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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel.	)	
MARY HENDOW and JULIE ALBERTSON,	)	
	)	2:03-cv-457-GEB-DAD
Plaintiffs,	)	
	)	
v.	)	<u>ORDER</u>
	)	
UNIVERSITY OF PHOENIX,	)	
	)	
Defendant.	)	
_____	)	

Defendant University of Phoenix ("UOP") moves for dismissal of Plaintiffs' ("Relators") action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that UOP "is no longer a proper defendant in this False Claims Act ("FCA") case."<sup>1</sup> (Def.'s Mot. at 1:3-4.) The Relators oppose this motion. In addition, the United States filed a statement of interest opposing UOP's motion. Oral argument on the motion was heard on June 25, 2007.

<sup>1</sup> All references to "Rules" are to the Federal Rules of Civil Procedure.

1 DISCUSSION

2 I. Standard

3 Rule 12(b)(1) allows a party to seek dismissal of a claim  
4 for lack of subject matter jurisdiction. "If [a] controversy is moot  
5 . . . the trial . . . court[] lack[s] subject matter jurisdiction."  
6 Felster Publ'g v. Burrell, 415 F.3d 994, 998 (9th Cir. 2005). A  
7 complete settlement of the underlying claims renders an action moot.  
8 See Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp., 893 F.2d 1109,  
9 1112 (9th Cir. 1990).

10 "[A] Rule 12(b)(1) motion can attack the substance of a  
11 complaint's jurisdictional allegations despite their formal  
12 sufficiency, and in so doing rely on affidavits or any other evidence  
13 properly before the court." St. Clair v. Chico, 880 F.2d 199, 201  
14 (9th Cir. 1989). "With a [Rule] 12(b)(1) motion, a court may weigh  
15 the evidence to determine whether it has jurisdiction." Autery v.  
16 United States, 424 F.3d 944, 956 (9th Cir. 2005). "When subject  
17 matter jurisdiction is challenged under [Rule] 12(b)(1), the plaintiff  
18 has the burden of proving jurisdiction in order to survive the  
19 motion." Tosco Corp. v. Cmty. for a Better Env't, 236 F.3d 495, 499  
20 (9th Cir. 2001).

21 II. Analysis

22 UOP contends:

23 While this case was on appeal from the Court's  
24 order dismissing Relators' Second Amended  
25 Complaint, the Government administratively pursued  
26 and settled the allegations asserted in this qui  
27 tam action against UOP for \$9.8 million. The  
28 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

1 determine how much, if any, Relators are entitled  
2 to of the \$9.8 million that UOP has already paid  
3 to the Government as a result of Relators'  
4 allegations.

5 (Def.'s Mot. at 1:4-11.) The Relators, and the United States, counter  
6 that the subject Settlement Agreement negotiated between UOP and the  
7 Department of Education ("DOE") in the Fall of 2004 does not moot this  
8 action since the Settlement Agreement "explicitly stated that the  
9 Settlement would not encompass or resolve UOP's potential [FCA]  
10 liability." (Relators' ("Rels.'") Opp'n at 1:3-4; Gov.'s Statement at  
11 1:9-12.) The Settlement Agreement stated:

12 [DOE] does not have the authority to, and this  
13 Agreement does not, waive, compromise, restrict or  
14 settle any past, present or future violations by  
15 UOP, its trustees, officers or employees of the  
16 criminal laws of the United States or any action  
17 initiated against UOP, its trustees, officers or  
18 employees for civil fraud against the United  
19 States under 31 U.S.C. §§ 3729-33 [the FCA].

20 (Rels.' Opp'n at 1:8-12.) The Relators and the United States further  
21 contend the Settlement Agreement cannot constitute an election of an  
22 alternate remedy within the meaning of the FCA because the FCA  
23 "commits exclusive authority to settle claims . . . to the Attorney  
24 General" and it was entered into "without the knowledge of the  
25 Attorney General." (Gov.'s Statement of Interest at 7:2-3; Rels.'  
26 Opp'n at 13:28-14:3.)

27 Since the Settlement Agreement did not constitute an  
28 "election" of an "alternate remedy" by the "Government" within the

29 ///

30 ///

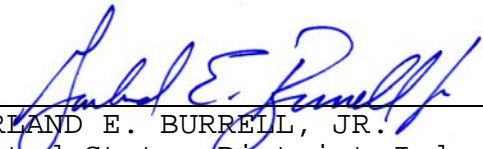
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1 meaning of the FCA, the Relators' action is not moot. Accordingly,  
2 UOP's motion is denied.

3 IT IS SO ORDERED.

4 Dated: August 17, 2007

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8 GARLAND E. BURRELL, JR.  
9 United States District Judge  
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