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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNIVERSITY OF PHOENIX,

Defendant.

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

**DEFENDANT'S REPLY BRIEF IN
SUPPORT OF ITS MOTION TO DISMISS
RELATORS' SECOND AMENDED
COMPLAINT PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 12(b)(6)**

Date: May 3, 2004
Time: 9:00 a.m.
Place: Courtroom 10
Judge: Hon. Garland E. Burrell, Jr.

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1 I. **HAVING FAILED FOR THE THIRD TIME TO STATE A VALID CAUSE OF**
2 **ACTION, RELATORS' COMPLAINT SHOULD BE DISMISSED WITHOUT LEAVE**
3 **TO AMEND**

4 A. **Relators Still Have Not Identified Any "Claim" for Payment Submitted by**
5 **Defendants to the Government**

6 1. **Requests for Funds Necessary to Administer the Financial Aid Program Do Not**
7 **Constitute "Claims" Within the Meaning of the FCA**

8 The essential element of every False *Claims* Act case is, of course, a claim. Courts have long
9 recognized that the FCA "attaches liability, not to the underlying fraudulent activity or to the
10 government's wrongful payment, but to the '*claim for payment.*'" *Harrison v. Westinghouse*
11 *Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (quoting *United States v. Rivera*, 55 F.3d 703,
12 709 (1st Cir. 1995) (emphasis added); see *United States ex rel. Clausen v. Lab. Corp. of America,*
13 *Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("submission of a claim is ... the sine qua non of a False
14 Claims Act violation"). The FCA defines a claim as "any request or demand, whether under a
15 contract or otherwise, for money or property." 31 U.S.C. § 3729(c). Thus, a relator cannot maintain a
16 FCA action unless he or she can first identify an actionable claim.

17 Relators allege the University of Phoenix ("UOP") has submitted false claims because it
18 submitted requests to the Department of Education ("ED") and third party lenders for funds it needs
19 to disburse financial aid to students. Relators' arguments are premised on the false notion that
20 student applications for Pell Grants, Guaranteed Student Loans, and other forms of financial aid are
21 not actually requests for money. See Relators' Opp'n, p. 15:1 ("UOP students do not request the Pell
22 Grant funds"); *id.* p. 16:6 ("UOP, not the student or parent, requests the government-insured loan").
23 While the Court must accept as true "well-pleaded" factual allegations in the complaint, it need not
24 accept inaccurate interpretations of law or unwarranted inferences drawn from statute or regulation.
25 See *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("conclusory allegations of law and
26 unwarranted inferences are not sufficient to defeat a motion to dismiss"). Relators' allegations are
27 demonstrably false and wholly insufficient to support a FCA claim.

28 There is simply no question that a Pell Grant is an award to the *student* not to the institution
that the student attends. It is the student that initiates the Pell Grant process by completing a Free

1 Application for Federal Student Aid for submission to ED. 34 C.F.R. § 690.12(a) ("As the first step
2 to receiving a Federal Pell Grant, a student shall apply on an approved application form to the
3 Secretary"). ED then calculates the student's Expected Family Contribution. 34 C.F.R. § 690.13.
4 The amount of a "student's Pell Grant for an academic year is based upon the payment and
5 disbursement schedules" published by ED. 34 C.F.R. § 690.62. Thus, the amount of the *student's*
6 Pell Grant is based on the *student's* financial need and ED payment and disbursement schedules, not
7 UOP's needs or desires.

8 Similarly, there is no question that it is students, and not UOP, that apply for, take out, and are
9 responsible for paying back guaranteed student loans. As the ED regulations explain, the guaranteed
10 student loan programs are designed to encourage financial institutions to "mak[e] loans to
11 undergraduate, graduate, and professional students." 34 C.F.R. § 682.100(a)(1). These regulations
12 also establish rules for the borrower (i.e., the student) to pay back those loans. 34 C.F.R.
13 § 682.102(e). UOP in no sense of the word "applies" for government-insured loans as suggested by
14 relators. *See Relators' Opp'n*, p. 16:19-20. UOP, like other institutions, is required to certify that "the
15 information it provides in connection with a loan application about the borrower . . . is complete and
16 accurate." 34 C.F.R. § 682.603. However, the certification regarding the borrower's status in no way
17 converts the loan into a UOP application or subjects UOP to any liability for the loan. Again, the
18 guaranteed student loan is designed to serve the student's needs, not UOP's needs.

19 With respect to the Pell Grant and Guaranteed Student Loan programs, UOP's responsibility is
20 to administer the programs and the monies that students receive. UOP's Program Participation
21 Agreements ("PPA") makes this distinction clear. The PPA describes UOP's role, for example, "[a]s
22 a fiduciary responsible for administering Federal funds." (Declaration of Robert T. Collins
23 [hereinafter "*Collins Decl.*"], Ex A, p. 3, ¶ (2)). UOP is required under the PPA to "establish and
24 maintain such administrative and fiscal procedures and records as may be necessary to ensure proper
25 and efficient *administration* of funds received from the Secretary or from students under Title IV
26 HEA programs." *Id.* at ¶ (4) (emphasis added). As part of the administration of the financial aid
27 programs, UOP requests funds from ED for disbursement to students, using procedures established by
28 ED. 34 C.F.R. § 668.162(a).

1 The ED regulations make clear that the purpose of the request for Pell Grant funds (and other
2 forms of financial aid) is so that funds may be *disbursed* to students. For example, 34 C.F.R.
3 § 690.61(a) states that "an institution must disburse a Federal Pell Grant to an eligible student who is
4 otherwise qualified to receive that disbursement." The amount of the request for financial aid, in fact,
5 is generally linked to the amount an institution needs for disbursements. See 34 C.F.R. § 668.162(b)
6 (if the advance payment method is used "[t]he institution's request for funds may not exceed the
7 amount of funds the institution needs immediately for disbursements the institution has made or will
8 make to eligible students and parents"). These disbursements may be made either by crediting the
9 student's account or providing the funds directly to the student or parent. 34 C.F.R. § 668.164(a).
10 Thus, the ED regulations make clear that an institution makes a request to the government or a private
11 lender for funds so that it may disburse those funds to students, not because of any independent
12 demand or right of the institution to payment.

13 At best, relators have described a situation in which UOP is in receipt of federal money. The
14 Ninth Circuit has explained that "[i]t is not the case that any breach of contract, or violation of
15 regulations or law, *or receipt of money* from the government where one is not entitled to receive the
16 money, automatically gives rise to a claim under the FCA." *United States ex rel. Hopper v. Anton*, 91
17 F.3d 1261, 1265 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) (emphasis added). Rather:

18 The FCA is far narrower. It requires a false claim. Thus, some request for payment
19 containing falsities made with scienter (*i.e.*, with knowledge of the falsity and with
20 intent to deceive) must exist. This does not mean that other types of violations of
21 regulations, or contracts, or conditions set for the receipt of moneys, or of other federal
22 laws and regulations are not remediable; it merely means that such are not remediable
23 under the FCA or the citizen's suit provisions contained therein.

24 *Id.* Any UOP request for funds under the Pell Grant or Guaranteed Student Loan program are not for
25 its own purposes, but to make disbursements on behalf of students. Without student applications for
26 loans and grants, there are no Title IV HEA funds for UOP to administer. ED has remedies available
27
28

