Jason M. Kerr (8222)
jasonkerr@ppktrial.com
Alan Dunaway (13514)
alandunaway@ppktrial.com
PRICE PARKINSON & KERR, PLLC
5243 W. Harold Gatty Dr.
Salt Lake City, Utah 84116
Tel: 801-517-7088
Attorneys for Appellant

No. 21-4059, 21-4143

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA Ex. rel. Mark Christopher Tracy, Appellant, vs. EMIGRATION IMPROVEMENT DISTRICT, et al., Appellees.	**ORAL ARGUMENT REQUESTED**

Appeal from the District of Utah, Central Division
Hon. Jill N. Parrish
D.C. No. 2:14-cv-00701-JNP

REPLY BRIEF OF APPELLANT

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GLOSSARY

SDWA:	Safe Drinking Water Act of 1974
FCA:	False Claim Act
SRF-Loan:	State Revolving Fund Loan

SUMMARY OF NEW ISSUES PRESENTED IN APPELLEES' CONSOLIDATED RESPONSE

United States of America ex rel. Mark Christopher Tracy, ("Mr. Tracy") by and through counsel, submits the following reply to the new issues presented by appellees Emigration Improvement District et al. ("EID" or "EID Defendants"), Carollo Engineers, ("Carollo") and private land developer / EID Advisory Committee Chairman R. Steve Creamer ("EID Chairman Creamer") (collectively "FCA Defendants").

Following the unanimous decision of United States Supreme Court, resolving a circuit split and affirming Mr. Tracy's previous augment before this Court that private relators have up to ten years to commence legal action under the Federal False Claims Act ("FCA"),[1, 2] and following the district court contradicting its own prior ruling that the present action was commenced "almost ten years ago" (Dist. Ct. Dkt. No. 226 at 1, 6-7), FCA Defendants now ask this Court to affirm dismissal on alternative grounds.

Namely, the FCA Defendants contest that the transfer of federally-backed funds into an escrow account administered by co-defendants within the Utah

[1] *United States ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, Case Nos.: 0:17-cv-04062, 717 F. Appx. 778 (10th Cir. 2017); 0:18-cv-04109, 804 Fed.Appx. 905 (10th Cir. 2020); 0:19-cv-04021, 804 Fed.Appx. 905 (10th Cir. 2020); 0:19-cv-04022, 804 Fed.Appx. 905 (10th Cir. 2020).
[2] *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

Division of Drinking Water ("DDW") in November 2002 for initial project financing and therewith later construction of the now defunct large-diameter commercial well ("Brigham Fork Well") and an unapproved drinking water reservoir with an estimated capacity between 1.3 and 2.0 million gallons ("Wildflower Reservoir") [3] on property belonging to EID Chairman Creamer constituted both "payment" and the "last culpable act" under the FCA's statute of repose[4] as articulated by the United States Supreme Court.[5]

In the yet further alternative, Carollo argues that the current operative Third Amended Complaint (hereinafter "Complaint") fails to allege scienter and a "sufficient nexus" between individual acts of co-conspirators leading to presentation of a false claim and economic damage and loss to the Government.[6, 7]

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[3] Prior to commencement of the present litigation, the database administered by co-defendants at DDW recorded the Wildflower Reservoir at 1.3 million gallons while internal EID documents recovered by Mr. Tracy cite a capacity of 2 million gallons. Measured at 96 feet in diameter, construction photos secured by Mr. Tracy reveal that the underground storage tank appears much larger than 20 feet in height yielding an estimated capacity between 1.3 and 2.0 million gallons. For reasons currently unknown, the DDW database has been subsequently altered and now records the Wildflower Reservoir at 1.0 million gallons as approved by DDW in the SRF-Loan over the objections of DDW project engineer Dr. Steve Onysko ("Dr. Onysko").

[4] Brief of Appellees at page 14.

[5] *See e.g. CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 82 (2014).

[6] Brief of Appellees at page 15.

[7] FCA Defendants' additional contention that Mr. Tracy's former legal counsel had referenced "claim" instead of "payment" in a single filing is likewise devoid of merit (Brief of Appellees at page 12). Prior to the United States Supreme Court unanimous confirmation of Mr. Tracy's previous legal augment before this Court,

These arguments fail.

The Complaint alleges that the following occurred after November 2002: (i) construction of an unapproved, "preposterously oversized," economically unfeasible, unsustainable, structurally defective, ecologically destructive, and patently unsafe drinking water system on property belonging to EID Chairman Creamer (and not Salt Lake City)[8] intended for massive future development at extraordinary private profit sometime in October 2003; (ii) false certification of both project compliance and completion by Carollo on September 22, 2004; (iii) unlawful disbursement of retainage funds on or after September 29, 2004, withheld from EID Defendants during construction to ensure both project compliance and completion; (iv) improper closure of the SRF-Loan on May 5, 2005, without issuance of federally-mandated operating permits required to distribute public drinking water following a mandatory post-construction inspection of substantial (and perhaps irreparable) structural defects of the Wildflower Reservoir and lastly, (v) technical revenue bond default in June 2013.

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the present litigation was commenced primarily under a theory of promissory fraud and frustration of government purpose, which the district court failed to address in its first and/or second dismissal. [Dist. Ct. Dkt. No. 219 at page 17]; *see e.g.*, *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 91 (2d Cir. 2012) and *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009).

[8] As a former environmental engineer with DDW, EID Chairman Creamer was irrefutably aware of federal SRF-Loan requirements.

As these culpable acts and/or omissions occurred in furtherance of an on-going scheme to defraud the Government within ten years of filing, this case should be remanded to another chamber of the district court for further proceedings in accordance with the instructions of this Court.

ARGUMENT

A. *Qui Tam* Pleading Requirements.

"Rule 9(b) joins with Rule 8(a) to form the general pleading requirements for claims under the FCA." *United States ex rel. Lemmon v. Envirocare*, 614 F.3d 1163, 1171 (10th Cir. 2010). Pre-*Twombly* cases required plaintiffs in FCA cases to plead the "who, what, when, where and how of the alleged [claim]." *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 727 (10th Cir. 2006). While the United States Supreme Court clarified Rule 9(b) requirements in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 622 (2009), the Rule's purpose remains unaltered – "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based…." *Lemmon*, 614 F.3d at 1172 (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir. 1992); *see also* 5A WRIGHT & MILLER § 1298. Rule 9 is flexible and "must remain so to achieve the remedial purpose of the False Claims Act." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

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

> The federal rules do not require a plaintiff to provide a factual basis for every allegation. Nor must every allegation, taken in isolation, contain all the necessary information. Rather, to avoid dismissal under Rules 9(b) and 8(a), plaintiffs need only show that, taken as a whole, a complaint entitles them to relief. *Id*. at 1173.

A relator can survive a motion to dismiss by showing circumstantial evidence of an agreement to defraud. *See, i.e., United States ex rel. Wilkins v. North American Construction Corp*., 173 F. Supp.2d 601, 641 (S.D. Tex. 2001).[9]

The relaxed pleading requirement for *qui tam* claims is understandable. The reality of many FCA cases is that the details of the fraudulent schemes are rarely fully ascertainable before fact discovery. Under the *Twombly* and *Iqbal* pleading

[9] In *Wilkins*, a relator established a conspiracy by merely demonstrating that the defendants held meetings and discussed altering drafts of a claim to be submitted to the Government and then made a statement about the inaccuracy of altered drafts, and omitted references critical to underlying information. *Wilkins*, 173 F. Supp.2d at 641. *See e.g.*, Aplt.App. at 050, 140-152.

standard, a defendant could violate the FCA and evade any claim based on the inability of the Government or a relator to meet the higher pleading requirements.

B. Claims under the Fraud and Recovery Act ("FERA").

In 2009, the Fraud Enforcement and Recovery Act ("FERA") was enacted by Congress and amended the FCA. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1617, 1624 (May 20, 2009).

Congress broadened the scope of conspiracy liability under the FCA, by expressly making conspiracy liability actionable for any violation of § 3729. *Id*. To establish a conspiracy, the Complaint must show that (1) the defendant knowingly agreed with another person to defraud the Government; and (2) at least one act was performed in furtherance of the conspiracy. *See, i.e., United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 343 (5th Cir. Tex. 2008); *United States v. Hill*, 676 F. Supp. 1158, 1173 (N.D. Fla. 1987).

C. Mr. Tracy's Qui Tam Claims against the FCA Defendants are Sufficiently Plead.

To secure and prevent recovery of SRF-Loan proceeds, FCA Defendants and public officials of DDW made numerous false representations to the Government including that EID owned sufficient water rights to complete the project, geohydrology studies did not expressly warn against the extraction of millions of gallons of water via large-diameter commercial wells from Emigration Canyon's Twin Creek Aquifer, the construction of a 1-million gallon reservoir on property

belonging to Salt Lake City (and not EID Chairman Creamer) for 67 "existing" homes was economically feasible and would not remedy the defunct Emigration Oaks PUD water system constructed with water rights stripped from the active federal military Mount Olivet cemetery, and that DDW would conduct a mandated post-construction inspection of substantial (and perhaps irreparable) construction defects of the Wildflower Reservoir and issue all operating permits prior to the closure of the SRF-Loan on May 3, 2005.[10] (Aplt.App. at 064-074, 081-084, ¶ 60)

The Complaint fulfills both the pleading requirements of specificity and scienter.

D. Qui Tam Claims against Carollo are Plead with Sufficient Particularity.

In the present case, Mr. Tracy has brought direct qui tam claims against Carollo, arising from its express and implied certification to the Government in support of EID Defendants' own false certification to obtain $1.846 million in federal funds, arising from EID's continued concealment of the violations of the requirements to retain the federal funds.

[10] On May 3, 2005, DDW closed the SRF-Loan even though EID failed to secure a permanent operating permit for the Wildflower Reservoir following a mandatory post-construction inspection of substantial construction defects. To date, with the positive knowledge of DDW public officials, EID Defendants continue to deliver public drinking water via the Wildflower Reservoir on property belonging to EID Chairman Creamer devoid of a valid operating permit mandated under the SDWA. *See* Aplt.App. at 074, ¶ 18; 095-96, ¶ 257.

Mr. Tracy's Complaint alleges sufficient facts to assert that (1) Carollo had sufficient knowledge of the alleged facts, and (2) Carollo's statements were material to the fraudulent scheme.

E. The Complaint Alleges Sufficient Facts to Support that Carollo Acted with Actual Knowledge of EID Defendants' and EID Chairman Creamer's Fraudulent Scheme.

Carollo previously argued before the district court that "Relator does not provide any facts to support a reasonable inference" that it acted with knowledge of the fraud, "deliberate ignorance" or "reckless disregard" with respect to the truthfulness of its statements. This argument is refuted by the allegations of the Complaint.

Mr. Tracy's Complaint alleges that EID's right to the $1.846 million loan from the federal Drinking Water State Revolving Fund ("DWSRF") program was conditioned upon EID agreeing to comply with ongoing contractual obligations.[11] EID agreed to use the funds to bring clean water to at least 57[12] existing canyon residents.[13] EID agreed not to use the funds to build water infrastructure for future development.[14] EID agreed to monitor the output of its water system so as to not

[11] Aplt.App. 065, ¶ 57.
[12] The Complaint mistakenly alleges 67.
[13] Aplt.App. 044-046.
[14] C.F.R. § 35.3520(e)(3) and (e)(5); 40 C.F.R. § 35.3520; Utah Admin. Code § 309-7054(3)(c). EID impliedly agreed to comply with these regulations when it accepted the $1.846 million.

decrease the flows of private wells or the Emigration Canyon stream.[15] EID agreed to build its water system in accordance with approved plans and specifications.[16] EID agreed that it would build the water system only if it had sufficient water rights to do so.[17] Mr. Tracy has alleged that EID failed to do these things.[18]

The Complaint describes Carollo's presently known involvement in the EID Defendants' and EID Chairman Creamer's fraudulent scheme and provides adequate basis for a reasonable inference that, with knowledge, it made material statements and concealed material information in furtherance of the fraudulent scheme.[19]

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[15] Aplt.App. 059-60, ¶¶ 288-91. This obligation was imposed on EID via a letter dated January 3, 2001, requiring EID to adopt a Water Management Conservation Plan. *Id*. 140-150.

[16] *Id*. 054-055; 067-073, ¶¶ 69-108; 091-092; 106-108, ¶¶ 327-342. EID incurred this obligation when it submitted plans and specifications as part of the NEPA review.

[17] *Id*. at p. 8. This obligation was imposed on EID via a letter dated January 3, 2001. *Id*. 140-150. While the district court placed great weight on the filing of a purported wrongful lis pendens, EID failed to contradict, and the district court failed to properly apply motion to dismiss legal standards that the now defunct Brigham Fork Well was both constructed and operated under disputed water claims as alleged. *Id*. at 061-062; 081-084; 132, ¶ 511. In awarding fees, the district court also failed to consider that the judgment related to the lis pendens was immediately satisfied by Mr. Tracy's former legal counsel and Mr. Tracy has prevailed in all appeals before this Court since the original fees award.

[18] *Id*. at 051 (only 30 of the 57 residents connected to the system); 081-094 (alleging that EID used the $1.846 million to build a water system for future population growth); 100-101¶¶ 288-91 (EID failed to measure the water in its monitoring wells); 067-073, ¶¶ 69-108, 092, ¶ 231, 106-108, ¶¶ 327-342 (EID failed to build the projects according to plans and specifications); 96, ¶ 258, (EID misrepresented that it had "superior" water rights).

[19] *Lemmon*, 614 F.3d at 1172 (citations omitted).

Carollo prepared a report in 1995 stating that a 500,000 gallon reservoir would be sufficient to service the existing 700 households in Emigration Canyon.[20] EID proposed to the Government a planned 1-million gallon reservoir on Salt Lake City property, which a DDW staff engineer found "preposterously oversized" beyond the 300,000 gallon capacity needed to fulfill federal requirements.[21]

In response, Carollo "refused" to consider a cost savings of $500,000.00 by engineering an appropriately sized 300,000 gallon reservoir,[22] and Carollo prepared a feasibility study falsely demonstrating the economic ability to service the federally-backed debt obligation.[23] Subsequently, with approval of pre-construction plans over the objections of the staff engineer, and following an undisclosed meeting with EID Chairman Creamer immediately following Dr. Onysko's objections,[24] Carollo was hired by EID to inspect and supervise the construction of the Wildflower Reservoir for EID with the $1.846 million federal loan.[25] Pursuant to the pre-construction plans, the Wildflower Reservoir's site was to be constructed on specified property belonging to Salt Lake City.[26] Carollo "actively concealed" the fact that EID intended to build, and built, the Wildflower Reservoir at a different

[20] Aplt.App. at 072, ¶ 102.
[21] *Id*. at 071, ¶ 97.
[22] *Id*. at ¶ 100.
[23] *Id*. at 099, ¶ 279.
[24] *Id.* At at50, 140-152.
[25] *Id*. at 070, ¶ 94; 072, ¶ 103.
[26] *Id*. at 069-70, ¶¶ 88-93.

location – on land owned by EID Chairman Creamer by withholding the completed land survey from the Salt Lake County Recorders' Office.[27] While the construction drawings provided for a 1-million gallon tank (71 foot diameter and 31 foot height), Carollo supervised construction of a 1.3 to 2-million gallon tank (100 foot diameter and 23-30 foot height).[28] Carollo Engineering failed to report that the Wildflower Reservoir was larger than approved and was built on EID Chairman Creamer's property with the assistance of EID Chairman Creamer.[29] The Wildflower Reservoir structure was deficient and immediately began leaking chlorinated water into the Emigration Canyon aquifers after it became operational sometime in October 2003.[30] In August 2003, Carollo also issued change orders contrary to the pre-construction plans reducing 8 inch water lines to 2 inch water lines.[31]

Despite its duties to supervise and inspect the construction of the Wildflower Reservoir, multiple open and obvious violations of the pre-construction plans, and an active leak in the reservoir, Carollo falsely certified the project as complete and in compliance with the preconstruction plans on September 22, 2004.[32]

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[27] *Id*.
[28] *Id*. at 070, ¶ 94.
[29] *Id*. at 070, ¶ 93; 072, ¶ 103.
[30] *Id*. at 103; ¶ 304.
[31] *Id*. at 073-74, ¶¶114-115.
[32] *Id*. at 068, ¶ 76; 074 ¶, 117; 107, ¶ 334; 114, ¶ 386.

Based upon these allegations, the Complaint alleges that Carollo "actively concealed" information, "falsely certified" the Wildflower Reservoir and water pipelines had been built according to the plans and specifications, "knowingly" made, used, or cause to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government, and conspired to defraud the Government by fraudulently inducing final disbursement of construction retainage funds on September 29, 2004.[33] Based upon these allegations, there are sufficient facts to support a reasonable inference that Carollo knew that its certification of the project was false, acted with deliberate indifference regarding the truth of its statements, and acted with reckless disregard with respect to the truth of its statements.

Shortly after Carollo's certification, former EID Trustee Bowen confronted Defendant Ronald P. Rash, a Carollo shareholder, and refuted the certification of project completion.[34] Carollo did nothing to correct its false certification. Further, since 2004, EID has designated payments to Carollo for engineering, Carollo has provided additional work for EID, and Carollo has reaped financial benefits for its false certification of the project. Accordingly, Carollo's motion to dismiss should be denied. These representations were demonstrably false.

[33] *Id.* at 070, ¶ 94; 090-91, ¶¶ 502, 507, 508.
[34] *Id.* at 074, ¶ 120.

Moreover, during initial plan review, DDW project engineer Dr. Onysko refused to certify project compliance with SDWA regulations as EID had proposed "grossly undersized" water distribution lines and a "preposterously oversized" water tank believed to evidence intent of future development. Following an undisclosed meeting with Defendant Fred A. Smolka and EID Chairman Creamer a few days later at the law office of EID's current legal counsel,[35] Dr. Onysko's objections were overruled by DDW director Michael Georgeson ("Defendant Georgeson") and federally backed funds placed into escrow, whereby a 10% retainage was withheld from each of the six (6) draw requests until final completion of the project.[36,]

Following EID's final draw request on September 16, 2004,[37] DDW released retainage funds to EID on September 29, 2004, and on May 3, 2005, DDW engineer McCully closed SRF-Loan despite not having completed the mandatory post construction inspection and with no permanent operating permit issued for the Wildflower Reservoir improperly constructed on property belonging to EID

[35] Aplt.App. at 140-152.
[36] For each of the six (6) draw requests submitted by EID, a 10% "retainage" was withheld to ensure both compliance and successful completion of the project.
[37] Contrary to the ruling of the district court, the six (6) draw requests submitted by EID for disbursement of escrow account funds were not "claims for payment" under the FCA, as EID provided no goods or service to the Government. These documents were not withheld from the district court.

Chairman Creamer and not Salt Lake City.[38] Moreover, on January 20, 2015, DDW engineer Grange falsely certified to the Government that the SRF-Loan "had closed" in the 2002 calendar year,[39] and on June 13, 2013, EID announced that it "must raise about $84,000.00 more money [sic] each year [from property owners not connected to the Emigration Oaks PUD water system]" to service its yet outstanding federal debt.

As such, EID and DDW public official intended and did disperse unfeasible SRF-Loan proceeds for the sole benefit of private land developers including EID Chairman Creamer with whom they had conspired for the purpose of retiring senior perfected water rights in Emigration Canyon under duplicitous water shares to both remedy and facilitate future development of over 500 new homes of the Emigration Oaks PUD at public expense and private profit. (*See* Aplt.App., 070, ¶ 94; 071, ¶ 97-98, 073, ¶ 109, 075, ¶¶ 121, 127; 081-084; 085, 089, ¶ 211.)

[38] The temporary operating permit issued for the Wildflower Reservoir by DDW engineer Kevin Brown due to "construction defects responsible for substantial leakage from the tank" expired on February 1, 2004.

[39] Per email correspondence dated January 20, 2015, EPA investigator Hawthorne reported to DDW engineer Grange that "[t]he powers above me have made the decision that based on the information provided by you and your office, we will not need to look any deeper in the allegations [of the FCA Complaint] received."

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal, award of attorney fees and remand for further proceedings with another chamber of the district court.

DATED this 31st day of March 2022.

PRICE PARKINSON & KERR, PLLC

/s/ Alan Dunaway
Jason M. Kerr
Alan W. Dunaway

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Date: March 31, 2022 */s/ Alan Dunaway*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF OF APPELLANT** was sent to the following individuals, by way of the Court's CM/ECF Filing System:

Craig R. Mariger – cmariger@joneswaldo.com
C. Michael Judd – mjudd@joneswaldo.com
JONES WALDO HOLBROOK & MCDONOUGH, PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Attorneys for Carollo Engineers, Inc. and Ronald R. Rash

Robert L. Janicki – rjanicki@strongandhanni.com
Michael L. Ford – mford@strongandhanni.com
STRONG & HANNI
9350 South 150 East, Suite 820
Sandy, Utah 84070
Attorneys for R. Steve Creamer

Jeremy R. Cook – jcook@ck.law
Cohne Kinghorn, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Attorneys for the District, Michael Hughes, Mark Stevens, David Bradford, Fred R. Smolka, Eric Hawkes and Lynn Hales

Amanda A. Berndt – Amanda.berndt@usdoj.gov
Assistant U.S. Attorney
Office of the United States Attorney
185 South State Street, Suite 300
Salt Lake City, Utah 84111-1506

Date: March 31, 2022 */s/ Alan Dunaway*

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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