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20 UNITED STATES DISTRICT COURT
21 EASTERN DISTRICT OF CALIFORNIA

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

24 Plaintiff,

25 v.

26 UNIVERSITY OF PHOENIX,

27 Defendant.

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

**DEFENDANT'S STATEMENT OF
UNDISPUTED FACTS IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

[Notice of Motion and Motion, Memorandum of Points and Authorities, Declaration of James L. Zelenay, 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.

Pursuant to Civil Local Rule 56-260, Defendant University of Phoenix (the “University”) submits this Separate Statement of Undisputed Facts, together with supporting evidence, in support of its Motion for Partial Summary Judgment:

UNDISPUTED FACTS SUPPORTING PARTIAL SUMMARY JUDGMENT

A. Relators’ Allegations And Assertions

UNDISPUTED FACTS	SUPPORTING EVIDENCE
1. Relators Mary Hendow and Julie Albertson filed this <i>qui tam</i> case under seal, pursuant to the False Claims Act (“FCA”), on behalf of the federal government in March of 2003.	Complaint For Damages, With Demand For Jury Trial (Mar. 7, 2003) (“Original Complaint”) [Docket Entry No. 1.]
2. Relators filed their Second Amended Complaint, which is the operative complaint in this matter, in March of 2004.	Declaration of James L. Zelenay, Jr. Ex. 1 (Second Amended Complaint For Damages, With Demand For Jury Trial (Mar. 5, 2004)) (“SAC”). ¹
3. At the time Relators filed the Original Complaint and SAC, they were still employed at the University.	Original Complaint ¶¶ 5-6; SAC ¶¶ 5-6; Ex. 4 (Nov. 12, 2008 Depo. of Mary Hendow) at 59:8-59:12 (stating she left the University in May of 2005); Ex. 5 (Nov. 14, 2008 Depo. of Julie Albertson (Behn)) at 261:16-18 (stating she left the University in August 2004).
4. In the SAC, Relators allege that the University defrauded the Department of Education (“Department”) out of Title IV federal	SAC ¶¶ 1, 14, 17, 23-29.

¹ All references to “Ex.” are references to the exhibits attached to the Declaration of James L. Zelenay, Jr., unless indicated otherwise.

<p>1 student financial aid by purportedly falsely 2 informing the Department in its Title IV Program 3 Participation Agreement (“PPA”) that it was in 4 compliance with a restriction on how student 5 recruiters may be paid, 20 U.S.C. § 1094(a)(20) 6 (the “contingent compensation” provision).</p>	
<p>7 5. In purported support of their contention that 8 the University violated the contingent 9 compensation provision, Relators assert a variety 10 of allegations, all of which naturally relate to 11 conduct that occurred before they filed their 12 SAC.</p>	<p><i>See, e.g., SAC ¶¶ 54-57 (making allegations regarding events purportedly occurring in 2002 and 2003).</i></p>
<p>13 6. Relators’ SAC does not include any specific 14 allegations regarding events occurring after the 15 SAC was filed in March of 2004 – nor could it.</p>	<p><i>See SAC.</i></p>
<p>16 7. Relators’ SAC does not include any 17 allegations regarding the new compensation plan 18 that the University implemented for its student 19 recruiters in June of 2004.</p>	<p><i>Compare Ex. 2 (Jan. 26-27, 2009 Rule 30(b)(6) Depo. of Vincent Grell) at 72:17-74:9, 445:16-446:5 (discussing new compensation plan that was implemented in June of 2004), with SAC (no allegations regarding June 2004 compensation plan).</i></p>
<p>20 8. Relators’ SAC does not include any 21 allegations regarding the change in management 22 that occurred at the University after they filed 23 their SAC.</p>	<p><i>Compare Ex. 3 (Apr. 16, 2009 Depo. of Todd Nelson (rough transcript)) at 218:8-10 (stating that he left his post as University President and CEO in January 2006), with SAC (no allegations regarding Mr. Nelson’s successor).</i></p>
<p>24 9. Both Mary Hendow and Julie Albertson left</p>	<p>25 Ex. 4 (Nov. 12, 2008 Depo. of Mary Hendow) at</p>

<p>1 the University not long after they filed their SAC.</p>	<p>59:8-59:12 (stating she left the University in May of 2005); Ex. 5 (Nov. 14, 2008 Depo. of Julie Albertson (Behn)) at 261:15-17 (stating she left the University in August 2004).</p>
<p>2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> <p>10. Relators' SAC includes "through the present" allegations.</p>	<p>SAC ¶¶ 1, 5, 6, 62, 65.</p>
<p>11. Relators have asserted that their claims in this case include the time-period post-dating the filing of their SAC up until today.</p>	<p><i>See, e.g.</i>, Ex. 6 (Joint Statement re Discovery Disagreement (Apr. 8, 2008)).</p>
<p>12. For purposes of discovery, Magistrate Judge Dale A. Drozd has found that Relators' allegations were sufficient to allow them certain discovery post-dating the filing of their SAC.</p>	<p><i>See, e.g.</i>, Apr. 9, 2009 Minutes [Docket No. 237]; Ex. 7 (Transcript of Apr. 9, 2009 Hearing Before Magistrate Judge Drozd) at 16:10-16:17.</p>
<p>13. Magistrate Judge Drozd, however, also has made it clear that his ruling was for discovery purposes, and that the District Court may disagree with him.</p>	<p>Ex. 7 (Transcript of Apr. 9, 2009 Hearing Before Magistrate Judge Drozd) at 16:10-16:17.</p>
<p>14. Magistrate Judge Drozd granted Relators' request for document discovery from March 2004 to March 2005, but generally denied their requests for further document discovery relating to documents post-dating the filing of Relators' SAC.</p>	<p><i>See, e.g.</i>, Apr. 14, 2008 Order [Docket No. 165]; Oct. 9, 2008 Minutes [Docket No. 181]; Oct. 10, 2008 Order [Docket No. 182]; Apr. 9, 2009 Minutes [Docket No. 237]; Ex. 7 (Transcript of Apr. 9, 2009 Hearing Before Magistrate Judge Drozd) at 23:2-24:16.</p>
<p>15. Mary Hendow and Julie Albertson have admitted that they do not know how the University's compensation plan for recruiters implemented in June of 2004 operates.</p>	<p>Ex. 4 (Nov. 12, 2008 Depo. of Mary Hendow) at 263:20-23 (no knowledge of compensation after left company in 2005), 133:22-135:25 (no knowledge of how compensated after complaint</p>

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unsealed), 301:17-302:18 (“no idea” what review under new compensation plan was based on), 309:2-14 (“I don’t know what the basis of my increases were after [the lawsuit was unsealed].”); Ex. 5 (Nov. 14, 2008 Depo. of Julie Albertson (Behn)) at 291:21-292:2 (stating, “I don’t know” whether the University is in violation of the contingent compensation regulations today), 294:25-295:6 (“I did not work under the 2004 compensation plan.”), 262:2-267:3 (disclaiming any knowledge of new compensation plan).

B. The Government’s Knowledge Of The University’s Compensation Practices

<p>16. In March 2003, Relators provided the government their Original Complaint and their Disclosure Statement.</p>	<p>Original Complaint ¶ 7; Ex. 8 (August 8, 2008 Declaration of Nancy Krop (“Krop Decl.”)) ¶¶ 2-4.</p>
<p>17. The Disclosure Statement purportedly contained “all material evidence and information related to” Relators’ allegations.</p>	<p>Original Complaint ¶ 7; Ex. 10 (March 7, 2003 Disclosure Statement); Ex. 8 (“Krop Decl.”) ¶¶ 2-4); Ex. 9 (August 28, 2006 Declaration of Daniel Robert Bartley (“Bartley Decl.”) ¶ 4.</p>
<p>18. The Disclosure Statement, signed by Relators Hendow and Albertson under penalty of perjury, consists of 25-pages purporting to detail Relators’ allegations that the University was violating the contingent compensation provision and includes a list of 18 potential witnesses and approximately 160 pages of exhibits.</p>	<p>Ex. 10 (March 7, 2003 Disclosure Statement); Ex. 8 (Krop Decl.) ¶ 4 (disclosure statement sets forth “Relators’ theories of the case and explain[s] how those theories appl[y] to the available evidence.”); Ex. 9 (Bartley Decl.) ¶ 4.</p>

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<p>19. On May 6, 2003, the government declined to intervene in Relators’ lawsuit.</p>	<p>Notice of Election to Decline Intervention (May 5, 2003) [Docket No. 3]; Ex. 11 (June 12, 2007 Declaration of Jennifer Woodward (“Woodward Decl.”)) ¶¶ 7-8.</p>
<p>20. On or around May 6, 2003, according to an attorney from the Department of Education, the “Department [of Education] advised the Department of Justice that the Department had substantial evidence that the University had violated section 487(a)(20) of the Higher Education Act; and that, in view of the declination decision, the Department was considering what administrative action to take against the University on account of the violation.”</p>	<p>Ex. 11 (Woodward Decl.) ¶¶ 8-9.</p>
<p>21. As early as May 2003, Relators, their counsel, and the Department of Education began sharing information regarding Relators’ allegations that the University was violating the contingent compensation provision and in an effort to prepare for the program review that the Department was going to conduct of the University.</p>	<p>Ex. 13 (QTAPOL000463598) (May 16, 2003 e-mail from Jennifer Woodward to Nancy Krop, discussing upcoming interview of Relators); Ex. 14 (QTAPOL000825292) (May 30, 2003 e-mail exchange between Jennifer Woodward, Nancy Krop, and Daniel Bartley, sharing information on Title IV funds received by University); Ex. 15 (QTAPOL000825300, 000463622 and 000463624) (June 2003 e-mail exchanges between Jennifer Woodward and Nancy Krop, discussing and providing index of documents prepared by Relators’ counsel); Ex. 16 (Relators’</p>

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	<p>Privilege Log) at 18-20 (emails from Jennifer Woodward to Daniel Bartley and Nancy Krop regarding “Qui Tam allegations and Program Review Investigation”); Ex. 8 (Krop Decl.) ¶¶ 2-4; Ex. 9 (Bartley Decl.) ¶¶ 3-7.</p>
<p>22. On their privilege log, Relators identify at least 15 different written communications with the Department from March 2003 through June 2003 regarding Relators’ allegations in this lawsuit.</p>	<p>Ex. 16 (Relators’ Privilege Log).</p>
<p>23. On June 10 and 11, 2003, the Department obtained sworn testimony from both Relators Hendow and Albertson with respect to their allegations in this lawsuit and in an effort to help the Department plan the upcoming program review of University.</p>	<p>Ex. 16 (Relators’ Privilege Log) at 15; Ex. 11 (Woodward Decl.) ¶ 9; Ex. 8 (Krop Decl.) ¶ 5.</p>
<p>24. According to the Department, when it conducted the interviews of Relators, it was already anticipating that litigation would result from the program review. Jennifer Woodward, an attorney for the Department has stated that the purpose of the program review “was to substantiate the allegations, and, if appropriate, quantify the extent of the violation, in order to set an appropriate fine amount, which the Department anticipated the University would contest.” The government has likewise recently</p>	<p>Ex. 11 (Woodward Decl.) ¶¶ 9-12; Ex. 17 (March 20, 2009 Appellate Brief) at 35.</p>

1 stated that releasing the transcripts from these
2 interviews “would reveal the [Department]
3 attorneys’ entire plan and strategy for the
4 Department’s program review and the anticipated
5 fine action based thereon.”

6 25. Following the interviews on June 10 and
7 11, 2003, the Department communicated
8 “regularly” with Relators and their counsel, and
9 planned the program review of the University.

Ex. 11 (Woodward Decl.) ¶ 10 (Department
“regularly” communicated with Relators’
counsel, asking “specific questions of the relators
through email communications gathering
information related to the strategy of the program
review, including what locations to focus on,
what documents to ask for, and who to
interview.”); Ex. 9 (Bartley Decl.) ¶ 7 (“Counsel
for Relators selected, analyzed, reviewed, and
forwarded documents believed to be material for
the government to reach a determination on the
Relators’ allegations.”), ¶ 21 (“From these
documents, Relators’ counsel selected analyzed
and reviewed sufficient documents to forward to
the Department of Justice and Department of
Education as material to their determination of
whether [University] violated the incentive
compensation ban.”); Ex. 8 (Krop Decl.) ¶ 7
 (“Relators’ counsel continued to assist the
government after the initial interviews, offering
thoughts on where documents might be located
and providing them with the documents that we

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	<p>believed supported a finding that [University] had defrauded the government.”)].</p>
<p>26. The government has stated that the Department’s program review attempted to determine “how to investigate, prosecute, and resolve the qui tam relators’ allegations” According to the government, the very “purpose of the program review was to quantify the extent of the violation in order to determine an appropriate fine.”</p>	<p>Ex. 17 (March 20, 2009 Appellate Brief) at 31-33.</p>
<p>27. The Department advised the University in a June 13, 2003 letter that it had “completed its review of University of Phoenix’s (Institution) application to participate in Title IV, HEA programs” and had concluded that University “meets the minimum requirements of institutional eligibility, administrative capability, and financial responsibility as set forth in 34 C.F.R. Parts 600 and 668.” The Department’s June 13, 2003 transmittal letter further stated, “Upon execution of the PPA by the Secretary, the Institution shall be certified to participate in Title IV, HEA programs until June 30, 2007.”</p>	<p>Declaration of Robert T. Collins (“Collins Decl.”) Ex. N (June 13, 2003 Transmittal Letter) at 1-2.</p>
<p>28. On July 2, 2003, the Department executed the PPA and, in a July 10, 2003 email notified University that “the Secretary of Education (Secretary) has determined that University of</p>	<p>Collins Decl. Ex. O (July 10, 2003 Email Forwarding PPA); Collins Decl. Ex. P (July 2, 2003 PPA).</p>

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<p>Phoenix [] satisfies the definition of eligible institution under the Higher Education Act of 1965, as amended (HEA).”</p>	
<p>29. In August 2003, the Department staff commenced an on-site program review of University.</p>	<p>Zelenay Decl. Ex. 11 (Woodward Decl.) ¶ 11.</p>
<p>30. The program review started an ongoing dialogue between University and the Department with respect to University’s compensation practices.</p>	<p>Collins Decl. ¶ 4 (explaining documents provided during onsite review and during program review, written correspondence with ED, meetings with ED on March 22, 2004 and August 19-20, 2004 and communications between attorneys and higher-level officials); Collins Decl. Ex. B (February 9, 2004 Letter from Todd Nelson to Rod Paige); Collins Decl. Ex. C (March 1, 2004 Letter from Todd Nelson to Donna Wittman enclosing documents); Collins Decl. Ex. D (March 12, 2004 Letter from Donna Wittman to Robert Collins); Collins Decl. Ex. E (March 19, 2004 Letter from Robert Collins to Todd Nelson); Collins Decl. Ex. F (March 25, 2004 Email Chain Between Robert Collins and Donna Wittman); Collins Decl. Ex. G (March 29, 2004 Email Between Robert Collins and Donna Wittman); Collins Decl. Ex. H (April 14, 2004 Letter from Robert Collins to Donna Wittman enclosing gift analysis); Collins Decl. Ex. I (April 29, 2004 Letter from Donna Wittman to</p>

	<p>Todd Nelson); Collins Decl. Ex. J (May 20, 2004 Letter from Robert Collins to Donna Wittman enclosing documents); Collins Decl. Ex. K (July 22, 2004 Letter from Donna Wittman to Todd Nelson); Collins Decl. Ex. L (August 5, 2004 Letter from Kenda Gonzales to Donna Wittman enclosing documents).</p>
<p>31. On February 5, 2004, the Department staff issued a Program Review Report (“PRR”) which stated that University had violated the contingent compensation provision.</p>	<p>Collins Decl. Ex. A (February 5, 2004 Program Review Report and Cover Letter).²</p>
<p>32. The University strenuously disputed the allegations in the PRR and worked to educate the Department on the serious inaccuracies contained therein.</p>	<p>Collins Decl. ¶¶ 3-4; Collins Decl. Exs. B-L.</p>
<p>33. Between February 2004 and September 7, 2004, the University provided the Department, through correspondence and meetings, with substantial documentation regarding the compensation of student recruiters, including salary data, compensation policy guides, several hundred personnel files and thousands of other documents relating to student recruiter</p>	<p>Collins Decl. ¶ 4; Collins Decl. Exs. B-L.</p>

² The University contends that the PRR was seriously flawed, biased, and untrustworthy. Moreover, the University asserts that the PRR is not admissible in this matter. The University submits the PRR in connection with this motion for partial summary judgment for the limited and sole purpose of showing what the Department staff stated in the PRR.

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<p>compensation.</p>	
<p>34. On September 7, 2004, the University and Department settled the program review for \$9.8 million without any “admission or concession by either party of any liability, wrongdoing or violation whatsoever.”</p>	<p>Collins Decl. Ex. M (September 7, 2004 Settlement Agreement) at 1.</p>
<p>35. The Settlement Agreement covered the Department’s review of University’s compliance with the contingent compensation provision for the period from September 1, 1998 through June 30, 2004.</p>	<p>Collins Decl. Ex. M (Settlement 7, 2004 Settlement Agreement) at 1.</p>
<p>36. The Settlement Agreement states that “The Department acknowledges and agrees that this Agreement does not constitute a basis for . . . placing or maintaining [the University] under a provisional form of Title IV Program Participation Agreement.”</p>	<p>Collins Decl. Ex. M (Settlement 7, 2004 Settlement Agreement) at 2.</p>
<p>37. The Settlement Agreement did not require the University to make any change to its compensation plans or policies.</p>	<p>Collins Decl. Ex. M (Settlement 7, 2004 Settlement Agreement).</p>
<p>38. At all times relevant to this lawsuit, the Department has continued to disburse and guarantee Title IV funds for University students.</p>	<p>Collins Decl. ¶ 5.</p>
<p>39. On October 30, 2002, the Department, through then Deputy Secretary William D. Hansen, issued a policy memo (the “Department Policy Memo”) which stated:</p>	<p>Declaration of Brian M. Jones (“Jones Decl.”) ¶ 5; Jones Decl. Ex. A. (Department Policy Memo).</p>

<p>[A] violation of the [contingent] compensation prohibition [does] not result[] in monetary loss to the Department. Improper recruiting does not render a recruited student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted.</p>	
<p>40. The Department Policy Memo constituted the official policy of the Department with respect to violations of the contingent compensation provision.</p>	<p>Jones Decl. ¶ 5.</p>

DATED: April 20, 2009

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

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