TIMOTHY J. HATCH, SBN 165369
thatch@gibsondunn.com
WAYNE W. SMITH, SBN 54593
wsmith@gibsondunn.com
JAMES L. ZELENAY, JR., SBN 237339
jzelenay@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

CHRISTY JOSEPH, SBN 136785
cjoseph@swlaw.com
SNELL & WILMER LLP
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
Telephone: (714) 427-7000
Facsimile: (714) 427-7799

CHARLES J. STEVENS, SBN 106981
cjs@stevensandoconnell.com
BRADLEY A. BENBROOK, SBN 177786
bab@stevensandoconnell.com
STEVENS & O'CONNELL LLP
400 Capital Mall, Suite 1400
Sacramento, CA 95814-4412
Telephone: (916) 329-9111
Facsimile: (916) 329-9110

Attorneys for Defendant,
UNIVERSITY OF PHOENIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

UNIVERSITY OF PHOENIX,

Defendant.

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

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS RELATORS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

[Notice of Motion and Motion, Request For Judicial Notice, Declaration of Robert T. Collins, and Appendix of Unpublished Authorities filed concurrently herewith]

Judge: The Honorable Garland E. Burrell
Place: Courtroom 10
Date: April 30, 2007
Time: 9:00 a.m.

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. BACKGROUND 3

A. Relators Alleged In This *Qui Tam* FCA Action That UOP Improperly Received Title IV Funding By Violating The Rule Regarding Incentive Compensation 3

B. The Government Declined To Intervene And Instead Chose To Pursue Relators' Allegations Through An ED Administrative Proceeding 5

1. The Government Initiated A Program Review Based On Relators' Allegations 5

2. ED's Administrative Allegations Mimicked Relators' Allegations 6

C. UOP And The Government Settled The Program Review 7

III. LEGAL STANDARD 9

IV. ARGUMENT 10

A. When The Government Elects To Pursue An Alternate Remedy Under The FCA, The Underlying *Qui Tam* Action Becomes Moot And A Relator No Longer Has Standing To Assert Claims On The Government's Behalf 10

B. The Court Must Dismiss Relators' Claims Because The Government Pursued An Alternate Remedy Through The ED Program Review Proceedings 16

C. The Terms Of The Settlement Agreement Do Not Change This Result 21

V. CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

A-Z Int'l v. Phillips,
323 F.3d 1141 (9th Cir. 2003) ... 9

Botosan v. Paul McNally Realty,
216 F.3d 827 (9th Cir. 2000) ... 16

Brooks v. United States Dep't of Agric.,
841 F. Supp. 833 (N.D. Ill. 1994) ... 14

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) ... 15

Eisinger v. Fed. Labor Relations Auth.,
218 F.3d 1097 (9th Cir. 2000) ... 16

GTE California, Inc. v. FCC,
39 F.3d 940 (9th Cir. 1994) ... 9

Heliotrope Gen., Inc. v. Ford Motor Co.,
189 F.3d 971 (9th Cir. 1999) ... 9

Hooper v. California,
155 U.S. 648 (1895) ... 15

McCarthy v. United States,
850 F.2d 558 (9th Cir. 1988) ... 9

Pacific Coast Agric. Exp. Ass'n v. Sunkist Growers, Inc.,
526 F.2d 1196 (9th Cir. 1975) ... 15

Safe Air for Everyone v. Meyer,
373 F.3d 1035 (9th Cir. 2004) ... 9

Savage v. Glendale Union High Sch., District No. 205,
343 F.3d 1036 (9th Cir. 2003) ... 9, 10

St. Clair v. City of Chico,
880 F.2d 199 (9th Cir. 1989) ... 10

Stevedoring Servs. of Am., Inc. v. Eggert,
953 F.2d 552 (9th Cir. 1992) ... 9

Tosco Corp. v. Communities for a Better Env't,
236 F.3d 495 (9th Cir. 2001) ... 9

United States ex rel. Barajas v. Northrop Corp.,
147 F.3d 905 (9th Cir. 1998) ... 15

United States ex rel. Barajas v. Northrop Corp.,
258 F.3d 1004 (9th Cir. 2001) ... passim

United States ex rel. Barajas v. Northrop Corp.,
65 F. Supp. 2d 1097 (C.D. Cal. 1999) ... 18, 20, 21

United States ex rel. Bledsoe v. Community Health Sys., Inc.,
342 F.3d 634 (6th Cir. 2003) ... passim

United States ex rel. Dunleavy v. County of Delaware,
123 F.3d 734 (3d Cir. 1997) ... 16

United States ex rel. Haskins v. Omega Inst., Inc.,
11 F. Supp. 2d 555 (D.N.J. 1998) 20, 21

United States ex rel. Hendow v. University of Phoenix,
461 F.3d 1166 (9th Cir. 2006).... 10

United States ex rel. Kelly v. Boeing Co.,
9 F.3d 743 (9th Cir. 1993).... 14, 15

United States ex rel. LaCorte v. Wagner,
185 F.3d 188 (4th Cir. 1999).... 13

United States ex rel. Stillwell v. Hughes Helicopters, Inc.,
714 F. Supp. 1084 (C.D. Cal. 1989) 13, 15

United States ex rel. Ubl v. Savin Corp.,
1:97mc117, 2006 U.S. Dist. LEXIS 24951 (E.D. Va. Apr. 18, 2006).... 13

United States v. Alvarez-Sanchez,
511 U.S. 350 (1994) 16

United States v. Daas,
198 F.3d 1167 (9th Cir. 1999).... 17

United States v. Rachel,
289 F. Supp. 2d 688 (D. Md. 2003) 14

Vermont Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 1, 10, 14, 16

White v. Lee,
227 F.3d 1214 (9th Cir. 2000).... 9

Statutes

20 U.S.C. § 1094(a)(20) 4

20 U.S.C. § 1094(b) 5

20 U.S.C. § 1094(c)(1)(F) 5, 20

20 U.S.C. § 1094(c)(3)(B) 5, 20

20 U.S.C. § 1099c-1(a)-(b) 5

20 U.S.C. § 1099c-1(b)(4) 5, 20

28 C.F.R. § 85.3(a)(9) 20

31 U.S.C. § 3729(a) 20

31 U.S.C. § 3730(b)(2).... 1, 10

31 U.S.C. § 3730(b)(4)(A) 1

31 U.S.C. § 3730(b)(4)(B) 1

31 U.S.C. § 3730(c)(1).... 1

31 U.S.C. § 3730(c)(2)(A) 1

31 U.S.C. § 3730(c)(2)(A)-(B).... 10

31 U.S.C. § 3730(c)(2)(B) 1

31 U.S.C. § 3730(c)(3).... 1

31 U.S.C. § 3730(c)(5).... passim

31 U.S.C. § 3730(d)(1).... 1, 10

31 U.S.C. § 3730(d)(2) ... 1
34 C.F.R. § 668.111-668.124 ... 5
34 C.F.R. § 668.112(b) ... 5
34 C.F.R. § 668.123 ... 5, 20
34 C.F.R. § 668.14(b)(22)(i) ... 4
34 C.F.R. § 668.14(b)(25) ... 5, 20
34 C.F.R. § 668.81-668.95 ... 5, 20
34 C.F.R. § 682.609 ... 5, 20
34 C.F.R. § 685.308 ... 5, 20

Other Authorities

S. Rep. No. 99-345, at 27 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5292 ... 14
U.S. Const. art. II, § 3 ... 15

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Phoenix ("UOP") brings this Motion because it is no longer a proper defendant in this False Claims Act ("FCA") case. While this case was on appeal from the Court's order dismissing Relators' Second Amended Complaint, the Government administratively pursued and settled the allegations asserted in this *qui tam* action against UOP for $9.8 million. The Government therefore pursued an "alternate remedy" to this action within the meaning of the FCA, 31 U.S.C. § 3730(c)(5). Consequently, the Government's claims against UOP are now barred as moot, and Relators no longer have standing to assert claims against UOP on the Government's behalf. All that remains is for a court to determine how much, if any, Relators are entitled to of the $9.8 million that UOP has already paid to the Government as a result of Relators' allegations.

Under the FCA, relators do not pursue claims for their own injuries. Rather, they sue as "partial assignees" of the Government's claims for alleged injuries to the Government. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000). It is not surprising then that when a relator files an FCA complaint on the Government's behalf, the Government has multiple, mutually exclusive options at its disposal:

Government Option #1. The Government can intervene and take control of the *qui tam* action, and then proceed with the action or even settle or dismiss it over the relator's objection. 31 U.S.C. § 3730(b)(2), (b)(4)(A), (c)(1), (c)(2)(A), (c)(2)(B). If the Government chooses this option, the relator is entitled to as much as 25% of the Government's recovery as a bounty for bringing the claims to the Government's attention. *Id.* § 3730(d)(1).

Government Option #2. The Government may decline to intervene and let the action proceed with the relator at the helm. *Id.* § 3730(b)(4)(B), (c)(3). If the Government chooses this option, the relator represents the Government's interests in the lawsuit, and is entitled to up to 30% of whatever he recovers on the Government's behalf. *Id.* § 3730(d)(2). The remainder of the recovery goes to the Government. *Id.*

Government Option #3. The Government may bypass the *qui tam* action entirely and instead pursue its claims in "any alternate remedy available to the Government," such as in an

“administrative proceeding to determine a civil money penalty.” *Id.* § 3730(c)(5). If the Government chooses this option, the alternate remedy proceedings replace and displace the *qui tam* action, which becomes moot under the FCA. In other words, “the government must choose one remedy or the other” – the *qui tam* action or the alternate remedy proceedings – but not both. *See United States ex rel. Barajas v. Northrop Corp.*, 258 F.3d 1004, 1010 (9th Cir. 2001). If the Government chooses to pursue an alternate remedy, the relator is entitled to the same share of the Government’s recovery in those proceedings that the relator “would have had if the [*qui tam*] action had continued.” 31 U.S.C. § 3730(c)(5).

Here, the Government elected Option #3 – choosing to pursue an alternate remedy. Relators filed their *qui tam* complaint on behalf of the United States in March 2003. Relators alleged that UOP falsely procured Higher Education Act, Title IV (“Title IV”) funding from or through the U.S. Department of Education (“ED”) because it accepted such funding while in alleged violation of Title IV’s restriction on paying incentive compensation to student recruiters. The Government declined to intervene and take over this action. Instead, the Government initiated and pursued an administrative “program review” of UOP based upon Relators’ claims.

A program review is an administrative process, which, if litigated to its conclusion, can result in an educational institution being fined, ordered to return Title IV funding, or otherwise penalized. As part of the Government’s program review of UOP, an ED review team investigated Relators’ allegations, visited the campuses where Relators worked, and purported to issue a program review report accusing UOP of engaging in the very same conduct alleged by Relators in this action. UOP contends that this program review report was irresponsible, inaccurate, biased, and untrustworthy. Nevertheless, in September 2004, UOP found it in its interests to settle the matter, and entered into a settlement agreement with ED to resolve the program review. Pursuant to this settlement, UOP paid the Government $9.8 million.

These ED proceedings – which were based upon Relators’ allegations and pursued as an alternative to the Government intervening in this action – constituted the Government’s pursuit of an alternate remedy under the FCA. Indeed, and as set forth below, these proceedings squarely qualified as an “administrative proceeding to determine a civil money penalty” – the lone example of an

alternate remedy provided for in the FCA. Because the Government pursued an alternate remedy to this action, this case is now moot and Relators no longer have standing to sue on the Government's behalf.

Moreover, all of Relators' potential arguments in response to this Motion fail as a matter of law. UOP anticipates that Relators will assert that their action may proceed because the settlement agreement between UOP and ED contained a boilerplate provision stating that ED did not have the authority to – and the agreement did not – explicitly waive, compromise, restrict, or settle any criminal or FCA claims. This contractual provision, however, has absolutely no effect on whether the program review proceedings constituted an "alternate remedy," as that term is defined in the statute of the FCA. In fact, various circuit courts, including the Ninth Circuit, have found similar settlement language entirely irrelevant to these issues of statutory interpretation and construction.

Thus, Relators' claims against UOP must be dismissed. Although Relators may be able to seek a share of the $9.8 million that UOP has already paid the Government as a result of their allegations, they can no longer assert claims against UOP on the Government's behalf based upon the same.

II. BACKGROUND

A. Relators Alleged In This *Qui Tam* FCA Action That UOP Improperly Received Title IV Funding By Violating The Rule Regarding Incentive Compensation

In March 2003, Relators Mary Hendow and Julie Albertson ("Relators"), two enrollment counselors from UOP's northern California campuses, filed this *qui tam* FCA action against UOP on behalf of the United States. Def.'s Req. for Jud. Not. ("RJN") Ex. A ("Compl."). The entire basis for Relators' complaint was (and is) their allegation that UOP improperly obtained Title IV federal student financial aid funding by falsely promising ED that it was in compliance with Title IV's restriction on paying incentive compensation to enrollment counselors (or student recruiters). *See, e.g.*, *id.* ¶ 1. Specifically, Relators alleged that UOP violated the Title IV provision which states that an educational institution shall not pay "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons . . . engaged in any student recruiting or admission activities . . . ." 20 U.S.C. § 1094(a)(20); *see also* 34 C.F.R. §

668.14(b)(22)(ii)(A) (clarifying that institutions may pay enrollment counselors a salary and adjust that salary up or down provided that the amount of any such adjustment is not based "solely" on the number of enrollments procured); Compl. ¶¶ 1, 13, 16.

Relators alleged that UOP violated the restriction on incentive compensation by compensating enrollment counselors "based upon the number of students they enroll and other enrollment activities." Compl. ¶ 22.[1] In particular, Relators claimed that:

- UOP purports to evaluate and compensate enrollment counselors based upon a "matrix" of factors, but that the only factor that really matters is the number of enrollments procured and "other enrollment factors." *Id.* ¶¶ 22, 26-28, 43(b).
- UOP "stack ranks" enrollment counselors based upon enrollment success, and provided them with incentive trips (including one to Universal Studios) and awards and gifts (including DVD players, spa packages, lottery tickets, and gift certificates) based upon the same. *Id.* ¶¶ 16, 23-25, 32-35, 43.
- UOP pressures enrollment counselors by comparing their performance to others', threatens to fire poorly performing recruiters, and encourages the enrollment of unqualified students. *Id.* ¶¶ 17, 24, 36-41.
- UOP management names documents and events in a manner intended to deceive ED and openly brags that its compensation system is "all about the numbers" while using "smoke and mirrors" to "fly under the radar" of ED and to "show [ED] what they want to see." *Id*. ¶¶ 18-22, 38, 42-43.

Relators contend that because UOP allegedly violated Title IV's restriction on incentive compensation, it is liable to the Government for Title IV funds it received from or through ED, as well as treble damages and penalties. *Id.* ¶¶ 1, 46, 49, p. 13:6-9.

[1] Relators' First Amended Complaint and Second Amended Complaint include the same allegations. RJN Ex. B (First Am. Compl) ("FAC") & Ex. C (Second Am. Compl.) ("SAC").

B. The Government Declined To Intervene And Instead Chose To Pursue Relators' Allegations Through An ED Administrative Proceeding

As required by the FCA, Relators filed their complaint under seal and provided it to the Government, along with "a statement of all material evidence and information related to [the] Complaint." *Id.* ¶ 7. On May 5, 2003, the U.S. Department of Justice ("DOJ") filed a notice informing the Court that the Government would not intervene in and take control of this action filed on its behalf. RJN Ex. D (Not. Of Election to Decline Intervention).

Instead, and specifically in light of this decision, the Government chose to pursue Relators' allegations through an ED regulatory proceeding known as a "program review." A program review is an ED administrative process used to investigate an educational institution's compliance with financial aid laws and impose, if appropriate, liabilities and penalties for violation of such laws. *See* 20 U.S.C. § 1099c-1(a)-(b); RJN Ex. E (ED, *Federal Student Aid Handbook, 2006-2007 Award Year*, Vol. 2) ("FSA Handbook") at 2-217; RJN Ex. F (Declaration of Jennifer Woodward (Sept. 21, 2006)) ("Woodward Decl. I") ¶ 1; RJN Ex. G (Declaration of Jennifer Woodward (Jan. 19, 2007)) ("Woodward Decl. II") ¶ 5.[2]

1. The Government Initiated The Program Review Based On Relators' Allegations

Jennifer Woodward, an ED attorney involved in the program review of UOP, has submitted sworn declarations regarding the events surrounding the review. *See* Woodward Decl. I; Woodward

---

[2] A program review generally begins with ED providing notice to the targeted educational institution, followed by an ED review team conducting an on-site review. FSA Handbook at 2-217 – 2-218; Woodward Decl. I ¶ 1; Woodward Decl. II ¶ 5. The review team will then prepare a program review report and issue the report to the institution. FSA Handbook at 2-218; Woodward Decl. I ¶ 1; Woodward Decl. II ¶ 5. This report includes preliminary findings and often requests further information from the institution, which can dispute the findings with rebuttal evidence. FSA Handbook at 2-218; Woodward Decl. I ¶ 1; Woodward Decl. II ¶¶ 5-6. After ED has considered any rebuttal evidence, it will issue a Final Program Review Determination ("FPRD"), which includes final findings. *See* 34 C.F.R. § 668.112(b); FSA Handbook at 2-218; Woodward Decl. I ¶ 1; Woodward Decl. II ¶¶ 6-7. These final findings can lead to, among other things, the institution repaying Title IV funding, civil penalties of up to $27,500 for each statutory or regulatory violation, or suspension or termination from Title IV programs. *See, e.g.*, 20 U.S.C. §§ 1094(c)(1)(F), 1094(c)(3)(B), 1099c-1(b)(4); 34 C.F.R. §§ 668.14(b)(25), 668.81-668.95, 668.123, 682.609, 685.308; FSA Handbook at 2-205, 2-222 – 2-224; Woodward Decl. I ¶ 1; Woodward Decl. II ¶¶ 6-7. A series of appeals may follow the issuance of the FPRD. *See* 20 U.S.C. § 1094(b); 34 C.F.R. §§ 668.111-668.124; FSA Handbook at 2-218 – 2-219; Woodward Decl. II ¶ 6.

Decl. II.[3] According to Ms. Woodward, ED staff investigated Relators' allegations after receiving Relators' sealed *qui tam* complaint and disclosure statement. Woodward Decl. I ¶¶ 2-3; Woodward Decl. II ¶ 8. Ms. Woodward states that based upon this investigation, ED staff came to the preliminary conclusion that UOP had violated Title IV's restriction on incentive compensation. Woodward Decl. I ¶¶ 2-3; Woodward Decl. II ¶ 8. ED staff then "advised" the DOJ of this belief and informed the DOJ that "in view of" the DOJ's decision not to intervene in this case, ED "was considering what administrative action to take against UOP." Woodward Decl. I ¶ 3; *see also* Woodward Decl. II ¶ 8.

ED then conducted the program review of UOP. Woodward Decl. II ¶¶ 8-9; Declaration of Robert T. Collins ("Collins Decl.") ¶ 2. Ms. Woodward admits that this program review was "unique in that its genesis was [Relators'] *qui tam* False Claims Act complaint." Woodward Decl. I ¶ 2; *see also* Woodward Decl. II ¶ 8. She also states that the "purpose" of this review "was to substantiate the allegations" made by Relators, and, "if appropriate, quantify the extent of the violation, in order to set an appropriate fine amount." Woodward Decl. II ¶ 9; *see also* Woodward Decl. I ¶ 2. As part of this program review, ED staff sent UOP a notice of visit letter and conducted an on-site review in August 2003. Collins Decl. ¶ 4; *see also* Woodward Decl. II ¶ 9. The review team visited UOP campuses in northern California, where Relators had worked, as well as locations in Phoenix, Arizona. Collins Decl. ¶ 4; *see also* Woodward Decl. II ¶ 9; Compl. ¶¶ 5-6.

2. ED's Administrative Allegations Mimicked Relators' Allegations

In February 2004, following the on-site review and extensive communications with Relators, the ED review team issued a program review report ("PRR") to UOP. *See* RJN Ex. H (ED, Program Review Report) ("PRR"); Collins Decl. ¶ 5; Woodward Decl. II ¶¶ 11-14.[4] The PRR accused UOP

---

[3] Ms. Woodward's declarations were submitted in connection with a dispute over discovery in an ongoing securities class action lawsuit involving UOP's parent company, Apollo Group, Inc.

[4] UOP contends that this report represents the position of an ED staff member who was unauthorized to issue the report, and not the final position of ED. Additionally, the issuance of a program review report is but one of the initial, preliminary steps in the multi-stage process involved in a program review. *See supra* n.2.

of engaging in the same conduct alleged by Relators in this action. By way of example, the PRR – like the Complaint – alleged that:

- UOP purports to evaluate and compensate enrollment counselors based upon a "matrix" of factors, but all that really matters is the number of enrollments procured and other enrollment criteria. *Compare* PRR at 9-10, 17-19, 26, *with* Compl. ¶¶ 22, 26-28, 43(b).
- UOP tracks enrollment counselors' success through "stack rankings," and it rewarded enrollment counselors with trips (including one to Universal Studios) and awards and gifts (including DVD players, spa packages, lottery tickets, and gift certificates) based upon the same. *Compare* PRR at 11-12, 20-24, *with* Compl. ¶¶ 16, 23-25, 32-35, 43.
- UOP "pressures" enrollment counselors to perform their job and to enroll unqualified students. *Compare* PRR at 6, 11-17, 24, *with* Compl. ¶¶ 17, 24, 36-41.
- UOP management names documents and events in a manner intended to deceive ED and openly brags that its compensation system is really "all about the numbers" while using "smoke and mirrors" to "fly under the radar" of ED and to "show [ED] what they want to see." *Compare* PRR at 9-11, 17-20, 25-26, *with* Compl. ¶¶ 18-22, 38, 42-43.

With regard to this report, UOP contended then (and continues to assert now) that the report was irresponsible, wholly inaccurate, and entirely untrustworthy. *See* Collins Decl. ¶ 6; Woodward Decl. II ¶ 15. Among other things, the report employed an incorrect legal standard, relied in large part upon Relators' self-interested statements, purported to make "systemic" findings about UOP based upon interviews with only a minute percentage of UOP's thousands of enrollment counselors and after visiting only a few campuses, demonstrated the bias that some ED staff holds against for-profit education, and purported to make conclusions about UOP's compensation system even though the ED review team had not obtained the compensation files necessary to make such an evaluation (in fact, ED requested such files from UOP in the PRR itself). Nevertheless, the PRR indisputably demonstrates that the program review proceedings were based upon Relators' allegations.

C. UOP And The Government Settled The Program Review

After receiving the PRR, UOP gathered and provided ED with substantial evidence rebutting the report's preliminary findings. Collins Decl. ¶ 6; Woodward Decl. II ¶ 15. Among other things,

UOP submitted a statistical analysis conducted by a prominent tax and audit firm demonstrating that the PRR's preliminary findings were flawed and that UOP did not compensate enrollment counselors based solely upon the number of enrollments procured, as alleged by the report and Relators. Collins Decl. ¶ 6.

After much back and forth between UOP and ED, and many exchanges of documents and information, UOP decided to enter into settlement negotiations with ED to "avoid the burdens and expenses of continuing the program review, and any other or future Department proceedings or litigation that may arise from the program review . . . ." RJN Ex. I ("Settlement Agreement") at Intro. & ¶ I.B; *see also* Collins Decl. ¶¶ 7-8. On September 7, 2004, prior to the issuance of a Final Program Review Determination or the imposition of any civil fines or penalties, UOP and ED executed a settlement agreement. Settlement Agreement; Collins Decl. ¶¶ 8-9; Woodward Decl. II ¶ 16.

Pursuant to the settlement agreement, UOP agreed to pay ED $9.8 million in exchange for a "resol[ution] [of] all issues raised in the program review report," as well as ED's promise not to: (1) undertake any further administrative investigation, audit, review, or proceeding regarding the conduct covered by the program review; (2) institute or pursue any other or future administrative action or proceeding against UOP "with respect to, arising out of or in any way relating to" the conduct covered by the program review; or (3) "impose on UOP any penalty, repayment liability, administrative fine or other sanction (including, without limitation, changing the method by which [UOP] requests, and [ED] provides, federal student financial aid) with respect to, arising out of or in any way relating to" the compensation practices covered by the program review. Settlement Agreement ¶¶ I.A, I.B, I.F.

UOP did not admit liability or wrongdoing as part of this settlement, but agreed to pay the Government $9.8 million "to resolve the program review, and to avoid the cost of future litigation." *Id.* ¶ I.B. Additionally, neither UOP nor ED stated in the Settlement Agreement what effect it would have on Relators' *qui tam* action. Instead, the Settlement Agreement stated that ED did not "have the authority" to – and thus the agreement did not – explicitly "waive, compromise, restrict, or settle" criminal or FCA claims. *Id.* ¶ I.E.

III. LEGAL STANDARD

Rule 12(b)(1) of the Federal Rules of Civil Procedure governs dismissal of a suit for lack of subject-matter jurisdiction. Issues of mootness and of standing "pertain to a federal court's subject-matter jurisdiction under Article III," and are properly raised in a motion to dismiss under Rule 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). *See also GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994) ("The jurisdiction of federal courts depends on the existence of a 'case or controversy' under Article III of the Constitution.").

"'A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears.'" *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (quoting *Stevedoring Servs. of Am., Inc. v. Eggert*, 953 F.2d 552, 554 (9th Cir. 1992)). "When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

A challenge to jurisdiction under Rule 12(b)(1) "can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch., District No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *White*, 227 F.3d at 1242). In a factual Rule 12(b)(1) challenge, "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("[i]n resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment").[5]

"Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing

---

[5] If the Court considers this to be a Rule 12(c) motion for judgment on the pleadings, it may properly consider any items subject to judicial notice. *See Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999).

subject matter jurisdiction. *Savage*, 343 F.3d at 1039 n.2. *See also St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

IV. ARGUMENT

A. When The Government Elects To Pursue An Alternate Remedy Under The FCA, The Underlying *Qui Tam* Action Becomes Moot And A Relator No Longer Has Standing To Assert Claims On The Government's Behalf

An FCA action is not brought to remedy harm done to the relator. Rather, a relator brings an FCA *qui tam* action as a partial assignee of the Government's claims for alleged injuries to the Government. *See Stevens*, 529 U.S. at 773 ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."). Indeed, and as the Ninth Circuit stated in this very case, Relators here allege that UOP "made false promises" ***to the Government*** to comply with the incentive compensation ban in order to become eligible to receive Title IV ***funds from the Government***. *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1169 (9th Cir. 2006); *see also id.* at 1177 ("Relators allege that the University submitted a claim against the government fisc.").

As mere "partial assignees" of the Government's claims, Relators were not the ones who controlled how this action would proceed. Rather, once a *qui tam* FCA action is filed, it is the Government that decides how to pursue its claims for alleged injury. The Government has three mutually exclusive options at its disposal:

Government Option #1: Intervene And Take Over The Litigation. The Government may respond to the filing of a *qui tam* FCA action by choosing to "intervene and proceed with the action," thereby assuming control of the lawsuit that the relator filed on its behalf. 31 U.S.C. § 3730(b)(2); *see also id.* § 3730(b)(4)(A). If the Government chooses this option, it is entirely in control of the case and may even dismiss or settle the action "notwithstanding the objections" of the relator. *Id.* § 3730(c)(2)(A)-(B). Additionally, if the Government obtains a recovery after choosing this option, the FCA provides that the relator is entitled to as much as 25% of whatever the Government recovers as a bounty for bringing the claims to the Government's attention. *Id.* § 3730(d)(1).

Government Option #2: Decline To Intervene. The Government may choose not to intervene and instead leave pursuit of its claims in the hands of its assignee, the relator. *Id.* § 3730(b)(4)(B),

(c)(3). If the Government chooses this option, the relator represents the Government's interests in the lawsuit and is entitled to as much as 30% of whatever he recovers on the Government's behalf. *Id.* § 3730(d)(2). The remainder goes to the Government. *Id.*

Government Option #3: Decline To Intervene And Instead Pursue An Alternate Remedy. The Government may decline to intervene, forego the FCA action entirely, and instead pursue its interests in another forum through an "alternate remedy." 31 U.S.C. § 3730(c)(5). Specifically, the FCA provides:

> Notwithstanding subsection (b) [outlining the procedures relating to the filing of a *qui tam* action and to the government's decision whether or not to intervene], the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action [i.e., the relator] shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

Id. As set forth below, it is this "alternate remedy" option that the Government chose in this case, as it declined to intervene and instead pursued an administrative program review of UOP based upon Relators' allegations. *See infra* Part IV.B.

Moreover, as the statute makes clear, the Government chooses this option to the exclusion of the others. That is, when the Government elects to pursue an alternate remedy, it has chosen an ***alternative*** to either intervening in the action or allowing the *qui tam* action to proceed with the relator at the helm. This is why, for instance, the statute states that when the Government pursues an alternate remedy, the relator shall have the "same rights" to a share in the Government's recovery "in such proceeding as [he] ***would have had*** if the [*qui tam*] action ***had continued***." 31 U.S.C. § 3730(c)(5) (emphasis added). Thus, when the Government does pursue an alternate remedy, the *qui tam* action does ***not*** "continue" and becomes moot. Furthermore, once the action is mooted, the relator – who is a mere partial assignee of the Government's claims – no longer has any standing under Article III to assert claims on the Government's behalf.

In *United States ex rel. Barajas v. Northrop Corp.*, the Ninth Circuit recognized that this was the consequence of the Government having pursued an alternate remedy under the FCA. 258 F.3d 1004 (9th Cir. 2001). In that case, a former employee filed two *qui tam* FCA actions against

Northrop Corporation ("Northrop"). *Id.* at 1006, 1007-8. In the second of these, the relator alleged that Northrop had violated the FCA by providing the United States with flight data transmitters containing "damping fluid" that did not comply with the Government's specifications. *Id.* The Government declined to intervene in the *qui tam* action. *Id.* at 1006, 1008.

Meanwhile, the Air Force had initiated administrative proceedings against Northrop that threatened to suspend or disbar Northrop from entering into contracts with the Department of Defense. *Id.* at 1006, 1007-8. These proceedings, although entirely separate from the *qui tam* action, were based on the same allegations raised by the relator. *Id.*[6] Ultimately, the Air Force and Northrop settled these suspension and debarment proceedings, with Northrop agreeing to provide the Air Force with cash and damping fluid meeting the Government's specifications. *Id.*

In the district court, the relator moved to treat the settlement as an alternate remedy so that he would be entitled to a share of the Government's recovery. *Id.* at 1006, 1009. Northrop agreed that the settlement constituted an alternate remedy, and had moved earlier in the proceedings to dismiss the relator's underlying *qui tam* action on these grounds. *Id.* at 1009; RJN Exs. J-L (briefing on Northrop's motion to dismiss relator's action under section 3730(c)(5)). The Government, because it did not want to share the value of the settlement with the relator, opposed Northrop's motion, arguing that the Air Force proceedings did not constitute an alternate remedy. *Barajas*, 258 F.3d at 1009; RJN Ex. K (Amicus Curiae Brief of United States).[7] Because the district court dismissed the relator's FCA claims on other grounds (i.e., res judicata), it never ruled on Northrop's motion to dismiss. *Barajas*, 258 F.3d at 1009.

On appeal from the relator's motion, however, the Ninth Circuit explicitly considered and found that the suspension and debarment proceedings constituted the Government's pursuit of an alternate remedy under the FCA. *Id.* at 1006, 1009-13. And, although not expressly holding that the relator's already-dismissed causes of action would have been barred on such grounds, the Ninth

---

[6] This is similar to how ED's allegations were based upon Relators' assertions in this action.

[7] Significantly, however, the Government recognized that "Congress envisioned the alternative remedy as one that ***substituted*** for the *qui tam* action and prevented the [underlying] federal court case from moving forward." RJN Ex. K at 8 (emphasis in original).

1 Circuit's opinion left little doubt that such is the result of the Government's having pursued a remedy
2 under section 3730(c)(5):

3 An alternate remedy under § 3730(c)(5) is a remedy achieved through the
4 government's pursuit of a claim after it has chosen not to intervene in a *qui tam* relator's FCA action. ***The use of the term "alternate remedy" makes clear that the***
5 ***government must choose one remedy or the other; it cannot choose both.*** If the government chooses to intervene in a relator's action, and if the government recovers
6 any proceeds in the action, the relator has a right to a share of those proceeds. If the government chooses not to intervene in the relator's action, but, ***instead***, chooses to
7 pursue "any alternate remedy," the relator has a right to recover a share of the proceeds of the "alternate remedy" to the same degree that he or she ***would have been***
8 entitled to a share of the proceeds of an FCA action.

9 *Id.* at 1010 (citations omitted) (emphasis added). In other words, the alternate remedy proceedings
10 displace and replace the *qui tam* action, which must be dismissed once the Government has pursued
11 an alternate remedy. *Cf. id.* at 1011 ("Despite the differences between an FCA action and a
12 suspension or debarment proceeding, the government can and sometimes does, seek a remedy in such
13 a proceeding that effectively takes the place of the FCA remedy.").

14 The Sixth Circuit reached a similar understanding in *United States ex rel. Bledsoe v.*
15 *Community Health Sys., Inc.*, 342 F.3d 634, 637 (6th Cir. 2003). There, in determining whether a
16 settlement reached between the Government and an FCA defendant outside the context of the *qui tam*
17 action constituted an alternate remedy, the court stated that "[t]he most logical reading of 'alternate
18 remedy' is as the government's ***alternative*** to judicial pursuit of the relator's claims." *Id.* at 647
19 (emphasis added). *See also id.* at 649 ("a settlement pursued by the government ***in lieu*** of
20 intervening in a *qui tam* action asserting the same FCA claims constitutes an 'alternate remedy' for
21 purposes of 31 U.S.C. § 3730(c)(5)") (emphasis added).[8]

22

23

[8] Other courts have made similar statements confirming that the Government's pursuit of an
24 alternate remedy bars the underlying *qui tam* action from proceeding. *See United States ex rel.*
Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1093 (C.D. Cal. 1989) (discussing
25 Government's "elect[ion] to pursue any alternate remedies available to it, including an administrative proceeding that effectively terminates the [*qui tam*] suit"). *See also United States*
26 *ex rel. Ubl v. Savin Corp.*, 1:97 mc 117, 1:99 mc 81, 2006 U.S. Dist. LEXIS 24951, at *6 (E.D. Va. Apr. 18, 2006) (the alternate remedy "provision 'preserves the rights of the original *qui tam*
27 plaintiffs when the Government resorts to an alternate remedy ***in place of*** the original action'")
(quoting *United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999)) (emphasis
28 added).

That section 3730(c)(5) puts the Government to the choice of pursuing recovery in the *qui tam* action or the alternate remedy proceedings – but not both – is consistent with basic principles of damages and fairness. In particular, if the underlying *qui tam* claims were allowed to continue despite the fact that the Government had pursued an alternate remedy and made a recovery, the Government would improperly be allowed to recover twice for the same alleged conduct – once in the alternate remedy proceedings, and again in the *qui tam* proceedings. This would violate the rule against "double recovery." *See United States v. Rachel*, 289 F. Supp. 2d 688, 697 (D. Md. 2003) ("The one wrong, one recovery rule precludes a party from double recovery for a single injury."), *vacated on other grounds*, No. 04-2276, 2006 U.S. App. LEXIS 30055 (4th Cir. Dec. 7, 2006); *Brooks v. United States Dep't of Agric.*, 841 F. Supp. 833, 840 (N.D. Ill. 1994) (Government may not recover damages under two statutes for same conduct; dismissing unjust enrichment counterclaim in light of Government's recovery under FCA). In fact, the Senate Report discussing the alternate remedy provision expressly recognizes this "double recovery" concern as a reason why the Government may pursue only a *qui tam* action ***or*** an alternate remedy, but not both:

> The Committee intends that if civil monetary penalty proceedings are available, the Government may elect to pursue the claim either judicially or through the administrative civil penalty proceeding. . . . While the Government will have the opportunity to elect its remedy, it will not have an opportunity for dual recovery on the same claim or claims. In other words, the Government must elect to pursue the false claims action either judicially or administratively . . . .

S. Rep. No. 99-345, at 27 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5292. As the *Bledsoe* court explained, "this passage suggests that the government may either proceed judicially (by intervening in the *qui tam* suit) or pursue an ***alternative*** to judicial enforcement (***i.e., an 'alternate remedy'***)." 342 F.3d at 648 (emphasis added).

And finally, constitutional principles dictate that the Government may pursue only the alternate remedy or the *qui tam* proceedings, but not both, and that the pursuit of the former precludes the continuance of the latter. As mentioned above, a relator asserting *qui tam* claims under the FCA does so solely on behalf of – and as a partial assignee of – the Government. *See Stevens*, 529 U.S. at 773. *See also United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) ("FCA effectively assigns the government's claims to *qui tam* plaintiffs . . . who then may sue based upon an

injury to the federal treasury."). A relator's standing under Article III of the Constitution is therefore fundamentally determined by the Government's standing. *See United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998) ("A *qui tam* relator has Article III standing to sue only as a relator, on behalf of the government."). If, then, the Government pursues and resolves its allegations against a defendant through alternate remedy proceedings (as occurred here), the Government and, by consequence, the relator no longer suffer any injury in fact and no longer have any Article III standing to pursue the FCA claims. *See Pacific Coast Agric. Exp. Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975) (assignee "steps into the shoes of its assignors"). Thus, there would be a violation of Article III if a relator were allowed to continue to assert claims on behalf of the Government even though the Government had already pursued an alternate remedy and made a recovery from the defendant as a result of that choice.[9]

Similarly, Article II's Take Care Clause, which provides that it is the Executive Branch that is entrusted with the duty to "take care that the laws be faithfully executed," would be violated if a relator's FCA claims were allowed to proceed despite the Government having pursued an alternate remedy. *See* U.S. Const. art. II, § 3. Indeed, the FCA's *qui tam* provisions have been challenged several times under this provision because they empower a private, third-party relator (rather than the Executive Branch) to enforce the laws. Courts have generally rejected these challenges, but only because the Executive Branch does "control a *qui tam* relator's exercise of prosecutorial powers in several ways," ***including*** by "remain[ing] free to seek any ***alternate remedies*** available, including through any administrative proceeding." *Kelly*, 9 F.3d at 753. *See also, e.g.*, *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1093 (C.D. Cal. 1989) (same). In other words, courts have found it critical in upholding the FCA's *qui tam* provisions that the Government is able to maintain control over its interests by always having the option of pursuing an alternate

---

[9] The FCA must be construed to avoid this result. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.")

remedy to the exclusion of the FCA *qui tam* action. If, however, a relator were allowed to proceed with a *qui tam* FCA action despite the Government's decision to pursue its interests elsewhere, the relator would effectively be able to trump this power, causing the FCA to violate Article II.

Accordingly, it is clear that when the Government pursues an alternate remedy under the statutory terms of the FCA (as the Government did here), it does so to the exclusion of the FCA *qui tam* action, which becomes moot and no longer provides a basis for the relator's standing.[10]

B. The Court Must Dismiss Relators' Claims Because The Government Pursued An Alternate Remedy Through The ED Program Review Proceedings

The program review proceedings that ED initiated, pursued, and settled against UOP constituted an alternate remedy within the meaning of the FCA. In interpreting a statute, one must begin with the statute's plain language. *See, e.g., Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000) ("Statutory interpretation begins with the plain meaning of the statute's language.") (citing *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994)); *Eisinger v. Fed. Labor Relations Auth.*, 218 F.3d 1097, 1102 (9th Cir. 2000) ("It is a well-recognized rule of statutory construction that 'the plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results.'") (quoting *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999)).

---

[10] Relators are likely to cite *United States ex rel. Dunleavy v. County of Delaware* as a case holding that an FCA *qui tam* action is not barred from proceeding when the Government has entered into a related settlement with the FCA defendant. *See* 123 F.3d 734, 739 (3d Cir. 1997). The *Dunleavy* decision, however, is no longer good law as it was premised upon two mistaken interpretations of the FCA, both of which have been rejected by binding precedent. First, the *Dunleavy* court assumed that the Government could be said to have pursued an alternate remedy under the FCA only if the Government first intervened in the *qui tam* action. *See id.* This position is not only inconsistent with the statutory language demonstrating that the Government pursues an alternate remedy as an alternative to intervening, but it was rejected by the Ninth Circuit's binding decision in *Barajas*, which held that an alternate remedy "is a remedy achieved through the government's pursuit of a claim after it has chosen ***not*** to intervene in a *qui tam* relator's FCA action." 258 F.3d at 1010 (emphasis added); *see also Bledsoe*, 342 F.3d at 647-49 (rejecting Government's argument that alternate remedy provision applies only if Government intervenes). Second, the *Dunleavy* court surmised that a defendant's settlement with the Government does not foreclose a relator from proceeding with an FCA *qui tam* action because it found that the FCA "is not limited to punishing the wrongs against the general public [but] also fills a remedial capacity in redressing injury to the individual relator." 123 F.3d at 739. The Supreme Court squarely rejected this view in *Stevens*, where it held that an individual relator does ***not*** suffer any injury in fact, but rather has standing under the FCA based on the Government's standing and injury. 529 U.S. at 773.

Here, the plain language of the FCA is clear and unambiguous, and it places ***no*** limits on what might constitute an alternate remedy, other than it must have been something that the Government pursued as an alternative to intervening in the *qui tam* action. Indeed, the FCA uses broad, sweeping language to describe the options available to the Government in seeking an alternate remedy. Specifically, the FCA states that "the Government may elect to pursue its claim through ***any*** alternate remedy available to the Government." 31 U.S.C. § 3730(c)(5) (emphasis added). It then provides an example, stating that the term "alternate remedy" includes, but is not limited to, "***any*** administrative proceeding to determine a civil money penalty." *Id.* (emphasis added).

In *Barajas*, discussed above, the Ninth Circuit explicitly recognized the broad scope of the alternate remedy provision when it was faced with deciding whether Air Force suspension and debarment proceedings (and the settlement reached therein), which were based upon the relator's allegations in an underlying *qui tam* action, constituted an alternate remedy under the FCA. 258 F.3d at 1006, 1009-13. Beginning with the plain language of the statute, the Ninth Circuit stated that "[a]n alternate remedy under § 3730(c)(5) is a remedy achieved through the government's pursuit of a claim after it has chosen not to intervene in a *qui tam* relator's FCA action." *Id.* at 1010. Recognizing that the FCA states that the Government may pursue "any" such remedy, the Ninth Circuit explained that the alternate remedy provision must be interpreted broadly to encompass any form of alternative remedy that the Government might pursue:

> The language of § 3730(c)(5) places ***no*** restrictions on the alternate remedies the government might pursue. It specifies broadly that the government may pursue "***any alternative*** remedy available to [it]" . . . . The term "any" is generally used to indicate lack of restrictions or limitations on the term modified. *See Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) ("According to *Webster's Third New Int'l Dictionary* (3d ed. 1986), 'any' means 'one, no matter what one'; 'ALL'; 'one or more discriminately from all those of a kind.' This broad meaning of 'any' has been recognized by this circuit.' (citations omitted)); *Turner v. McMahon*, 830 F.2d 1003, 1007 (9th Cir. 1987) ("[U]se of the adjective 'any' indicates that Congress intended that overpayments must be recouped without restriction.").

Id. at 1010-11 (emphasis added) (bracketed text in original).

With this broad definition in hand, the Ninth Circuit held that the Air Force suspension and debarment proceedings – despite being "significantly different from an FCA action" – constituted an

alternate remedy. *Id.* at 1011, 1013.[11] The court looked past these differences and found that "the government can, and sometimes does, seek a remedy in [these] proceeding[s] that effectively takes the place of the FCA remedy," and that such had occurred in this case. *Id.* at 1011.

In *Bledsoe*, the Sixth Circuit adopted a similarly broad understanding of what constitutes an alternate remedy. 342 F.3d 634 (6th Cir. 2003). In that case, the relator brought an FCA *qui tam* action alleging that the defendant had engaged in health care fraud. *Id.* at 637. The Government declined to intervene in the *qui tam* action. *Id.* Meanwhile, the Department of Health and Human Services ("DHHS") had initiated an investigation of defendant. *Id.* at 638. This investigation ended with a settlement, with the defendant agreeing to repay the Government over $30 million in Medicare overpayments. *Id.* at 639. The settlement agreement also explicitly stated that it did not release the relator's *qui tam* FCA claims. *Id.*

The *Bledsoe* relator then moved for the court to recognize the settlement as an alternate remedy. *Id.* at 640, 647. On appeal, the Sixth Circuit decided that the HHS settlement could constitute an alternate remedy, and it broadly held that the FCA's term "'alternate remedy' refers to the government's pursuit of ***any alternative*** to intervening in a relator's *qui tam* action." *Id.* at 647 (emphasis added). More specifically, the court explained: "The most logical reading of 'alternate remedy' is as the government's alternative to judicial pursuit of the relator's claims, i.e., an alternative to intervening in a *qui tam* action." *Id.*

---

[11] The Government outlined some of the differences between the suspension and debarment proceedings and an FCA action. RJN Ex. K (Amicus Curiae Brief of United States). Specifically, the Government noted that the proceedings focused on Northrop's qualifications to presently provide services to the Government and had "little to do with [its] liability for fraud or any damages or penalties," *id.* at 4; that the settlement between Northrop and the Air Force "did not determine or even address Northrop's possible [FCA] liability," did not "provide for any payment of damages or penalties for Northrop's alleged [FCA] violations," and did not include the DOJ as signatory, *id.* at 5-6 (emphasis omitted); that "[t]he relator and his counsel played no role whatsoever in the entire process" of the Air Force proceedings, *id.* at 6; and that the proceedings did not entail "any findings, conclusions of law or legal rulings of any sort," *id.* at 13. Many of these differences were discussed by the Ninth Circuit, as well as by the district court. *See Barajas*, 258 F.3d at 1011; *id.* at 1014-15 (Gould, J., dissenting); *United States ex rel. Barajas v. Northrop Corp.*, 65 F. Supp. 2d 1097, 1102-3 (C.D. Cal. 1999), *rev'd and remanded*, 258 F.3d 1004.

1 Here, in this case, there can be no doubt that the Government's program review proceedings
2 of UOP and the resulting settlement constituted an alternate remedy under the FCA. First and
3 foremost, the Government pursued these program review proceedings as an "alternative" to
4 intervening in the instant *qui tam* action. Indeed, Ms. Woodward, an attorney for ED, admits that the
5 proceedings were "unique" because their "genesis was [Relators'] *qui tam* False Claims Act
6 complaint." Woodward Decl. I ¶ 2; *see also* Woodward Decl. II ¶ 8. Ms. Woodward further
7 provides that after receiving Relators' complaint and disclosure statement, ED investigated Relators'
8 allegations and came to the preliminary belief that UOP had violated the restrictions on incentive
9 compensation as alleged in Relators' FCA complaint. Woodward Decl. I ¶¶ 2-3; Woodward Decl. II
10 ¶ 8. ED then approached the DOJ, which had declined to intervene in this action, and specifically
11 informed the DOJ that "***in view of the [DOJ's] declination decision***," ED "was considering what
12 administrative action to take against UOP." Woodward Decl. I ¶¶ 2-3; Woodward Decl. II ¶ 8.
13 ED then initiated the program review. As part of this review, ED staff further investigated
14 Relators' allegations, conducted on-site visits at campuses in northern California where Relators
15 worked, and purported to issue a program review report accusing UOP of engaging in the very same
16 conduct outlined in Relators' *qui tam* FCA complaint. *See supra* Part II.B. Thus, like the Air Force
17 suspension and debarment proceedings found to be an alternate remedy in *Barajas*, these
18 administrative proceedings "effectively [took] the place of the FCA remedy" in this case. *See*
19 *Barajas*, 258 F.3d at 1011.[12]
20 Moreover, the program review proceedings are precisely the type of proceedings
21 contemplated by the FCA's alternate remedy provision. Pursuant to these proceedings, ED may
22 request the return of fraudulently obtained Title IV funding (which is what Relators claim UOP
23 obtained in this case), suspend or terminate an academic institution's ability to participate in Title IV
24 programs (similar to how the Air Force could suspend or disbar Northrop from further government
25
26
27
28

[12] Indeed, even Relators recognize that ED proceedings may provide an alternative to their *qui tam* claims, as they specifically attempt to justify their own allegations by citing ED proceedings where ED demanded a school return Title IV funding as a result of alleged violations of the restriction on incentive compensation. FAC ¶ 27; SAC ¶ 28.

contracting in *Barajas*), or levy a "civil penalty" against an academic institution for as much as $27,500 per violation of any statute or regulation (which is almost three times the amount that can be awarded as a civil penalty for each "false claim" under the FCA). *See* 20 U.S.C. §§ 1094(c)(1)(F), 1094(c)(3)(B), 1099c-1(b)(4); 34 C.F.R. §§ 668.14(b)(25), 668.81-668.95, 668.123, 682.609, 685.308; FSA Handbook at 2-205, 2-222 – 2-224; Woodward Decl. I ¶ 1; Woodward Decl. II ¶¶ 6-7; *see also* 31 U.S.C. § 3729(a) (civil penalties under FCA); 28 C.F.R. § 85.3(a)(9) (same). In fact, Ms. Woodward states that the particular "purpose" of ED's program review of UOP "was to substantiate the allegations" made by Relators, and, "if appropriate, quantify the extent of the violation, in order to set an appropriate fine amount." Woodward Decl. II ¶ 9; *see also* Woodward Decl. I ¶ 2. In this sense, the program review proceedings even fit the lone example of an alternate remedy provided for in the FCA: an "administrative proceeding to determine a civil money penalty." *See* 31 U.S.C. § 3730(c)(5).

In sum, the program review proceedings and the resulting settlement constituted the Government's pursuit of an alternate remedy under the statutory terms of the FCA. Because the Government has pursued an alternate remedy, this FCA action is now moot and Relators no longer have any standing to assert FCA claims on the Government's behalf. Accordingly, Relators' pending *qui tam* FCA claims against UOP must now be dismissed.[13]

---

[13] Relators will likely argue that the program review proceedings and the resulting settlement did not constitute an alternate remedy, citing *United States ex rel. Haskins v. Omega Inst., Inc.* in support. 11 F. Supp. 2d 555, 561 (D.N.J. 1998). *Haskins*, however, is not good law in this Circuit because it – like *Dunleavy* – relied upon two interpretations of section 3730(c)(5), both of which have been rejected by binding precedent. First, the *Haskins* court found that program review proceedings cannot constitute an alternate remedy because they do not specifically involve the investigation or adjudication of allegations of false or fraudulent claims. *Id.* The Ninth Circuit's decision in *Barajas*, however, reversed the district court for relying upon this same, very narrow understanding of an alternate remedy. *Compare Barajas*, 65 F. Supp. 2d at 1101-2 (Air Force proceedings not alternate remedy because they did not investigate and adjudicate false or fraudulent claims, as could have occurred under administrative proceedings under Program Fraud Civil Remedies Act, and because Air Force did not "have any authority to prosecute or settle FCA claims"), *with Barajas*, 258 F.3d at 1010 (reversing district court because "[section] 3730(c)(5) places no restrictions on the alternate remedies the government might pursue"). Second, the *Haskins* court relied upon *Dunleavy*'s holding that the Government can be said to have pursued an alternate remedy barring a relator's claims only if it first intervened in the *qui tam* FCA proceedings. *See Haskins*, 11 F. Supp. 2d at 561-62. But, as discussed *supra* in note 10, the Ninth Circuit (and the Sixth Circuit) have expressly rejected this reasoning.

C. The Terms Of The Settlement Agreement Do Not Change This Result

UOP anticipates that Relators will attempt to avoid the plain meaning and consequences of the alternate remedy provision by arguing that the Settlement Agreement preserved their ability to proceed with this action. The Settlement Agreement provides that ED "does not have the authority to, and this Agreement does not, waive, compromise, restrict or settle any past, present or future violations by UOP, its trustees, officers or employees of the criminal laws of the United States or any action initiated against UOP, its trustees, officers or employees for civil fraud against the United States under [the FCA]." Settlement Agreement ¶ I.E. This contractual provision, however, does nothing to alter the analysis of whether Relators' claims are barred under the FCA's statutory terms and the constitutional principles of mootness and standing.

Indeed, the Settlement Agreement actually reflects nothing other than that ED did not have the "authority" to settle FCA claims (or criminal matters), and therefore did not settle them via the agreement. The Settlement Agreement states nothing about what those "claims" are, who can pursue them, or whether they are still viable. Instead, all of these issues are particularly and solely determined by the statutory terms established by Congress in the FCA. It is these terms that determine if this FCA case is moot and whether Relators continue to have standing to pursue the Government's claims.

This position is confirmed by *Barajas*. There, the Air Force did not have authority to prosecute or settle FCA claims, and the settlement agreement between the Northrop and the Air Force "did not discuss any possible FCA liability . . . , nor did its release section release Northrop of any FCA liability." 65 F. Supp. 2d at 1100; *see also* 258 F.3d at 1011. *See generally* RJN Ex. K at 10-11. In this sense, the Settlement Agreement between ED and UOP simply made explicit what was implicit in the agreement in *Barajas*. The Ninth Circuit, however, explicitly found that the settlement agreement between the Air Force and Northrop constituted an alternate remedy under the FCA. *Barajas*, 258 F.3d at 1006, 1009-13.

Bledsoe provides another example. There, the Government and the defendant entered into a settlement agreement that, like the Settlement Agreement here, "specifically excluded" the Relator's FCA claims from among those resolved by the settlement agreement. *Bledsoe*, 342 F.3d at 639. The

Government argued that this precluded the settlement agreement from constituting an alternate remedy to which the relator was entitled to a share. *Id.* at 649-50. The Sixth Circuit rejected this argument, finding that the settlement agreement did not control whether or not any particular proceeding constituted an alternate remedy under the statutory terms of the FCA. *Id.* According to the Sixth Circuit, "[i]f the government has recovered funds lost from conduct asserted in Relator's *qui tam* action, then the government has essentially settled Relator's claims" and has pursued an alternate remedy. *Id.* at 649; *see also id.* at 650 & n.9.

Accordingly, despite what Relators may argue, the Settlement Agreement does not control whether or not ED's program review proceedings constituted an alternate remedy barring this case from proceeding. That agreement simply stated that ED did not have the "authority" to waive FCA claims. What matters is that the program review and the resulting settlement constituted an alternate remedy, as that term is defined and understood within the FCA, and that relators' claims are now barred based upon the constitutional principles of mootness and standing.

V. CONCLUSION

Relators' *qui tam* FCA claims against UOP must be dismissed. The Government pursued its interests through the alternate remedy of ED program review proceedings and the settlement reached therein. Now that the Government has realized the benefits of an alternate remedy, Relators

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

must look to the Government for payment, not UOP. For these reasons, UOP respectfully requests that the Court dismiss all of Relators' causes of action against UOP.

DATED: March 22, 2007

STEVENS & O'CONNELL LLP
Charles J. Stevens
Bradley A. Benbrook

SNELL & WILMER LLP
Christy Joseph

GIBSON, DUNN & CRUTCHER LLP
Timothy J. Hatch
Wayne W. Smith
James L. Zelenay, Jr.

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

Attorneys for Defendant,
UNIVERSTY OF PHOENIX