2d 1503, 1510 (D.C. Cir. 1984) (quoting *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978)). In contrast, "the word 'harassment' suggests bad faith on the part of the plaintiff." *J. Cooper & Assocs.*, 422 F. Supp. 2d at 238 n19. "[A] Plaintiff uses the *qui tam* provisions for the purposes of harassment" when "the Plaintiff [does] little more than dress up his personal grievance[s] . . . as a *qui tam* claim . . . ." *U.S. ex rel. Herbert v. Nat'l Acad. of Scis.*, No. CIV. A. 90-2568, 1992 WL 247587, at *9 (D.D.C. Sept. 15, 1992). The court finds that Tracy's behavior was both vexatious and harassing.

a. Vexatious

First, Tracy's behavior was clearly vexatious. Not long after the initiation of his suit, Tracy filed a *lis pendens* indicating that the lawsuit had put at issue Defendants' water rights. But in fact,

there was no good faith basis for suggesting that Tracy's lawsuit for damages under the False Claims Act had any bearing at all on the ownership of Defendants' water rights. Nevertheless, Tracy immediately followed his wrongful *lis pendens* filing by sending letters to the residents of Emigration Canyon describing the *lis pendens* and accusing the District of fraudulently manipulating water rights. And when Defendants challenged the *lis pendens*, Tracy made no serious effort to defend its filing. Indeed, during oral argument on the motion to release the *lis pendens*, Tracy's counsel admitted that the *lis pendens* was based upon the premise that equitable relief was available to a relator under the False Claims Act, but he could not identify a single case supporting that proposition. Hr'g Mot. Release Lis Pendens Tr. 21:1–25:8, ECF No. 141. Tracy's counsel further admitted that Tracy had not even included in his prayer for relief anything that would affect the property interest in the water rights that were the subject of the *lis pendens*. *Id.* at 35:18–36:8. He also acknowledged that Tracy had continued to send out letters to clients of the District referencing the *lis pendens* even after the government had declined to intervene in the case and after Tracy had offered to withdraw the *lis pendens* if the District would withdraw its request for attorney fees. *Id.* at 36:9–40:8. The court thereafter concluded that the *lis pendens* was "unreasonable" and "without foundation." Accordingly, the court held the *lis pendens* was wrongful and ordered the *lis pendens* be released. This behavior was clearly vexatious.

b. Brought Primarily for Purposes of Harassment

The court also finds that Tracy's actions indicate bad faith and a clear intent to harass. During the course of the litigation, Tracy continued to make specious accusations against Defendants that he aired to the public. Tracy wrote letters and emails to the residents of Emigration Canyon. His correspondence included allegations from court documents describing the fraud allegations that he had levied against Defendants. For example, in September of 2015, Tracy wrote a letter specifically discussing the alleged involvement of David Bradford and Michael Hughes in

the lawsuit at the time that Bradford and Hughes were both running for reelection on the District's Board. Other letters that Tracy sent in 2017 and 2018 repeated the allegations that the District intended to use residents' money and tax dollars to pay the fees and federal debt at issue in the lawsuit. Tracy sent these letters as self-proclaimed president of the Emigration Canyon Homeowner's Association. His letters, immediately following new filings with the court, are evidence of his bad faith in pursing this lawsuit. Tracy's behavior leads the court to conclude that Tracy brought his *qui tam* suit to air personal grievances against the Defendants in pursuit of an ulterior motive, rather than seek money damages on behalf of the United States. The court finds that Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4).

B. ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1927

Defendants also move for Tracy's counsel, Christensen & Jensen, to be held jointly and severally liable pursuant to 28 U.S.C. section 1927. That statute states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (emphasis added). On May 25, 2016, the court granted the motion to release the wrongful *lis pendens* and entered judgment, including attorneys' fees, against Tracy. Defendants moved to hold Tracy's attorneys, Christensen & Jensen, jointly and severally liable for the filing of the wrongful *lis pendens*. Christensen & Jensen opposed this motion, which led to the court's subsequent disqualification of Christensen & Jensen. Christensen & Jensen later withdrew its objection to being held jointly and severally liable and filed a motion for reconsideration regarding

its disqualification. The court denied the motion to reconsider and dismissed Tracy's Second Amended Complaint when he failed to appoint new counsel. Tracy appealed to the Tenth Circuit. On appeal, the Tenth Circuit upheld the district court's decision to disqualify Christensen & Jensen, but reversed the denial of the motion for reconsideration and the dismissal of the Second Amended Complaint.

On remand, the district court reinstated Christensen & Jensen and ordered that it be held jointly and severally liable for defendants' attorneys' fees and costs in the amount of $19,936.00 related to the wrongfully filed *lis pendens*. Because the court has already held Christensen & Jensen jointly and severally liable for actions related to the wrongful *lis pendens*, the court must now consider whether its behavior unrelated to the *lis pendens* has "so multiplie[d] the proceedings in [this] case unreasonably and vexatiously" that further judgment should be entered against it jointly and severally with Tracy. The court finds that it has not.

After being reinstated, Christensen & Jensen continued to litigate the case on behalf of its client. When the court granted Tracy permission to file an amended complaint, Christensen & Jensen filed the Third Amended Complaint based upon factual representations made by Tracy. Christensen & Jensen then pursued the litigation through the dismissal of the complaint and the entry of judgment against Tracy. Although the court holds that the case is frivolous and vexatious, this determination is primarily based upon Tracy's actions in using the lawsuit and its allegations to attack the District and its business operations. The court has seen no evidence that Christensen & Jensen sent harassing letters, nor did it multiply the proceedings unreasonably and vexatiously after being disciplined for the wrongful *lis pendens*. Thus the court will not hold Christen & Jensen jointly and severally liable with Tracy.

C. Reasonable Attorneys' Fees

31 U.S.C. section 3730(d)(4) states that "the court may award to the defendant its reasonable attorneys' fees and expenses . . . ." Defendants request attorneys' fees in the amount of $118,831.00 for 497.2 hours billed by counsel after the government's second notice of intent not to intervene, at the rate of $220.00 to $280.00 per hour. The court finds that the billing rates of Jeremy R. Cook ($220.00 per hour) and William Garbina ($265.00–$280.00 per hour) are reasonable. In Jeremy R. Cook's affidavit in support of the motion for attorneys' fees, Cook includes a detailed summary of the time spent by each attorney in the course of the litigation. *See* Affidavit/Declaration of Jeremy R. Cook, Ex. 1, ECF No. 228. The billing summary is sufficiently detailed and the hours recorded therein are reasonable. Counsel has already excluded fees awarded by the court in the previous judgment for hours billed on the wrongful *lis pendens*. However, even though the amount requested is reasonable, the court cannot award fees in the full amount requested by Defendants. Defendants' request includes fees related to the litigation in this court following the disqualification of Christensen & Jensen, the overturned dismissal of the case, and the fees incurred while litigating the appeal to the Tenth Circuit. The court will not award those fees for the reasons explained below.

First, the court's denial of the motion to reconsider the disqualification of Christensen & Jensen and the subsequent dismissal of the lawsuit due to Tracy's lack of counsel were reversed on appeal, meaning that Defendants did not prevail on these issues. Accordingly, the court declines to award fees for the period from the filing of the motion for reconsideration on September 14, 2016 through the order that dismissed the case for Tracy's failure to appoint a new attorney on March 28, 2017.

Second, this court is not authorized to award fees related to the appeal. The Tenth Circuit has held "that a district court lack[s] authority to award appellate-related fees to a prevailing party

absent explicit statutory authorization." *See In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1024 (10th Cir.), *cert. denied sub nom. U.S. ex rel. Grynberg v. Agave Energy Co.*, 138 S. Ct. 84, 199 L. Ed. 2d 184 (2017) (quoting *Hoyt v. Robson Cos., Inc.*, 11 F.3d 983, 985 (10th Cir. 1993)). Defendants have not alleged that this court has any such statutory authorization. Although there is a narrow exception to this rule available in the context of interlocutory appeals, that exception is only available if the party seeking attorneys' fees prevails on the interlocutory appeal. *Id.* (citing *Crumpacker v. Kansas*, 474 F.3d 747, 756 (10th Cir. 2007)). As Defendants did not prevail in the Tenth Circuit, the court cannot award fees related to the appeal and the court will not award fees related to the initial litigation regarding the issues on which the court was reversed.

The fees incurred litigating Christensen & Jensen's and Tracy's motions to reconsider and the dismissal of the case include 24.9 hours billed from September 14, 2016 through March 28, 2017, at various rates, for a total sum of $5,906.00[5] and the fees related to the appeal include 87.5 hours billed from April 21, 2017 through December 14, 2017, at various rates, for a total sum of $20,260.00.[6] The court will therefore reduce the fee award requested by a total amount of $26,166.00.

[5] *See* Affidavit/Declaration of Jeremy R. Cook, Ex. 1 at 5-7. The court considers the 24.9 hours billed from September 14, 2016 through March 28, 2017 to be fees incurred litigating the issues for which Defendants were not the prevailing parties. These entries total $5,906.00. The court does not exclude the hours billed between the disqualification order on August 6, 2016 and the filing of the motion to reconsider on September 14, 2016, because the court was not reversed on its initial disqualification of Christensen & Jensen.

[6] *See* Affidavit/Declaration of Jeremy R. Cook, Ex. 1 at 7-8. The court considers the 61 billing entries from April 21, 2017 through December 14, 2017 to be fees incurred during the appeal. These 61 entries total $20,260.00.

ORDER

The court **GRANTS** Defendants' motion for an award of attorneys' fees and costs against plaintiff-relator Tracy pursuant to 31 U.S.C. § 3730(d)(4) in the amount of **$92,665.00** for 384.8 hours billed. The court **DENIES** the motion to hold plaintiff's counsel, Christensen & Jensen, jointly and severally liable pursuant to 28 U.S.C. § 1927. **IT IS HEREBY ORDERED** that the Clerk of Court enter Judgment for Defendants against plaintiff Mark Christopher Tracy in the amount of **$92,665.00.**

Signed February 5, 2019

BY THE COURT

Jill N. Parrish
United States District Court Judge

EXHIBIT
2

OFFICE OF
PROFESSIONAL
CONDUCT

Billy L. Walker
Chief Disciplinary Counsel
Adam C. Bevis
Deputy Chief Disciplinary Counsel
Diane Akiyama
Assistant Disciplinary Counsel
Sharadee Fleming
Assistant Disciplinary Counsel
Emily A. Lee
Assistant Disciplinary Counsel
Barbara L. Townsend
Assistant Disciplinary Counsel

Office of Professional Conduct

Serving the Public by Regulating Attorneys and Licensed Paralegal Practitioners

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June 16, 2020

Mark Christopher Tracy
1160 E Buchnell Dr.
Sandy, UT 84094

Re: Your Informal Complaint Against Jeremy Cook
OPC File No.: 20-0225

Dear Mr. Tracy:

I have reviewed your Informal Complaint with the other attorneys in this office, along with the response to the allegations submitted by Jeremy Cook, a copy of which is enclosed. Additionally, we reviewed the supplemental information submitted by you on June 10, 2020, and we have concluded, upon consideration of all factors, it must be dismissed for the reasons summarized below.

In summary, you or your dba, Emigration Home Owners Association, are involved in litigation against Emigration Improvement District ("EID") and various other parties (Third District Court case nos. 190901675 and 190904621 and US District Court for the District of Utah case no. 2:14-cv-00701-JNP-PMW). Mr. Cook is opposing counsel in these matters. You have alleged Mr. Cook may have violated Rules of Professional Conduct 1.2(d), 1.7(a), 3.3, 4.1, 3.4(a) and 4.4(a). You have further alleged Mr. Cook has violated Rule 1.16(a) by continuing to actively participate in the litigation and is subject to further disciplinary action under Rule 8.5 for failing to withdraw.

Mr. Cook responded and denies that there is any merit to your allegations. He believes, however, that your assertions should be submitted to and reviewed by the courts and not the Office of Professional Conduct.

The OPC has reviewed the evidence in the file, including the dockets and certain orders and pleadings for these matters, and we agree that your allegations should be addressed in the context of the ongoing litigation. The OPC notes that you have filed a motion to disqualify counsel with the Utah Court of Appeals. The OPC does not ordinarily intercede where there is a more appropriate forum.

Because the allegations against Mr. Cook should be addressed through other means, the OPC is exercising its prosecutorial discretion by declining to prosecute your Informal Complaint and the case will be closed. You may wish to consult an attorney about this matter. If a court finds that Mr. Cook violated the Rules of Professional Conduct, you may submit the findings to the OPC and we will determine whether they warrant re-opening your Informal Complaint.

Accordingly, we are declining to prosecute this matter.

Pursuant to Rule 14-510(a)(7) of the Rules of Lawyer Discipline and Disability, you may appeal this decision to the Chair of the Ethics and Discipline Committee of the Utah Supreme Court within fifteen days after the date of this letter. If you wish to appeal the decision, notify the Clerk of the Ethics and Discipline Committee in writing, with a copy to the OPC, both of which can be mailed to 645 South 200 East, Salt Lake City, Utah 84111. It is very important that you copy the OPC on your notice so that the OPC can forward to the Chair of the Ethics and Discipline Committee a copy of the case file.

We nevertheless thank you for bringing this matter to our attention. Your concerns aid the OPC in monitoring the professional conduct of attorneys in Utah.

Sincerely,

Adam C. Bevis
Deputy Chief Disciplinary Counsel
Office of Professional Conduct

ACB/mp
Enclosure: Mr. Cook's Letter dated May 28, 2020
cc: Jeremy Cook
Enclosure: Information received from Mr. Tracy June 10, 2020 and June 15, 2020

EXHIBIT
3

From: Eric Hawkes <eric@ecid.org>
Sent: Monday, July 27, 2020 5:31 PM
To: The ECHO-Association <m.tracy@echo-association.com>
Subject: Re: GRAMA Request - Laboratory Test Results for Lead Contamination of EID Water System No. 18143 Operated by the Simplifi Company

Dear Mr. Tracy,

I have attached a copy of the results for the latest lead & copper testing. I believe you have already received the previous testing results from DDW as per your GRAMA request. Thank you for your patience as we have been processing these results and working with DDW. The District has sent the homeowners a copy of their results and sent a public notice to water users on the copper results. Please let me know if you have any questions.

Thanks,
Eric Hawkes

On Thu, Jul 9, 2020 at 9:04 AM Eric Hawkes <eric@ecid.org> wrote:
Hi Mr. Tracy,

The District received your GRAMA request regarding the Lead Testing for the past 10 years. Your request for an expedited response has been denied. We are looking at the costs associated with providing this information to you and will get back with you as soon as possible. As an alternative option, you may want to consider contacting DDW (Division of Drinking Water) as they receive all the test results directly from the lab regarding any lead testing. They may be able to provide you this information quicker and with less expense as they have more resources available to them than the District.

Thanks,
Eric Hawkes
801-243-5741

On Thu, Jul 2, 2020 at 2:25 PM The ECHO-Association <m.tracy@echo-association.com> wrote:
Dear Mr. Hawkes,

Attached herewith is a electronic copy of the Request for Government Records ("***GRAMA***") regarding laboratory test results of lead contamination for public water system No. 18143 operated by the Simplifi Company for Emigration Improvement District ("***EID***" aka Emigration Canyon Improvement District).

A hard copy of this request will be sent today via certified United States postal service.

As you have refused to answer questions regarding lead testing and possible continued contamination during the past EID trustee meeting on June 11, 2020 (*see* excerpt of video and audio recording EID Trustee meeting available at https://echo-association.com/?page_id=5666), we have requested an expedited response to this GRAMA request under Utah Code sec. 63G-2-204 (5) as the information will

be used for publication and broadcast to the general pubic (*see* https://echo-association.com/?page_id=5014).

Salt Lake Tribune environmental reporter Brian Maffly is cc'ed here (*see e.g.* https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/)

Please feel free to contact me directly with any questions.

Kind Regards,

Mark Christopher Tracy
Tel. 929-208-6010

EXHIBIT
4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA *ex rel.* MARK CHRISTOPHER TRACY, Plaintiff, v. EMIGRATION IMPROVEMENT DISTRICT, *et al.*, Defendants.	**AMENDED[1] MEMORANDUM DECISION AND ORDER GRANTING MOTIONS TO DISMISS** Case No. 2:14-cv-00701 District Judge Jill N. Parrish

I. INTRODUCTION

In the words of Relator Mark Christopher Tracy, "This lawsuit is simple." He asserts two causes of action. Both arise under the False Claims Act. The first is barred by the applicable statute of limitations because the alleged violations occurred almost ten years before Mr. Tracy filed suit. The second fails because it is based on conclusory allegations that are contradicted by a document that Mr. Tracy incorporated by reference into his complaint. Mr. Tracy has amended his complaint three times, and letting him do so a fourth time would prove futile. Accordingly, Mr. Tracy's third amended complaint is dismissed with prejudice as to the defendants that have moved to dismiss.

[1] This memorandum decision and order has been amended to correct the typographical errors identified by Mr. Tracy in his response to the court's order to show cause (ECF No. 225).

II. STATEMENT OF FACTS

Mr. Tracy's third amended complaint spans 93 pages. There are twenty-two named defendants[2] and 145 unnamed "Doe" defendants. For the sake of brevity, the court highlights the most salient points, of which there are few:

Defendant Emigration Improvement District, which the court will refer to as the District, is a special service district organized under the laws of the State of Utah. The District was created to provide water and sewer services to the residents of Emigration Canyon, a township in Salt Lake County, Utah. The District has the power to issue bonds, charge fees and assessments, and levy taxes on the residents of Emigration Canyon.

On or about September 29, 2004, the District received the final disbursement of a $1.846 million loan. The loan came from Utah's Drinking Water State Revolving Fund, which uses federal funds to finance the construction of water systems for drinking or culinary water.

Mr. Tracy filed his initial complaint on September 26, 2014. His current complaint, the third amended complaint, alleges two causes of action under the False Claims Act. First, he alleges that the District and its co-conspirators made false statements that induced the Government to disburse the proceeds of the $1.846 million loan. Second, he alleges that the District, after the loan proceeds were disbursed, failed to comply with conditions of the loan and failed to report this noncompliance to the Government.

---

[2] The twenty-two named defendants are Emigration Improvement District; Barnett Intermountain Water Consulting; Carollo Engineers, Inc.; Aqua Environmental Services, Inc.; Aqua Engineering, Inc.; R. Steve Creamer; Fred A. Smolka; Michael Hughes; Mark Stevens; David Bradford; Lynn Hales; Eric Hawkes; Don A. Barnett; Joe Smolka; Ronald R. Rash; Kenneth Wilde; Michael B. Georgeson; Kevin W. Brown; Robert Rousselle; Larry Hall; The Boyer Company, L.C.; and City Development, Inc.

Mr. Tracy voluntarily dismissed his claims against Aqua Environmental Services, Inc.; Aqua Engineering, Inc.; Robert Rouselle; and Larry Hall. And Mr. Tracy has not served The Boyer Company, L.C. and City Development, Inc.

III. DISCUSSION

A number of the defendants move to dismiss Mr. Tracy's third amended complaint with prejudice.[3] First, these defendants argue that the first cause of action is barred by the six-year statute of limitations found at 31 U.S.C. § 3731(b)(1). Second, these defendants argue that the second cause of action fails to state a claim because Mr. Tracy has not alleged that the defendants were obligated to pay or transmit money or property to the Government, a requirement of the provision upon which Mr. Tracy bases the second cause of action. The court agrees with both arguments and concludes that it would be futile to let Mr. Tracy amend his complaint for a fourth time. Accordingly, Mr. Tracy's third amended complaint is dismissed with prejudice as to the defendants that have moved to dismiss.

A. MOTION STANDARD: RULE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a claim upon which relief cannot be granted. The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties may present at trial but to assess whether a party's allegations are legally sufficient to state a claim upon which relief can be granted. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). This standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Where the allegations are merely "label and conclusions" or a "formulaic

[3] The defendants that have moved to dismiss are Emigration Improvement District; Fred A. Smolka; Michael Hughes; Mark Stevens; David Bradford; Lynn Hales; Eric Hawkes; R. Steve Creamer; and Carollo Engineers.

recitation of the elements of a cause of action," the plaintiff's claim will not survive a motion to dismiss. *Twombly*, 550 U.S. at 555.

Moreover, "[a] complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief." *Jones v. Bock*, 549 U.S. 199, 215 (2007). "If the allegations, for example, show that relief is barred by the statute of limitations, the complaint is subject to dismissal for failure to state a claim . . . ." *Id.*; *see also Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) ("While the statute of limitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute.").

B. THE FIRST CAUSE OF ACTION: DIRECT FALSE CLAIMS UNDER 31 U.S.C. § 3729

Mr. Tracy alleges that "Defendants knowingly 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," Third Am. Compl. ¶ 502, and that "Defendants knowingly made, used, or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the United States Government—or by a contractor, grantee, or other recipient—in order to induce disbursement of $1.846 million in federal funds," Third Am. Compl. ¶ 507. Specifically, the District and its co-conspirators "made misrepresentations to the federal government or its agents that induced the federal government or its agents to disburse the $1.846 million loan." Third Am. Compl. at 8. "On or about September 29, 2004, [the District] received the final disbursement of [the] . . . $1.846 million loan . . . ." Third Am. Compl. ¶ 40.

The first cause of action is based on § 3729(a)(1)(A) and § 3729(a)(1)(B), which impose liability on any person who (A) "knowingly presents, or causes to be presented, a false or

fraudulent claim for payment or approval" or (B) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." § 3729(a)(1)(A), (B). Section 3730(b)(1) provides that "[a] person may bring a civil action for violation of section 3729 . . . ."

Section 3731(b) provides the applicable statute of limitations for claims brought under § 3730:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, which occurs last.

But the statute of limitations found at § 3731(b)(2) "was not intended to apply to private qui tam relators." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006). So only the six-year statute of limitations found at § 3731(b)(1) "applies to actions pursued by private qui tam relators." *United States ex rel. Told v. Interwest Const. Co.*, 267 F. App'x 807, 809 (10th Cir. 2008); *see also Sikkenga*, 472 F.3d at 725–26.[4]

[4] Mr. Tracy, citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996), and *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1088–90 (11th Cir. 2018), argues that "the better-reasoned cases" have allowed private qui tam relators to rely on the statute of limitations found at § 3731(b)(2). But these cases are contrary to the Tenth Circuit's holding in *Sikkenga*, and this court must follow Tenth Circuit precedent, irrespective of the court's views as to the "advantages of the precedent of [other] circuits." *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990). The Tenth Circuit has also declined, at least once, to reconsider its interpretation of § 3731(b): "Because '[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court, we decline [the relator's] novel invitation to revisit our decision in *Sikkenga*.'" *Told*, 267 F. App'x at 809 (citation omitted).

1. The First Cause of Action is Barred by the Statute of Limitations

Mr. Tracy is a private qui tam relator. The Government declined to intervene in this case on three separate occasions. Mr. Tracy urges to court to disregard Tenth Circuit precedent and apply the statute of limitations found at § 3731(b)(2). *See supra* note 4. But this court is bound by Tenth Circuit precedent, and the Tenth Circuit has held that the six-year statute of limitations found at § 3731(b)(1) applies to actions pursued by private qui tam relators. Consequently, a six-year statute of limitations applies to Mr. Tracy's first cause of action.[5]

Here, Mr. Tracy's claims are barred by the six-year statute of limitations. First, any alleged violation of § 3729(a)(1)(A) or § 3729(a)(1)(B) must necessarily have occurred on or before September 29, 2004, the date on which the District received "the *final* disbursement of

[5] The Tenth Circuit refers to § 3729(b)(1) as a six-year statute of limitations. *Sikkenga*, 472 F.3d at 726 ("[W]e are hard pressed to describe a circumstance where the six year statute of limitations in § 3731(b)(1) would be applicable."); *Told*, 267 F. App'x at 809 ("[T]he [False Claims Act's] six-year statute of limitations applies to actions pursued by private qui tam realtors."). But when a private qui tam relator brings suit, § 3731(b)(1) technically operates as a statute of repose, not a statute of limitations. "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." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) (citation omitted). The central difference between a statute of limitations and a statute of repose is that statutes of limitations "are subject to equitable tolling, a doctrine that 'pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *Id.* at 2183 (citation omitted). In contrast, a statute of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* Section 3731(b), when applied to claims brought by private qui tam relators, provides: "A civil action under section 3730 may not be brought . . . more than 6 years after the date on which the violation of section 3729 is committed." Thus, under the Tenth Circuit's interpretation, § 3731(b) bars *all* suits brought by private qui tam relators (but not the Government) if the suit is brought six years after the underlying violation; there is no tolling. In short, the Tenth Circuit has interpreted § 3731(b) so that private qui tam relators cannot sue persons who violate the False Claims Act if six years have passed since the date of the violation. *Cf. CTS Corp.*, 134 S. Ct. at 2183 ("[A] statute of repose is a judgment that defendants should 'be free from liability after a legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" (citation omitted)). Nevertheless, the court, so as to maintain consistency with the Tenth Circuit, will refer to § 3729(b)(1) as a statue of limitations, even if it is a bit of misnomer.

[the] . . . $1.846 million loan." (emphasis added).[6] Mr. Tracy's explains that his first cause of action is based on a theory that the District and its co-conspirators violated the False Claims Act by making false statements to the Government that induced the Government to disburse the $1.846 million loan. Any false statements that induced the Government to disburse the $1.846 million loan must necessarily have occurred before the date of the final disbursement: September 29, 2004. 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. Accordingly, Mr. Tracy's first cause of action is barred by § 3731(b) because it was brought almost ten years after the defendants supposedly violated § 3729(a)(1)(A) or § 3729(a)(1)(B).

2. The First Cause of Action Must Be Dismissed with Prejudice

"A dismissal with prejudice is appropriate where a complaint fails to state a claim . . . and granting leave to amend would be futile." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006). Mr. Tracy has amended his complaint not once, not twice, but three times. More importantly, his first cause of action is undoubtedly barred by the applicable statute of limitations. Giving Mr. Tracy a fourth chance to amend his first cause of action would prove futile, wasting both the court's and the parties' time. Accordingly, the first cause of action is dismissed with prejudice as to the defendants that have moved to dismiss.

C. THE SECOND CAUSE OF ACTION: REVERSE FALSE CLAIMS UNDER 31 U.S.C. § 3729

Mr. Tracy alleges that the District "knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the United States Government, or knowingly concealed or knowingly and improperly avoided or

[6] The court assumes without deciding that the first cause of action states a violation of § 3729.

decreased an obligation to pay or transmit money or property to the United States Government." Third Am. Compl. ¶ 516. Specifically, Mr. Tracy alleges that the District defaulted on the loan by failing to comply with certain conditions and, because it was in default, the District was obligated to transmit money to the Government. Third Am. Compl. ¶¶ 529–30.

The second cause of action is based on § 3729(a)(1)(G), which imposes liability on any person who (1) "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 (2) "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[7] The term "obligation," as it is used in the False Claims Act, means "*an established duty*, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based relationship or similar relationship, from statute of regulation, or from the retention of any overpayment." § 3729(b)(3) (emphasis added).

Mr. Tracy concedes that he is relying on the second provision of § 3729(a)(1)(G).[8] Thus, to state a claim to relief, Mr. Tracy's allegations must plausibly establish that the District

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[7] Claims brought under § 3729(a)(1)(G) have been referred to as reverse false claims: "instead of creating liability for wrongfully *obtaining* money from the government, the reverse-false-claims provision creates liability for wrongfully *avoiding* payments that should have been made to the government." *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, 878 F.3d 1224, 1226 (10th Cir. 2017).

[8] The court assumes without deciding that Mr. Tracy can rely on the second provision of § 3729(a)(1)(G). In 2009, Congress amended the False Claims Act. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009). At that time, Congress included the provision upon which Mr. Tracy relies: "Congress added a second route to liability . . . . This second route to liability expands on the first by not requiring a 'false record or statement.' Simply 'knowingly and improperly avoid[ing] . . . an obligation to pay or transmit money or property to the Government' is enough." *Barrick*, 878 F.3d at 1230. Congress provided that the amendment to § 3729(a)(1)(G) "shall take effect on the date of enactment [May 20, 2009] . . . and *shall apply to all conduct on or after the date of enactment*." Pub. L. No. 111-21, § 4(f), 123 Stat. at 1625 (emphasis added).

knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government. *See* § 3729(a)(1)(G). The defendants contend that Mr. Tracy has not alleged that the District was obligated to pay or transmit money or property to the Government. The court agrees.

1. Mr. Tracy's Allegations Do Not Plausibly Establish That the District Was Obligated to Pay or Transmit Money or Property to the Government

Mr. Tracy alleges in a conclusory manner that "[b]ecuase [the district] . . . defaulted on the loan, it has an established duty to transmit or pay money to the United States Government." Third Am. Compl. ¶ 530. But this allegation is nothing more than an unsupported legal conclusion—so the court disregards it. *Iqbal*, 556 U.S. at 680 (noting that the Court, in *Twombly*, implicitly held that plaintiff's assertion of an "unlawful agreement" was a legal conclusion not entitled to an assumption of truth). Curiously, Mr. Tracy says nothing about whether the terms of the loan required the District to transmit money or property to the Government in the event of default. 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. Consequently, Mr. Tracy has not sufficiently alleged that the District was "obligat[ed] to pay or transmit money or property to the Government" and thus his second cause of action does not state a claim to relief.

2. The Terms of the Loan Contradict Mr. Tracy's Conclusory Allegations

Even if the court credits Mr. Tracy's conclusory allegations (it cannot), the allegations are contradicted by the terms of the loan. Mr. Tracy did not attach the loan documents to his third amended complaint. But the court can nevertheless consider the terms of loan at this stage because: (1) the loan is referenced in the third amended complaint, (2) the terms of the loan are central to Mr. Tracy's claims, and (3) the defendants have attached a copy of the loan documents

to their motion, and Mr. Tracy has not challenged their authenticity. *See Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) ("Courts are permitted to review 'documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" (citation omitted)).[9]

The terms of the loan documents contradict Mr. Tracy's conclusory allegations. Mr. Tracy alleges that the District defaulted on the loan and was therefore required to pay or transmit money or property to the Government. Third Am. Compl. ¶ 530. But this conclusory allegation finds no support in the loan documents, which provide:

> Section 5.1. Default and Remedies. Failure of the [the District] to perform any covenant or requirement of the [the District] under this Bond Resolution within thirty (30) days after having been notified in writing by a Bondholder[10] of such failure, shall constitute an event of default hereunder and shall allow each Bondholder to take the following enforcement remedies:
>
> (a) The Bondholder may require the [the District] to pay an interest penalty equal to eighteen percent (18%) per annum of the outstanding principal amount on the Series 2002 Bonds and the Hardship Grant Assessment, said interest penalty to accrue from the date of the notice of the Bondholder to the [the District] referenced hereinabove until the default is cured by the [the District]. Said interest penalty shall be paid on each succeeding payment date until the default is cured by the [the District].
>
> (b) The Bondholder may appoint a trustee bank to act as a receiver of the Revenues of the System for the purposes of applying said Revenues toward the Revenue allocations required in Section 3.4 herein and in general protecting and enforcing each Bondholder's right thereto, in which case, all administrative costs of the trustee bank in performing said function shall be paid by the [the District].

Notably, an event of default occurs only if the District fails "to perform any covenant or requirement of the [the District] under this Bond Resolution within thirty (30) days *after having been notified in writing by a Bondholder of such failure*." (emphasis added). And if there is an

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[9] Moreover, the defendants requested that the court consider the terms of the loan, and Mr. Tracy did not oppose the request.

[10] "Bondholder" is defined as "the registered holder of any Series 2002 Bond . . . ."

event of default, "[t]he Bondholder *may* require [the District] to pay an interest penalty." (emphasis added).

Here, Mr. Tracy fails to allege that there was an event of default because he does not allege that the District was "notified in writing" that it had failed to perform a covenant or requirement of the loan. Because Mr. Tracy did not allege an event of default, the District, taking Mr. Tracy's allegations as true, was not required to pay an interest penalty and thus the District was not "obligat[ed] to pay or transmit money or property to the Government." *See* § 3729(a)(1)(G); *Barrick*, 878 F.3d at 1231 ("[P]otential obligations [are] not actionable under the [False Claims Act]."). And even if Mr. Tracy alleged an event of default (he did not), he did not allege that the Bondholder required the District to pay an interest penalty: as the loan provides, "[t]he Bondholder *may* require [the District] to pay an interest penalty." (emphasis added). That is, even if there was an event of default, the District was not necessarily required to pay an interest penalty. In short, the terms of the loan are inconsistent with Mr. Tracy's allegation that the District was in default and was therefore required to pay or transmit money or property to the Government. Consequently, the second cause of action fails to state a claim that is plausible and must be dismissed.

3. The Second Cause of Action and thus the Third Amended Complaint Must Be Dismissed with Prejudice

As noted above, "[a] dismissal with prejudice is appropriate where a complaint fails to state a claim . . . and granting leave to amend would be futile." *Brereton*, 434 F.3d at 1219. Mr. Tracy has had four opportunities to state a claim against the defendants. He has been unable to do so. At this point, it is apparent that Mr. Tracy cannot state a claim for relief against the defendants because he has none. As such, Mr. Tracy's second cause of action, and thus his complaint, is dismissed with prejudice as to the defendants that have moved to dismiss the

complaint. *See Barrick*, 878 F.3d at 1233 (affirming district court decision to dismiss complaint with prejudice because relator could not allege that there was an "established duty" to pay the Government).

IV. CONCLUSION

The following motions are GRANTED: Motion to Dismiss Third Amended Complaint (ECF No. 207); Motion to Dismiss Relator's Third Amended Complaint (ECF No. 208); and Motion to Dismiss Relator's Third Amended Complaint (ECF No. 210).

Mr. Tracy's Third Amended Complaint (ECF No. 204) is DISMISSED WITH PREJUDICE as to the following defendants: Emigration Improvement District; Fred A. Smolka; Michael Hughes; Mark Stevens; David Bradford; Lynn Hales; Eric Hawkes; R. Steve Creamer; and Carollo Engineers.

Mr. Tracy is ORDERED to show cause as to why his third amended complaint should not be dismissed with prejudice as to the remaining defendants. Alternatively, Mr. Tracy may voluntarily dismiss his remaining claims. Mr. Tracy shall respond accordingly on or before Friday, June 22, 2018.

Signed June 22, 2018

BY THE COURT

Jill N. Parrish
United States District Court Judge

EXHIBIT
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From: The ECHO-Association <m.tracy@echo-association.com>
Date: August 10, 2020 at 10:58:52 AM MDT
To: moabvacationrental@gmail.com, mindyjmac@hotmail.com, Brian Maffly <bmaffly@sltrib.com>, Bubba Brown <bubba@parkrecord.com>, paigeb@hcn.org, jfahys@kuer.org, jnguyen@abc4.com, Amy Joi O'Donoghue <amyjoi@deseretnews.com>, tstevens@sltrib.com, dharrie@sltrib.com, ldavidson@sltrib.com, Katie McKellar <kmckellar@deseretnews.com>, lpacker@xmission.com, lindsaywhitehurst@gmail.com, newsdesk@kutv2.com, news@fox13now.com, hannahjoycee00@gmail.com, purpleturtle1221@yahoo.com
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Subject: Update of Emigration Canyon Water Litigation - Groundwater Mining & Stream Contamination

Dear Emigration Canyon Home Owner,

As you are aware, last year the Emigration Canyon Home Owners Association ("***The ECHO-Association***") began documenting earth collapse and fissures often associated with Groundwater Mining near the Emigration Oak Private Urban Development ("***Emigration Oaks PUD***") and recently released a aerial video documenting a massive 700-foot fissure and earth collapse near Pioneer Ridge Road, north of Margarethe Lane possible due to the continued operation of the Upper Freeze Creek Well and Boyer Well Nr 1 by The Simplifi Company for Emigration Improvement District ("***EID***" aka Emigration Canyon Improvement District aka ECID).

See https://echo-association.com/?page_id=3310.

We note that in 2014, the Utah Geological Survey has expressly concluded that similar subsidence and fissures in Iron County, Utah may provide a direct path for contaminated surface water to reach the principle source of drinking water for the Cedar Valley.

See https://echo-association.com/?page_id=3919.

Despite direct questions regrading these developments during the August EID trustee meeting, EID General Manager Eric Hawkes of the Simplifi Company refused to disclose the water levels of EID's production and monitor wells (audio-video recording available upon request).

As such, this morning The ECHO-Association filed legal action in Utah State Third District Court for the disclosure of public records by the Simplifi Company, Eric Hawkes and Emigration Canyon Metro Township Council member Jennifer Hawkes.

See https://echo-association.com/?page_id=7151.

The lawsuit records that EID through Mr. Hawkes, WIlly Stokman and Mindy McAulty Utah recently circulated a correspondence to Emigration Canyon residents that "faulty septic systems in the Canyon" was an "attributed cause" of surface water contamination despite the fact that in 2008 the United States Geological Survey had expressly determined that older septic systems were not linked to loading of nitrates and E *coli* in the Emigraiton Canyon Stream and the deterioration of drinking-water quality.

See https://echo-association.com/?page_id=7139.

While we recognize that pumping and testing of septic systems located near the stream is important for the health and safety of Canyon residents, we will not tolerate the dissemination of false and misleading information by EID, the Simplifi Company, Eric Hawkes or Canyon residents who fail to disclose the use of EID public funds for their activities.

We will release all public documents related to groundwater mining and the actual source of surface/drinking-water contamination upon receipt.

Feel free to contact us directly with any questions, concerns or comments.

Kind Regards,

Mark Christopher Tracy
- *qui tam* Relator / ECHO President
Tel. 929-208-6010