

FILED

MAY 20 2004

**CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel.)
MARY HENDOW and JULIE ALBERTSON,)
)
Plaintiffs,)
)
v.)
)
UNIVERSITY OF PHOENIX,)
)
Defendant.)
_____)

NO. CV S-03-457 GEB DAD

ORDER*

CLOSED
DATE 5/20/04

Defendant University of Phoenix ("UOP") moves to dismiss Relators' Second Amended Complaint ("SAC"), arguing it fails to allege UOP submitted a false or fraudulent claim for payment to the United States in violation of the False Claims Act ("FCA").

Relators allege that an educational institution such as UOP seeking to participate in certain federal student financial aid programs must enter an agreement with the government promising that it will not compensate enrollment counselors based on the number of students who enroll. (SAC ¶¶ 14, 24.) Relators further allege that UOP enters such an agreement annually, and knows it will breach that

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

1 | agreement because it compensates enrollment counselors based on the
2 | number of students who enroll. (Id. ¶ 29.)

3 | UOP argues Relators' FCA claims must be dismissed because
4 | Relators do not allege "an actual false claim for payment being made
5 | to the Government." United States v. Kitsap Physicians Service, 314
6 | F.3d 995, 1002 (9th Cir. 2002). "The False Claims Act . . . focuses
7 | on the submission of a claim, and does not concern itself with whether
8 | or to what extent there exists a menacing underlying scheme." Id.

9 | Relators allege "UOP submits a request for [financial aid]
10 | funds directly to the Secretary of the United States Department of
11 | Education." (SAC ¶ 33.) But they do not allege that those claims
12 | contain express false statements. Instead, Relators argue that UOP's
13 | claims constitute "implied certification" that UOP is in compliance
14 | with its agreement with the government. A false certification of
15 | compliance with applicable law only gives rise to an FCA claim if
16 | certification of compliance with a particular statute is a
17 | prerequisite to obtaining a government benefit. See United States ex
18 | rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) (holding that
19 | false certification of compliance with federal disability laws did not
20 | give rise to FCA claim since payment was not conditional on
21 | certification). Relators contend that 20 U.S.C. § 1094(a) imposes
22 | such a certification requirement. 20 U.S.C. § 1094(a) provides:

23 | In order to be an eligible institution for the
24 | purposes of [participating in federal student
25 | financial aid programs,] an institution must . . .
26 | enter into a program participation agreement with
27 | the Secretary [of Education]. The agreement shall
28 | condition the initial and continuing eligibility
 of an institution to participate in a program upon
 compliance with the following requirements:

. . . .

1 (20) The institution will not provide
2 any commission, bonus, or other
3 incentive payment based directly or
4 indirectly on success in securing
5 enrollments or financial aid to any
6 persons or entities engaged in any
7 student recruiting or admission
8 activities. . . .

9 Since this statute only requires that UOP enter into an
10 agreement, and does not require a certification, Relators' argument is
11 unpersuasive.

12 Relators alternatively argue that UOP's actions give rise to
13 a "promissory fraud" FCA claim. Promissory fraud can be actionable
14 where a claimant intentionally makes a "false certification" that it
15 will comply with a particular law when such certification is "a
16 prerequisite for the [claimant] to receive [federal] funds," and
17 subsequently submits a claim for payment despite its failure to comply
18 with that law. Hopper, 91 F.3d at 1267. Since Relators have not
19 identified any certification which is a prerequisite for UOP to
20 receive federal funds, this argument also fails.¹

21 UOP requests that the SAC be dismissed with prejudice, and
22 Relators do not request leave to amend. Therefore, the SAC is

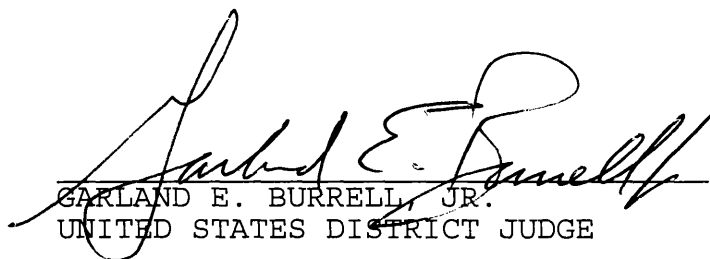
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28 ¹ Relators also argue that UOP makes a certification in
"management assertion letters" written by UOP management for an
annual compliance audit . . . performed by an independent certified
public accountant." (SAC ¶ 30.) But Relators identify no statute or
regulation which makes any certification in these letters a
prerequisite to the receipt of federal funds.

1 dismissed with prejudice. Judgment shall be entered in favor of
2 Defendant.

3
4 IT IS SO ORDERED.

5 DATED: May 19, 2004

6 
7 GARLAND E. BURRELL, JR.
8 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Eastern District of California
May 20, 2004

* * CERTIFICATE OF SERVICE * *

2:03-cv-00457

Hendow

v.

Univ of Phoenix

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 20, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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by: Deputy Clerk