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18 UNITED STATES DISTRICT COURT
19 EASTERN DISTRICT OF CALIFORNIA

20 UNITED STATES OF AMERICA, *ex rel.*
21 MARY HENDOW and JULIE ALBERTSON,

22 Plaintiffs,

23 v.

24 UNIVERSITY OF PHOENIX and DOES 1-500,
25 Inclusive,

26 Defendants.

CASE NO. CIV. S-03-0457 GEB DAD

**DEFENDANT UNIVERSITY OF
PHOENIX'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF ITS
MOTION TO DISMISS PURSUANT TO
FEDERAL RULES OF CIVIL PROCEDURE
12(b)(6)**

Date: February 9, 2003

Time: 9:00 a.m.

Place: Courtroom 10

Judge: Hon. Garland E. Burrell, Jr.

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1 I. INTRODUCTION AND SUMMARY OF ARGUMENT

2 This is a *qui tam* action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3730, by
3 relators Mary Hindow and Julie Albertson against the University of Phoenix (hereinafter "UOP").
4 Styled as a "false certification" case, relators contend UOP violated recruiter compensation
5 restrictions contained in the Higher Education Act ("HEA") and the implementing regulations of the
6 Department of Education ("ED") by paying its recruiters a salary based on the number of students
7 enrolled and other enrollment activities. First Amended Complaint (hereinafter "Compl.") ¶¶ 1, 29.
8 Relators contend UOP falsely certified compliance with the HEA restrictions through execution of
9 one or more Program Participation Agreements ("PPA") in which UOP stated it would comply with
10 the HEA. Compl. ¶ 26.

11 Relators' contentions, however, fall far short of what is required to state a claim under the
12 FCA. In fact, two District Courts have recently dismissed with prejudice FCA complaints against
13 educational institutions based on virtually identical theories.¹ The relators in these other cases, as in
14 this case, accused the institutions of violating HEA restrictions by paying recruiters a salary tied
15 directly to enrollments and, as in this case, the relators argued that the institutions' PPAs constituted
16 "false certifications" of compliance with the HEA. The courts dismissed those complaints with
17 prejudice under F.R.C.P. 12(b)(6), because the relators failed to satisfy the basic elements of every
18 FCA claim: (1) the submission of a "claim" against the United States; (2) that was false or
19 fraudulent; (3) with knowledge of the falsity or false claim. *United States v. Kitsap Physicians*
20 *Service*, 314 F.3d 995, 1000 (9th Cir. 2002).

21 First, the relators have not identified any claim that UOP submitted or caused to be submitted
22 to the government. The existence of a claim is "the *sine qua non* of a False Claims Act violation."
23 *United States ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002)
24 *cert. denied*, 537 U.S. 1105 (2003). A claim is "any request or demand, whether under a contract or

25 _____
26 ¹ These matters are *United States ex rel. Graves v. ITT Educational Services, Inc.*, 2003 U.S. Dist.
27 LEXIS 17574 (S.D. Tex. 2003) (hereinafter *Graves*) and *United States ex rel. Gay v. Lincoln*
28 *Technical Institute, Inc.*, Civ. Act. No. 3:01-CV-505-K (N.D. Tex. 2003) (hereinafter *Gay*). The
Gay decision is attached as Exhibits A to the Request for Judicial Notice, filed concurrently. The
Graves matter has been appealed to the Fifth Circuit.

1 otherwise, for money or property." 31 U.S.C. § 3729(c). Nowhere in the Complaint have the relators
2 described any such demand or request, much less UOP's alleged involvement with such a request or
3 demand. Relators allege that UOP receives federal financial aid (Compl. ¶ 1), but the receipt of
4 money is not sufficient to establish a FCA claim. See *United States ex rel. Hopper v. Anton*, 91 F.3d
5 1261, 1265-66 (9th Cir. 1996), cert. denied, 444 U.S. 1049 (1997) (receipt of money not sufficient to
6 establish a FCA; liability attaches to the claim for payment, not the underlying fraudulent activity). In
7 the absence of any identifiable "claim," the relators cannot maintain a FCA action.

8 Second, the relators have not alleged facts sufficient to establish that any purported claim was
9 false or fraudulent. Relators allege that, as a condition of participating in federal financial aid
10 programs, UOP must execute a PPA, which relators contend is a certification of past and present
11 compliance with the HEA recruiter compensation provisions. The relators' assertions are contradicted
12 by the express terms of the PPA. As set forth in the PPA, educational institutions are required to
13 provide certifications regarding their compliance with specific statutes and ED regulations. The list
14 of statutes and regulations to which institutions must certify their present compliance does not include
15 the HEA recruiter compensation provisions at issue here. Through the PPA, UOP only agrees that it
16 will comply with HEA requirements in the future. Thus, the PPAs are not certifications of past or
17 present compliance with the HEA limitations, contain no false statements, and do not support a claim
18 under the FCA. Both the *Graves* and *Gay* courts rejected claims by relators that the PPAs constituted
19 certifications of compliance. In sum, relators are attempting to bootstrap alleged violations of the
20 HEA requirements into FCA violations, but it is axiomatic that "[v]iolations of laws, rules, or
21 regulations alone do not create a cause of action under the FCA." *Hopper*, 91 F.3d at 1266.

22 Finally, relators have failed in any event to allege facts sufficient to establish that UOP
23 violated the HEA restrictions. On the contrary, the relators' description of the alleged violation is
24 actually consistent with the HEA and its implementing regulations. The implementing regulations
25 issued by ED make clear that an institution is permitted to compensate its recruiters based on the
26 number of enrollments, as long as the number of enrollments is not the **sole** basis for compensation.
27 34 C.F.R. § 668.14(b)(22)(ii)(A). In their Complaint, Relators acknowledge that UOP's
28 compensation decisions are based on enrollments *and other enrollment activities*. Compl. ¶¶ 29, 39

1 (emphasis added). Relators allege that these "other enrollment activities" include telephone calls,
2 generation of leads, and appointments. Thus, as alleged in the Complaint, UOP's compensation
3 decisions are not based "solely" on the number of enrollments, do not run afoul of the HEA
4 restrictions and, therefore, do not support a FCA action.

5 **II. FACTUAL AND PROCEDURAL BACKGROUND**

6 **A. The University of Phoenix**

7 Founded in 1976, the UOP is the largest private university in the United States. UOP's
8 primary mission is to educate working adults to develop the knowledge and skills that will enable
9 them to achieve their professional goals, improve the productivity of their organizations, and provide
10 leadership and service to their communities. UOP's adult learning model makes higher education
11 more accessible, efficient, and relevant to the real world, as adult learners bring to the classroom
12 organizational and personal experiences that enrich the learning process.

13 Accredited by the Higher Learning Commission of the North Central Association in 1978,
14 UOP offers both undergraduate and graduate programs in a variety of fields. UOP currently enrolls
15 174,939 degree seeking adult students at 47 campuses and 87 learning centers in 28 states.² UOP
16 also offers its degree programs worldwide through its University of Phoenix Online campus.

17 **B. Allegations of the Complaint**

18 Relators Mary Hendow and Julie Albertson are Enrollment Counselors at UOP's Northern
19 California campus. Compl. ¶¶ 5-6. The Complaint alleges that UOP is the largest recipient of federal
20 student financial aid funds from ED pursuant to the HEA, Title IV. Compl. ¶ 1. The Relators do not
21 indicate what particular student financial aid funds are implicated in this action, but suggest that
22 educational institutions in general receive funds through the Federal Pell Grant program, Federal
23 Supplemental Educational Opportunity Grant Program, Federal Perkins Loan Program, and the
24 Federal Family Education Loan Program. Compl. ¶ 22.

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27 ² UOP has locations in Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois,
28 Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Mexico,
North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia,
Washington, Wisconsin, Puerto Rico, and Vancouver, British Columbia.

1 Relators suggest the HEA prohibits "universities from providing 'any commission, bonus or
2 other incentive payment . . . ' to recruiters based on recruiting activities." Compl. ¶ 13. Relators
3 allege that to be eligible to receive federal student financial aid funds, an institution must "certify to
4 the government that the institution will comply with the incentive compensation ban through a
5 Program Participation Agreement." Compl. ¶ 23. Relators do not attach a copy of a PPA to the
6 Complaint or explain what in the PPA constitutes a "certification" that an institution has complied
7 with or is in compliance with the HEA restrictions. Relators simply allege that UOP "falsely certifies
8 to the [ED] compliance with the incentive compensation ban in the" PPA which, in turn, induces ED
9 to pay out financial aid funds based on UOP's alleged false promises to comply. Compl. ¶ 28.

10 Relators allege that UOP violates the restrictions on "commission, bonus, or other incentive
11 payments" by paying its Enrollment Counselors a salary based upon the number of students they
12 enroll and other enrollment activities, such as telephone calls, generation of leads, and appointments.
13 Compl. ¶¶ 29. Relators contend that Enrollment Counselors are evaluated based on their enrollments
14 and enrollment activity. Compl. ¶ 32. Relators contend that Enrollment Counselors also receive
15 trips, gifts, and bonuses based upon enrollments and enrollment activities. Compl. ¶ 39. The relators
16 seek, before trebling, approximately \$3 billion in damages. Compl. ¶¶ 52, 55.

17 **C. Procedural Posture: the Government Investigates and Declines to Intervene**

18 The relators filed the Complaint on or about March 7, 2003, under seal pursuant to 31 U.S.C.
19 § 3730(b)(2). The seal requirements are designed to provide the United States with the opportunity to
20 investigate the allegations before a defendant is made aware of the action. The government then has
21 the option of intervening and assuming control of the litigation. On May 5, 2003, the Department of
22 Justice announced that it decided not to intervene, leaving the relators to pursue this matter on their
23 own. On May 7, 2003, the Court unsealed the Complaint and ordered that it be served immediately.
24 Relators served the Complaint on UOP on August 29, 2003. The parties subsequently stipulated to
25 extend the date for UOP to respond to the Complaint for 30 days.
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