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8  
9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

11  
12 UNITED STATES OF AMERICA, ex rel.  
13 MARY HENDOW and JULIE ALBERTSON,

14 Plaintiff,

15 v.

16 UNIVERSITY OF PHOENIX,

17 Defendant.

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

**DEFENDANT’S MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

[Notice of Motion and Motion, Separate Statement  
of Undisputed Facts, Declaration of James L.  
Zelenay, Jr., Declaration of Robert T. Collins, and  
Declaration of Brian M. Jones filed concurrently  
herewith]

Judge: The Honorable Garland E. Burrell

Place: Courtroom 10

Date: May 18, 2009

Time: 9:00 a.m.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Through this narrowly-tailored motion for partial summary judgment, the University of Phoenix (“University”) seeks a judgment from this Court that the claims of Relators Mary Hendow and Julie Albertson in this case cut-off at and do not continue past the signing of the July 2, 2003 Program Participation Agreement between the U.S. Department of Education (“Department”) and the University, or, at the latest, on February 5, 2004 (when Department staff issued a program review report to the University), March 5, 2004 (when Relators filed the Second Amended Complaint in this matter), or September 7, 2004 (when the University and the Department settled the program review). Although the University will likely bring a broader motion for summary judgment at the end of discovery, partial summary judgment on this narrow issue regarding the time-period at hand is necessary and appropriate now in light of Relators’ assertions that their claims continue into the never-ending “present” and in order to streamline the case, conserve the Court’s and the parties’ resources and, importantly, allow the parties to instruct their expert witnesses on the scope of this matter.<sup>1</sup>

Relators filed their Second Amended Complaint (“SAC”) in this action on March 5, 2004. In it, they allege that the University committed “fraud” on the federal government, and violated the False Claims Act (“FCA”), from January 1, 1997 “through the present.” More specifically, they claim that the University committed fraud on the federal government and improperly obtained Title IV federal student financial aid funding by falsely informing the Department in a Title IV Program Participation Agreement (“PPA”) that it was in compliance with certain restrictions in the Higher Education Act regarding how it may compensate its student recruiters.<sup>2</sup> Naturally, Relators’

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<sup>1</sup> Additionally, it will assist the parties in resolving a variety of other issues, including, for instance, the time period relevant for purposes of identifying witnesses for trial.

<sup>2</sup> There are three multi-year PPAs at issue in this case – executed in 1997, 2000, and 2003. The arguments relevant to this motion relate only to the 2003 PPA, which remains in effect. Arguments regarding the other two PPAs, in addition to other arguments relating to the 2003 PPA, will be addressed at the close of discovery.

1 allegations do not include any post-Complaint conduct. Rather, they are limited to events that  
2 occurred before they filed their Complaint in March of 2004.

3 Nevertheless, Relators have now taken the position that the relevant time period in this  
4 litigation – for *all* purposes, including liability and damages – includes the time period following the  
5 filing of their March 2004 Complaint up until today and, presumably, up until trial in 2010. In other  
6 words, Relators claim that the time period relevant to this action not only includes the seven year  
7 period from 1997 to 2004 alleged in the SAC, but also the additional six years since the 2003 PPA  
8 was signed, and the five year period following the date that Relators filed their SAC. This is an  
9 attempt to put into play additional *billions* of dollars in financial aid that the University’s students  
10 received after 2004.

11 Relators’ efforts to dramatically expand the scope of this litigation are improper. Relators  
12 simply have not alleged any post-Complaint conduct in their SAC entitling them to claim liability  
13 and damages for the additional *five year* period following the filing of their Complaint. Their mere  
14 allegations of “through the present” are insufficient, and do not change things. Allowing Relators to  
15 assert claims for unalleged conduct post-dating their Complaint would also constitute a complete and  
16 impermissible end-run around the purposes of Rule 9(b) of the Federal Rules of Civil Procedure. In  
17 sum, there is no justification for Relators’ assertion that they can expand this action to include an  
18 additional five years of potential liability and damages in addition to the seven years they already  
19 assert are at issue.

20 There are factual reasons why Relators’ claims must be cut-off as well. Specifically, the  
21 United States government – on whose behalf Relators sue – was fully aware of the allegations at  
22 issue in this case as early as March of 2003 and by May of 2003 believed there was “substantial  
23 evidence” to support Relators’ claim that the University was illegally compensating its recruiters.  
24 Despite these facts, the Department entered into a new Title IV PPA with the University in July 2003  
25 and continued to disburse and guarantee Title IV funds to the University’s students. Of course, it is  
26 black letter law, under both the FCA and general fraud principles, that a party cannot claim it was  
27 defrauded when it was aware of the facts underlying the alleged fraud. This is precisely what  
28 Relators are attempting to do here to the extent they assert their claims continue after July 2003.

1 Moreover, even if the Court finds that the Relators' claims do not cut-off at the signing of the PPA  
2 (in July 2003), they must be cut-off at the latest in either February 2004 or September 2004. In  
3 February, the Department staff issued a program review report allegedly "finding" that the University  
4 was violating the rules regarding how student recruiters may be compensated; in September, the  
5 Department and the University settled the program review. Despite these additional facts, the  
6 Department never revoked or suspended the University's eligibility to participate in Title IV  
7 programs. Neither Relators nor the government can reasonably claim that the government was  
8 defrauded after it became aware of the facts underlying the alleged fraud.

9 **II. BACKGROUND**

10 **A. Relators' Complaint and Allegations**

11 Relators Mary Hendow and Julie Albertson filed this *qui tam* case under seal, pursuant to the  
12 FCA, on behalf of the federal government in March of 2003. SUF ¶ 1. They filed their Second  
13 Amended Complaint, which is the operative complaint in this matter, in March of 2004. SUF ¶ 2. At  
14 the time of filing these Complaints, Relators were employed by the University. SUF ¶ 3.

15 In the SAC, Relators allege that the University defrauded the Department of Education out of  
16 Title IV federal student financial aid by purportedly falsely informing the Department in its Title IV  
17 PPA that it was in compliance with a restriction on how student recruiters may be paid. SUF ¶ 4.  
18 This restriction, called the "contingent compensation" provision, provides that an academic  
19 institution shall not pay a student recruiter a "commission, bonus, or other incentive payment based  
20 directly or indirectly on success in securing enrollments or financial aid . . . ." 20 U.S.C.  
21 § 1094(a)(20).<sup>3</sup>

22 In purported support of their contention that the University violated this provision, Relators  
23 assert a variety of allegations, all of which naturally relate to conduct that occurred before they filed  
24 their SAC. SUF ¶ 5. Relators did not include any allegations (particularized or otherwise) regarding  
25

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26 <sup>3</sup> A related regulation states that an academic institution does not violate the contingent  
27 compensation provision merely by paying a student recruiter a salary, and adjusting that salary up  
28 or down as much as twice per year, as long as any adjustment is not based "solely" on the number  
of students that the recruiter enrolls. 34 C.F.R. § 668.14(b)(22)(ii)(A).

1 conduct occurring *after* the SAC was filed in March of 2004. SUF ¶ 6. They did not, for instance,  
2 include any allegations relating to the new compensation plan that the University implemented in  
3 June of 2004 or regarding the new management that took over the University thereafter. SUF ¶¶ 7-8.  
4 In fact, both Relators had left the University not long after they filed their Second Amended  
5 Complaint. SUF ¶ 9.

6 Relators' March 2004 Complaint also includes a couple of vague "through the present"  
7 allegations, without any supporting factual contentions:

- 8 • "This is an action to recover damages and civil penalties on behalf of the  
9 United States of America arising out of false claims approved and presented by  
10 Defendants . . . from at least January 1, 1997, continually through the present."  
SAC ¶ 1, attached to accompanying Declaration of James L. Zelenay, Jr. as  
11 Exhibit 1; SUF ¶ 10.
- 12 • "Relators estimate . . . the amount of damages sustained by the United States  
of America is in excess of a half billion dollars per annum, from January 1,  
13 1997, through the present." SAC ¶¶ 62, 65; SUF ¶ 10.

14 In sum, Relators do not allege anything in the SAC, particularized or otherwise, regarding  
15 post-Complaint conduct – nor could they.

16 **B. Relators Assert That Their Claims Continue Into The Never-Ending Future**

17 Although their Complaint does not contain any specific factual allegations regarding conduct  
18 occurring after they filed their Complaint (and although the Department voluntarily engaged in the  
19 actions outlined more below), Relators have asserted that their claims include the time-period post-  
20 dating the filing of their SAC up until today. SUF ¶ 11. That is, they contend that even though their  
21 Complaint was filed in March of 2004 and contains no factual allegations regarding post-Complaint  
22 conduct, they are actually entitled to claim liability and damages regarding the five year period from  
23 March 2004 up until today and, presumably, up until trial. *Id.* This is in addition to the seven year  
24 period from 1997 to 2004 that they already claim is at issue in this litigation. *Id.*

25 For purposes of discovery, Magistrate Judge Drozd has found that Relators' allegations were  
26 sufficient to allow them certain discovery post-dating the filing of their Complaint. SUF ¶ 12. But  
27 Magistrate Judge Drozd also made it clear that he was not determining the merits. SUF ¶ 13. Rather,  
28 that is for this Court to do, and it is one of the reasons for the instant Motion. *See, e.g.,* Zelenay Decl.  
Ex. 7 (Transcript of Apr. 9, 2009 Hearing) at 16:11-16:17 (Judge Drozd: "[F]or discovery purposes,

1 [I] have found that the complaint alleges a continuing violation. . . . Judge Burrell may or may not  
2 agree with me, *but for discovery purposes*, I’ve already found that the complaint states a – alleges a  
3 continuing violation.”) (emphasis added).<sup>4</sup>

4 **C. The Government’s Knowledge Of Relators’ Allegations And The Continuance Of**  
5 **The University’s Title IV Eligibility**

6 **1. The Government Is Informed Of Relators’ Allegations In 2003 And**  
7 **Conducts A Program Review Of The University With Relators’ Assistance**

8 At or around the time they filed their original Complaint in March of 2003, Relators and their  
9 counsel were communicating with the government, and particularly the Department of Education,  
10 regarding their allegations. SUF ¶¶ 16, 21. At that time, Relators provided the government with a  
11 copy of their original Complaint and their Disclosure Statement. SUF ¶ 16. The Disclosure  
12 Statement contained “*all* material evidence and information related to” Relators’ allegations, and  
13 listed 18 potential witnesses and included approximately 160 pages of exhibits which purported to  
14 support Relators’ claims. SUF ¶¶ 17-18. On May 6, 2003, after reviewing Relators’ Complaint and  
15 Disclosure Statement, the Department of Justice declined to intervene in this matter. SUF ¶ 19.

16 Nevertheless, after having extensively communicated with Relators and their counsel, and at  
17 about this same time in May of 2003, the Department of Education’s staff informed “the Department  
18 of Justice that [it] had substantial evidence that the University had violated [the contingent  
19 compensation provision]; and that, in view of the declination decision, the Department was  
20 considering what administrative action to take against the University on account of the violation.”  
21 SUF ¶ 20. The Department’s staff had therefore determined, as early as May 2003, that it believed  
22 the University was not complying with the contingent compensation provision. *Id.*

23 From May 2003 through 2004, Relators assisted the Department staff in preparing and  
24 conducting an investigation of the University regarding the University’s compensation of its

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25 <sup>4</sup> Of note, Magistrate Judge Drozd, although allowing Relators certain post-complaint discovery,  
26 generally denied their motions to seek post-complaint document discovery. SUF ¶ 14. Because  
27 the Magistrate did not order broad post-complaint discovery, the University did not appeal the  
28 discovery orders. However, as the parties must now instruct their experts on the scope of work  
necessary, the parties need to know if Relators’ “to the present” claim is part of this case going to  
trial.

1 recruiters. SUF ¶¶ 21-22, 25. Indeed, as the government has recently stated, the Department’s  
2 program review attempted to determine “how to investigate, prosecute, and resolve the *qui tam*  
3 relators’ allegations . . . .” SUF ¶ 26. Among other things, on June 10 and 11, 2003, the Department  
4 obtained sworn testimony from Relators regarding their allegations. SUF ¶ 23. By this time, the  
5 Department anticipated that litigation would result from the program review and that there would be  
6 a “fine action” against the University – *i.e.*, that it would make “findings” that the University was in  
7 noncompliance with the contingent compensation provision. SUF ¶ 24. In fact, according to the  
8 government, the very “purpose of the program review was to quantify the extent of the violation in  
9 order to determine an appropriate fine.” SUF ¶ 26.

10 **2. The Department Executes A PPA With The University In 2003 Despite Its**  
11 **Staff’s Belief That The University Was In Violation Of The Contingent**  
12 **Compensation Provision**

13 The Department, although believing as early as May 2003 that it had “substantial evidence”  
14 that the University was in violation of the contingent compensation provision, nevertheless executed  
15 a PPA with the University in that same year. SUF ¶¶ 20, 27. Indeed, the Department advised the  
16 University in a June 13, 2003 letter – just two days after interviewing Relators as part of the program  
17 review – that it had “completed its review of University of Phoenix’s . . . application to participate in  
18 Title IV, HEA programs” and had concluded that the University “meets the minimum requirements  
19 of institutional eligibility, administrative capability, and financial responsibility.” SUF ¶ 27. The  
20 Department’s transmittal letter further stated, “Upon execution of the PPA by the Secretary, the  
21 Institution shall be certified to participate in Title IV, HEA programs until June 30, 2007.” *Id.* On  
22 July 2, 2003, the Department executed the PPA and, in a July 10, 2003 email, notified the University  
23 that the Secretary of Education “has determined that University of Phoenix [] satisfies the definition  
24 of eligible institution under the Higher Education Act of 1965, as amended (HEA).” SUF ¶ 28.

25 **3. The Department Staff Makes “Findings” That The University Violated**  
26 **the Contingent Compensation Provision, Yet The Department Never**  
27 **Takes Any Action to Terminate or Otherwise Limit The University’s**  
28 **Participation in Title IV Programs**

In August of 2003, after working hand in glove with Relators to obtain various information,  
the Department staff went on-site at the University to conduct a program review. SUF ¶ 29. The

1 program review started an ongoing dialogue between the University and the Department with respect  
2 to University's compensation of its recruiters. SUF ¶ 30. On February 5, 2004, the Department staff  
3 issued a Program Review Report ("PRR") to the University alleging that the University had violated  
4 the contingent compensation provision. SUF ¶ 31. The University strenuously disputed the  
5 allegations in the PRR and worked to educate the Department on the serious inaccuracies it  
6 contained. SUF ¶ 32.

7 Between February 2004 and September 7, 2004, the University provided the Department with  
8 substantial documentation regarding the compensation of its student recruiters, including salary data,  
9 compensation policy guides, several hundred personnel files and thousands of other documents  
10 relating to recruiter compensation. SUF ¶ 33. The University also provided additional information  
11 regarding the compensation of recruiters through correspondence and meetings with the Department  
12 staff. *Id.* As a result of this dialogue, on September 7, 2004, the University and the Department  
13 settled the program review for \$9.8 million without any "admission or concession by either party of  
14 any liability, wrongdoing or violation whatsoever." SUF ¶ 34; Collins Decl. Ex. M (Sept 7, 2004  
15 Settlement Agreement) at 1. The Settlement Agreement also stated that "The Department  
16 acknowledges and agrees that this Agreement does not constitute a basis for . . . placing or  
17 maintaining [the University] under a provisional form of Title IV Program Participation Agreement."  
18 SUF ¶ 36.<sup>5</sup> The settlement that the University and the Department entered into was consistent with  
19 established Department policy, stating that an academic institution does *not* cause monetary loss to  
20 the government if it violates the contingent compensation provision and that such a violation, if any,  
21 does not render a student at the institution ineligible to continue to receive Title IV funding at that  
22 institution. SUF ¶¶ 39-40; *see also* Declaration of Brian M. Jones Ex. A (October 30, 2002  
23 Department Policy Memo) at 1. Nor did the Settlement Agreement require the University to make

24 \_\_\_\_\_  
25 <sup>5</sup> A provisional Title IV PPA is one that a school may be required to enter into when its  
26 participation in Title IV programs has been limited or suspended and the Department determines  
27 that the school is in an administrative condition that might jeopardize its ability to perform its  
28 responsibilities under the PPA. If the Department determines that a school with provisional  
certification cannot meet its responsibilities, the Department may revoke the school's  
participation in financial aid programs.

1 any change to its compensation plans or policies. SUF ¶ 37. At all times relevant to this lawsuit, the  
2 Department has continued to disburse and guarantee Title IV funds for University students. SUF  
3 ¶ 38.

### 4 **III. LEGAL STANDARD**

5 A motion for summary judgment is “regarded not as a disfavored procedural shortcut.”  
6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Rather, it is a “principal tool[ ] by which  
7 factually insufficient claims or defenses [can] be isolated” and disposed of. *Id.* On summary  
8 judgment, the moving party has the burden of establishing the absence of a genuine issue of material  
9 fact. *Id.* at 323. If the moving party meets this burden, the burden shifts to the nonmoving party to  
10 show a genuine issue for trial. *Id.* at 324. The nonmoving party must go beyond the pleadings to  
11 meet this standard. *Id.* A “‘scintilla of evidence,’ or evidence that is ‘merely colorable’ or ‘not  
12 significantly probative’” fails to meet the non-moving party’s burden. *United Steelworkers of Am. v.*  
13 *Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989).

### 14 **IV. ARGUMENT**

15 Relators claims should be cut off at the signing of the July 2, 2003 PPA or, at the latest, on  
16 February 5, 2004 (when the PRR was issued), March 5, 2004 (when the SAC was filed), or  
17 September 7, 2004 (when the program review was settled). Relators’ claims should not be allowed to  
18 continue to the never-ending “present,” including up until trial, when Relators have not alleged any  
19 post-Complaint conduct in their SAC and the government has continued to pay out the funds that  
20 Relators claim is subject to the “fraud” while fully aware of the facts underlying the allegations at  
21 issue in this matter. There must be some limit on the time period of Relators’ claims.

#### 22 **A. Judgment Should Be Entered That Relators’ Claims Cut-Off In July 2003** 23 **Because The Government Knew Of The Facts Underlying The University’s** 24 **Alleged Fraud At That Time And Entered Into A New PPA**

25 The University is entitled to a judgment that Relators’ claims cut-off at July 2, 2003 due to  
26 the fact that they cannot claim that the government was deceived after that point. As the facts  
27 outlined above demonstrate, the government’s knowledge of the claims underlying Relators’ lawsuit  
28 is clear. Prior to executing the July 2, 2003 PPA, the government had obtained and reviewed  
Relators’ lawsuit, the Disclosure Statement, hundreds of supporting documents involving the

1 compensation of ECs and had obtained sworn interviews from Relators. SUF ¶¶ 16-28. All of this  
2 led the Department staff to conclude in May of 2003 that it had “substantial evidence” that the  
3 University was violating the contingent compensation provision and that there would be a “fine  
4 action” against the University. SUF ¶¶ 20, 24. While the University disputes that it has ever violated  
5 the contingent compensation provision, the key point here is that – as the case law makes clear – the  
6 government cannot claim it was defrauded once it knows of the facts underlying the alleged fraud.  
7 That is precisely what Relators are trying to do here.

8 **1. There Is No FCA Liability When The Government Knows Of The Facts**  
9 **Underlying the Alleged Fraud**

10 The crux of an FCA violation is intentionally deceiving the government. *United States ex rel.*  
11 *Englund v. Los Angeles County*, No. S-04-282, 2006 U.S. Dist. LEXIS 82034, at \*24 (E.D. Cal.  
12 Oct. 31, 2006); *see also, e.g., Lord v. Goddard*, 54 U.S. 198, 211 (1852) (“Fraud means an intention  
13 to deceive.”). No violation of the FCA exists where the government has not been deceived.  
14 *Englund*, 2006 U.S. Dist. LEXIS 82034, at \*39. Thus, where the government knows of the facts  
15 underlying the alleged fraud, the courts – in the Ninth Circuit and elsewhere – have repeatedly found  
16 that no FCA violation exists. In short, if the government knows the facts, it cannot be deceived and  
17 cannot rely to its detriment on any purportedly “false” claim.

18 *Chen-Chang Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1414 (9th Cir. 1992)  
19 is instructive on this point. There, the plaintiff alleged that the defendant had defrauded the federal  
20 government through its substandard performance. The Ninth Circuit affirmed summary judgment for  
21 the defendant dismissing the claim, finding that “[t]he government knew of all the deficiencies  
22 identified by Wang, and discussed them with [the defendant]. The fact that the government knew of  
23 [the defendant’s] mistakes and limitations, and that [the defendant] was open with the government  
24 about them, suggests that while [the defendant] might have been groping for solutions, it was not  
25 cheating the government in the effort.” *Id.* at 1421.

26 The following cases are also instructive:

- 27 • In *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir.  
28 1995), although the plaintiff produced evidence that certain testing requirements  
were not met despite the defendant’s statements otherwise, the court held that  
because the Army was fully aware of and acceded to all deviations from the testing

1 regime, the defendant had not acted with the requisite intent to deceive. *Id.* at 326-  
2 29.

- 3 • In *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th  
4 Cir. 2008), the relators alleged that the defendant fraudulently represented in a  
5 Form 1155 that it would comply with the contract’s maintenance requirements, all  
6 the while knowing it would not do so. The court held that any such  
7 misrepresentation on the form did not create FCA liability because if there was  
8 any such potential future non-compliance, the government already knew of it:  
9 “the government had already observed [the defendant’s] performance under the  
10 task order for five months when [the defendant] signed the form in July. Thus, it  
11 had ample basis by which to judge [the defendant] and its ability to comply with  
12 the task order independent of the Form 1155.” *Id.* at 378.
- 13 • In *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008), the  
14 relators alleged that high-ranking administrators of New Mexico State University  
15 (“NMSU”) falsely certified that NMSU was a “minority institution” eligible for  
16 Department of Defense (“DOD”) set-aside contract grants. *Id.* at 933. In holding  
17 that the defendants did not violate the FCA, the court then stated that the  
18 Department had “accurate data from which to ‘verify’ whether NMSU met the  
19 definition of a ‘minority institution’ . . . . And the DOD had access to the  
20 [Department’s] lists, if not data, prior to mailing its solicitations.” *Id.* Based on  
21 the information available to the government, the court concluded, “both agencies  
22 were aware of the same universe of facts of which defendants were aware when  
23 defendants certified NMSU’s minority eligibility.” *Id.* As a result, the defendants  
24 “did not ‘knowingly’ submit false claims within the meaning of § 3729(a) of the  
25 FCA.” *Id.* at 957.

15 Here, as in each of the cases addressed above, the government knew about the alleged facts  
16 underlying the purported fraud committed by the University. Specifically, before July 2, 2003, the  
17 government had: (1) obtained and reviewed Relators’ Complaint and Disclosure Statement; (2)  
18 received and reviewed documents purportedly supporting Relators’ allegations – including  
19 documents relating to the alleged improper compensation of student recruiters; and (3) interviewed  
20 both Relators regarding their allegations. SUF ¶¶ 16-23. This led Department staff to conclude, as  
21 early as May of 2003, that it had “*substantial evidence*” supporting the alleged violations of the  
22 contingent compensation provision. SUF ¶¶ 20, 24.

23 Despite that “substantial evidence,” the Department executed a Title IV Program Participation  
24 Agreement with the University on July 2, 2003, expressly approving the University’s eligibility to  
25 continue to receive and disburse Title IV funds. SUF ¶¶ 27-28. This is the very document where  
26 Relators claim the purported “fraud” occurred, and it was the document that entitled the University to  
27 continue to receive Title IV funds – which is what Relators claim the Department was “defrauded”  
28 out of. Yet, the Department was fully aware of the alleged illegal activity at the time that it signed

1 this PPA. It cannot, therefore, have been “defrauded.” Indeed, the Department, armed with all the  
2 facts, found that the University “satisfies the definition of eligible institution under the Higher  
3 Education Act,” SUF ¶ 28, and it has continued to disburse Title IV funds to the University students  
4 ever since. For this reason, Relators’ cannot claim “fraud” on behalf of the government after the  
5 signing of this PPA in July of 2003. Their claims must be cut-off.

6 **2. Relators’ Claims May Also Be Cut-Off In Either February 2004 (When**  
7 **The PRR Was Issued) Or September 2004 (When The Program Review**  
8 **Was Settled)**

9 The government’s knowledge of the University’s compensation practices, starting at least in  
10 March of 2003, dictates that the University did not defraud the government in the July 2, 2003 PPA.  
11 If the Court disagrees, however, there can be no dispute that the government at the least knew about  
12 the University’s compensation practices and had sufficient dialogue with the University during the  
13 period of the program review to preclude any FCA liability after issuance of the PRR on February 5,  
14 2004 or, at the latest, after the settlement agreement on September 7, 2004. *See, e.g., Butler*, 71 F.3d  
15 at 327-329 (continuing dialogue with defendant precluded liability because the “[defendant] and the  
16 Army had so completely cooperated and shared all information during the testing” that “[defendant]  
17 did not ‘knowingly’ submit false claims.”); *Chen-Chang Wang*, 975 F.2d at 1421. In short, the  
18 University could not have “knowingly” submitted false claims regarding its compliance with the  
19 contingent compensation provision when the Department thoroughly reviewed those practices and  
20 permitted the University to continue to participate fully in Title IV programs.

21 *United States v. Southland Mgmt. Corp.*, 326 F.3d 669 (5th Cir. 2003), is instructive on this  
22 point. In that case, the owners of an apartment project were alleged to have falsely certified that the  
23 properties they owned were decent, safe and sanitary in order to receive payments from HUD. *Id.* at  
24 674. In finding no FCA liability, the court pointed out that pursuant to the parties’ contract, “if the  
25 property is not decent, safe, and sanitary and HUD chooses *to work with the Owners to remedy* the  
26 property’s condition, the Owners *remain entitled* to housing assistance payments . . . .” *Id.* at 676  
(emphases added).

27 As in *Southland*, the government here was also working with the University in this case to  
28 address and remedy its purported “findings” regarding the University’s alleged non-compliance with

1 the contingent compensation provision. Between August 2003 and September 7, 2004, the  
2 Department and the University had an open dialogue and exchanged a significant amount of  
3 information regarding the University's compensation practices. SUF ¶¶ 29-33. As a result of that  
4 dialogue, the Department and the University entered into a settlement agreement on September 7,  
5 2004. SUF ¶ 34. In addition, both parties have continued to operate under the Department's  
6 conclusion that the University was eligible to participate in Title IV programs and could continue to  
7 receive and disburse Title IV funds. SUF ¶¶ 36, 38. Importantly, the Department has never sought to  
8 revoke the July 2, 2003 PPA entitling the University to participate in Title IV programs and has not  
9 initiated any termination or suspension proceedings against the University. *Id.* Instead, consistent  
10 with a Department Policy Memorandum, the Department has continued to disburse and guarantee  
11 billions of dollars in Title IV funds to University students:

12 [A] violation of the [contingent] compensation prohibition [does] not result[] in  
13 monetary loss to the Department. Improper recruiting [in violation of the contingent  
14 compensation provision] does not render a recruited student ineligible to receive  
15 student aid funds for attendance at the institution on whose behalf the recruiting is  
16 conducted.

15 SUF ¶¶ 39-40; Declaration of Brain M. Jones Ex. A (October 30, 2002 Department Policy Memo)  
16 at 1.

17 The Department's actions have therefore ratified the July 2, 2003 PPA and conclusively  
18 demonstrate that the government has not been defrauded by the University. As a result, the  
19 University respectfully requests that the Court enter judgment in its favor that Relators' claims cut-  
20 off at the signing of the July 2, 2003 PPA or, at the latest, on February 5, 2004 (when the PRR was  
21 issued), or September 7, 2004 (when the program review was settled).

22 **B. Alternatively, Judgment Should Be Entered That Relators' Claims Do Not**  
23 **Continue Past March 5, 2004 Because Relators Have Not Alleged Any Post-**  
24 **Complaint Conduct In Their SAC**

24 Should the Court not cut-off Relators' claims at one of the dates mentioned above, it should at  
25 least enter a judgment that Relators' claims cut-off on the date they filed their SAC in March of 2004.  
26 This is because Relators simply have not alleged any post-complaint conduct in their Complaint.  
27 Indeed, all of the allegations in the SAC, which is the operative Complaint in this matter, relate to  
28 events that occurred *before* its filing. There is simply nothing in the SAC that should allow Relators

1 to tack on an additional *five years* of potential post-complaint liability and the concomitant additional  
2 *billions* of dollars in potential damages. Such would ignore the actual allegations in the SAC and  
3 intrude on the principles embodied in Rule 9(b) of the Federal Rules of Civil Procedure.

4 **1. Relators' Complaint Does Not Assert Any Post-Complaint Conduct And**  
5 **Their Mere "Through The Present" Allegations Do Not Change Things**

6 As outlined above, Relators' SAC simply does not include any post-Complaint conduct. SUF  
7 ¶ 6. It does not, for instance, address the new compensation plan that the University put in place for  
8 its recruiters in June of 2004. SUF ¶ 7. Nor does it address the change in management that occurred  
9 at the University since the filing of the SAC. SUF ¶ 8.<sup>6</sup> All of the allegations in the SAC relate  
10 solely and completely to pre-Complaint conduct. SUF ¶ 6.

11 In response to this argument in discovery disputes, Relators have claimed that they have  
12 alleged post-Complaint conduct – and are entitled to tack on five years of additional liability –  
13 because their Complaint asserts that the University's conduct occurred "from January 1, 1997  
14 continually through the present." See SUF ¶¶ 10-11. "The present," however, can only mean to the  
15 date that the Complaint was filed. Indeed, it would have violated Relators' counsel's obligations  
16 under Rule 11 to assert allegations based upon conduct that has not yet occurred.

17 Perhaps this is why courts regularly find that "the present" in a complaint simply means the  
18 date the complaint was filed. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007)  
19 (reading "to the present" to mean the "7-year span" from the beginning of the alleged conduct to the  
20 date the complaint was filed, rather than the date the decision was rendered); *United States v. Fisher*,  
21 112 F. Supp. 233, 235 (W.D. Ky. 1953) (in case dealing with statute of limitations issues, stating that  
22 when plaintiff alleges that defendant's misconduct continues "to the present," that means to "the date  
23 the complaint was filed"); see also *Cohen v. Gerber Prods. Co.*, No. 96-3071, 1996 U.S. Dist. LEXIS  
24 15253, at \*2-3 (E.D. Pa. Oct. 21, 1996) ("to the present" means to the date that the complaint was

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25  
26 <sup>6</sup> Likewise, Relators' SAC does not address the program review, any changes that may have  
27 occurred in the University's compensation plan for its recruiters thereafter, or *any* facts regarding  
28 the *five year period* from March of 2004 to today that Relators claim is subject to liability in this  
case. SUF ¶ 6. In fact, both Relators admit that they do not know how the University's new  
compensation plan works. SUF ¶ 15.

1 filed); *Franzie v. Equitable Life Assurance Soc’y*, No. 94-2036, 1995 U.S. Dist. LEXIS 20140, at \*22  
 2 (S.D. Fla. Sept. 29, 1995) (same); *Panache Broad. of Pa., Inc.*, No. 90-C-64-00, 2001 U.S. Dist.  
 3 LEXIS 3520, at \*8 (N.D. Ill. Mar. 16, 2001) (same). In other words, Relators’ allegation of “through  
 4 the present” does not change things. Their claims, as alleged by them, cut-off on the date they filed  
 5 their Complaint.

6 Moreover, other allegations in Relators’ March 2004 Complaint only further demonstrate that  
 7 the SAC’s assertion that the violations continued to “the present” does not mean “up until trial five  
 8 years later” – as Relators are now asserting. For instance, Relators allege in the SAC that they  
 9 worked for the University “through the present.” SAC ¶¶ 5-6; SUF ¶ 10. Neither Relator works for  
 10 the University today, and neither has worked for the University for over 3 years. SUF ¶ 9.<sup>7</sup>

11 Furthermore, Relators’ contention that their claims somehow continue up until today (and  
 12 presumably up until trial) is completely unworkable and unfair. In the case of trial witnesses, for  
 13 example, it would require the University to continually duplicate its efforts, going back each month  
 14 (or perhaps each week or each day) possibly up to and including trial to identify new witnesses.  
 15 Courts in the class action context have rejected class definitions extending “up to the present” based  
 16 on similar manageability concerns, and their reasoning is directly applicable here. *See Mueller v.*  
 17 *CBS, Inc.*, 200 F.R.D. 227, 234-36 (W.D. Pa. 2001) (refusing to certify class extending “up to the  
 18 present” as impermissibly vague and as unmanageable because it would require ongoing notifications  
 19 to class members until resolution of litigation); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281,  
 20 285-86 (W.D. Mich. 2001) (refusing to certify class extending until “date of judgment” and instead  
 21 defining class as extending through the date of the complaint).

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22  
 23  
 24 <sup>7</sup> Indeed, if Relators truly wish to take the extreme position that their Complaint, filed in March of  
 25 2004, somehow continues to float forward into the future, so that anything that happened within  
 26 that Complaint after its filing is encompassed by it, then Relators’ assertion that they are working  
 27 for the University “through the present” is blatantly false and sanctionable. This is not the  
 28 University’s position; it just shows how absurd Relators’ theory is. Indeed, if Relators were  
 correct that their claims continued into the ever-changing “present,” how could the University –  
 or any defendant – have properly filed an answer? The defendant would have to constantly  
 monitor things and go back and change the answer on a regular basis.

1 In short, Relators' claims should be cut-off in March of 2004 when they filed their SAC  
2 because they do not allege any post-complaint conduct and their mere allegation the University's  
3 purported misconduct continued "through the present" does not change things. Nor do any of the  
4 other allegations included in their SAC. Relators simply have not alleged as part of this action that  
5 liability continues up until today.

6 **2. Rule 9(b) Supports The University's Argument That Relators' Claims**  
7 **Cut-Off At The Date They Filed Their Complaint**

8 Rule 9(b) further supports the University's argument that Relators' claims should be cut-off at  
9 the date they filed their SAC in March of 2004. Rule 9(b) applies to FCA claims, and requires that  
10 allegations of fraud be pled with particularity. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th  
11 Cir. 2001). A primary purpose of Rule 9(b) is to prevent relators from bringing spurious allegations  
12 of fraud, and relying upon inadequate or unpled allegations as a pretext to gain discovery and seek  
13 liability. *Id.*, 236 F.3d at 1018; *United States ex rel. Fisher v. Network Software Assocs.*, 227 F.R.D.  
14 4, 9-11 (D.D.C. 2005). Courts have stated that Rule 9(b) must be applied with particular diligence in  
15 FCA cases. *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006).

16 Here, by asserting that their claims continue to the never-ending "present," Relators are  
17 essentially contending that they are now allowed to proceed not only on claims that have not been  
18 pled with particularity, but on claims that have not be pled at all. This is precisely the type of thing  
19 that Rule 9(b) was intended to protect defendants against. *United States ex rel. Atkins v. McInteer*,  
20 470 F.3d 1350, 1359 (11th Cir. 2006) (explaining that "[t]he particularity requirement of Rule 9 is a  
21 nullity if Plaintiff gets a ticket to the discovery process without identifying a single claim"). Rather,  
22 Relators are only allowed to proceed on claims that have been pled.

23 As the Supreme Court has recently stated, the "factual allegations [in a Complaint] must be  
24 enough to raise a right to relief above the speculative level." *See Bell Atl. Corp.*, 550 U.S. at 555.  
25 Here, Relators attempt to impose liability based upon allegations regarding post-2004 conduct that  
26 have never been pled. This is entirely impermissible, and this Court should enter judgment that  
27 Relators' claims end, at the latest, in March of 2004.

1 **V. CONCLUSION**

2 Thus, for the reasons set forth above, the University respectfully requests that the Court enter  
3 judgment finding that Relators' claims are cut-off at and do not continue past the signing of the  
4 July 2, 2003 PPA or, at the latest, on February 5, 2004 (when the PRR was issued), March 5, 2004  
5 (when the SAC was filed), or September 7, 2004 (when the program review was settled).

6  
7  
8 DATED: April 20, 2009

By: /s/ James L. Zelenay, Jr.  
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