

**FILED**

FEB 24 2004

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

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\*

*c/GEB*

Defendant University of Phoenix ("UOP") moves to dismiss Relators' First Amended Complaint ("the Complaint"), 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").<sup>1</sup> Relators counter that the Complaint alleges UOP made a fraudulent promise to the United States that UOP will not pay its enrollment counselors a commission based on the number of students it enrolls, and if UOP did not make this promise, its students would be ineligible for federal

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

<sup>1</sup> Relators are *qui tam* plaintiffs under the FCA. See Cedars-Sinai Medical Center v. Shalala, 125 F.3d 765, 767 (9th Cir. 1997).

1 financial aid. Relators contend this fraudulent promise violates the  
2 FCA.

### 3 FACTUAL ALLEGATIONS

4 Relators Mary Hendow and Julie Albertson are employed as  
5 enrollment counselors at UOP. (Complaint ¶¶ 4-5.) Before UOP  
6 students can be eligible for federal financial aid programs, UOP must  
7 execute a Program Participation Agreement with the Department of  
8 Education which includes UOP's promise not to compensate enrollment  
9 counselors based on the number of enrolled students. (Id. ¶¶ 23, 26.)  
10 Relators allege UOP is "fully aware" that its compensation system is  
11 inconsistent with its fraudulent promise. (Id. ¶¶ 18, 28.) They  
12 allege UOP pays salaries to enrollment counselors based on the number  
13 of students they enroll, and that the enrollment counselors are also  
14 provided "incentive trips, awards and gifts based upon their  
15 enrollment numbers." (Id. ¶ 16.) UOP maintains two sets of personnel  
16 files on its enrollment counselors, one which is shown to the  
17 government and appears to comply with the Program Participation  
18 Agreement, and another which is secret and violates the Program  
19 Participation Agreement. (Id. ¶ 20.)

### 20 STANDARD OF REVIEW

21 Under the Rule 12(b)(6) dismissal standard, all material  
22 allegations in the complaint must be accepted as true and construed in  
23 the light most favorable to Relators. Scheuer v. Rhodes, 416 U.S.  
24 232, 236 (1974); Sprewell v. Golden State Warriors, 266 F.3d 979, 988  
25 (9th Cir. 2001); North Slope Borough v. Rogstad (In re Rogstad), 126  
26 F.3d 1224, 1228 (9th Cir. 1997). A claim "should not be dismissed for  
27 failure to state a claim unless it appears beyond doubt that  
28 [Relators] can prove no set of facts in support of [their] claim which

1 would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46  
2 (1957); see also Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

3 DISCUSSION

4 To establish a cause of action under the False  
5 Claims Act . . . [Relators] must prove three  
6 elements: (1) a "false or fraudulent" claim; (2)  
7 which was presented, or caused to be presented, by  
8 the defendant to the United States for payment or  
9 approval; (3) with knowledge that the claim was  
10 false.

11 United States v. Mackby, 261 F.3d 821, 826 (9th Cir. 2001) (quoting 31  
12 U.S.C. § 3729(a)(1)).

13 The FCA defines a claim as:

14 any request or demand, whether under a contract or  
15 otherwise, for money or property which is made to  
16 a contractor, grantee, or other recipient if the  
17 United States Government provides any portion of  
18 the money or property which is requested or  
19 demanded, or if the Government will reimburse such  
20 contractor, grantee, or other recipient for any  
21 portion of the money or property which is  
22 requested or demanded.

23 31 U.S.C. § 3729(c). UOP argues that the Complaint fails to allege  
24 UOP submitted a false claim for payment to the government. Relators  
25 counter that UOP's students' federal financial aid applications are  
26 claims for payment to the government, and that UOP benefits from the  
27 financial aid money which is used to pay tuition.

28 But the Complaint does not allege that UOP submitted a  
claim, only that it made its students eligible to submit claims.<sup>2</sup>  
Although the Complaint alleges UOP signs its Program Participation  
Agreements with the Department of Education while intending to breach

---

<sup>2</sup> Relators cite 34 C.F.R. §§ 668.161-668.163 for the proposition that UOP submits claims to the Department of Education for student financial aid. These regulations concern the disbursement of Pell Grant funds after the Department of Education has approved a claim, but do not reveal whether the student or the school submits the claim.

1 those agreements, "the [FCA] attaches liability, not to underlying  
2 fraudulent activity, but to the claim for payment." United States ex  
3 rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996).

4 Relators alternatively argue that the Complaint states a  
5 claim for "promissory fraud" under the FCA. The Ninth Circuit has  
6 indicated that "promissory fraud may be actionable in rare  
7 circumstances under the FCA." Id. at 1267. Under this theory, a  
8 claimant whose actual claim contains no false statements, but who  
9 earlier made a false promise which was "a prerequisite for the  
10 [claimant] to receive [federal] funds," can be liable under the FCA.  
11 Id. But the Complaint does not allege that UOP was a claimant who  
12 received federal funds, rather it alleges that UOP's false promise  
13 enabled students to claim federal financial aid money. Since the  
14 Complaint does not allege a false or fraudulent claim, it will be  
15 dismissed.

16 Relators request leave to file an amended complaint, which  
17 they contend will indicate that UOP submits false or fraudulent  
18 claims. UOP counters that any amendment would be futile, noting that  
19 other district courts have dismissed similar complaints with  
20 prejudice. But since Relators have not been given an opportunity to  
21 address the defects in the Complaint, it is dismissed without  
22 prejudice.<sup>3</sup> Cf. United States ex rel. Graves v. ITT Educ. Serv.,  
23 Inc., 284 F. Supp. 2d 487, 509 (S.D. Tex. 2003) (dismissing complaint  
24 with prejudice after giving relators "three attempts to plead").

---

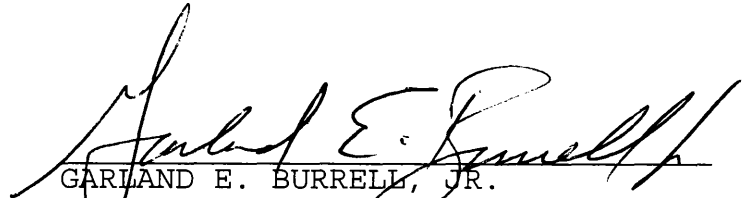
25  
26  
27  
28 <sup>3</sup> Relators amended their complaint "once as a matter of  
course" under Rule 15(a) of the Federal Rules of Civil Procedure, but  
no prior dismissal order has issued.

1 Relators have leave to file an amended complaint within ten days of  
2 the date on which this Order is filed.

3 UOP also requests clarification of a portion of the Status  
4 (Pretrial Scheduling) Order filed January 9, 2004. Specifically, UOP  
5 requests that a deadline be set for initial disclosures under Rule  
6 26(a)(1) of the Federal Rules of Civil Procedure. However, because of  
7 the questions raised as to whether Relators will be able to state a  
8 claim, the January 9 Status Order is vacated and discovery is stayed.  
9 This moots UOP's request.

10  
11 IT IS SO ORDERED.

12 DATED: February 19, 2004

13   
14 GARLAND E. BURRELL, JR.  
15 UNITED STATES DISTRICT JUDGE  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
for the  
Eastern District of California  
February 24, 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 February 24, 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.

Daniel Robert Bartley  
Daniel R Bartley Attorney at Law  
PO Box 686  
Novato, CA 94948-0686

SF/GEB

PB/DAD

Nancy Gail Krop  
Law Office of Nancy Krop  
1534 Plaza Lane  
Suite 322  
Burlingame, CA 94010

Bryan B Arnold  
Gibson Dunn and Crutcher  
333 South Grand Avenue  
Suite 5000  
Los Angeles, CA 90071-3197

Michael A Hirst  
United States Attorney  
501 I Street  
Suite 10-100  
Sacramento, CA 95814

**Jack L. Wagner, Clerk**



**by: Deputy Clerk**