

1 WAYNE W. SMITH, SBN 54593
WSmith@gibsondunn.com
2 TIMOTHY J. HATCH, SBN 165369
THatch@gibsondunn.com
3 GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
4 Los Angeles, California 90071-3197
Telephone: (213) 229-7000
5 Facsimile: (213) 229-7520

6 Attorneys for Defendant,
UNIVERSITY OF PHOENIX
7 **[Additional Counsel on Signature Page]**

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 REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR PARTIAL SUMMARY
JUDGMENT**

[Defendant's Reply to Relators' Response To
Defendant's Statement Of Undisputed Facts,
Defendant's Response To Relators' Statement Of
Additional Facts, and Supplemental Declaration of
James L. Zelenay, Jr. filed concurrently herewith]

Judge: The Honorable Garland E. Burrell
Place: Courtroom 10
Date: June 8, 2009
Time: 9:00 a.m.

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1 **REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

2 **I. INTRODUCTION**

3 The University of Phoenix (“University”) argued in its Motion for Partial Summary Judgment
4 that Relators’ claims in this *qui tam* action must be cut off in either 2003 or 2004 because: (i) by that
5 time, the government was fully aware of facts underlying the alleged fraud in this matter and could
6 not thereafter have been “defrauded” with knowledge of those facts, and (ii) Relators’ Second
7 Amended Complaint (“SAC”) does not assert a single allegation entitling them to seek liability and
8 damages for the *five year* period following the filing of their Complaint. Relators have not and
9 cannot adequately respond to the University’s arguments. So, instead, they have filled their
10 opposition with a series of *ad hominem* attacks, strawmen, and irrelevant (and inaccurate) “factual
11 assertions” in an attempt to create a dispute. When the irrelevant arguments are pushed aside,
12 however, Relators do not and cannot reasonably deny the following facts that demonstrate that the
13 University’s Motion must be granted:

- 14 ▪ Relators have not alleged *any facts* in their Complaint post-dating March 2004. *See*
15 Def.’s Reply to Relators’ Resp. to Def.’s Sep. Statement of Undisputed Facts (“RSUF”)
 ¶¶ 5-6.
- 16 ▪ Relators have no first-hand knowledge regarding the operation of the June 2004
17 compensation plan. RSUF ¶ 15.
- 18 ▪ Relators provided the government their original Disclosure Statement in January 2003 and
19 their Complaint and Supplemental Disclosure Statement in March 2003. RSUF ¶ 16.
- 20 ▪ In May 2003, the Department of Education (“Department”) informed the Department of
21 Justice that it had “substantial evidence” that the University had violated the contingent
22 compensation provision. RSUF ¶ 20.
- 23 ▪ In May 2003, Relators and the government began sharing information regarding the facts
24 underlying the alleged fraud so the Department could conduct a program review. RSUF
25 ¶ 21.
- 26 ▪ On June 10 and 11, 2003, the Department obtained sworn testimony from Relators
27 regarding their allegations of fraud. RSUF ¶ 23.
- 28 ▪ Despite the foregoing, the Department entered into a new Program Participation
 Agreement (“PPA”) with the University in July of 2003 and has continued to disburse
 Title IV funds at all times since. RSUF ¶¶ 28, 38.
- In February 2004, the Department issued a program review report essentially adopting all
 of the allegations of Relators’ Complaint. Notwithstanding such, the Department has
 continued to disburse Title IV funds to the University’s students. RSUF ¶¶ 31, 38.

1 Understanding that they cannot overcome these undisputed facts, Relators attempt to shift the
2 focus of the Motion by asserting a series of irrelevant arguments. For example, in an effort to
3 distance themselves from the common-sense argument that the government could not have been
4 defrauded with full knowledge of the underlying facts, Relators assert two strawman “arguments”
5 that fail to address the key issue – the government’s awareness of the facts underlying the alleged
6 fraud.

- 7
- 8 ■ First, Relators claim that the University is improperly arguing that a government agent
9 “ratified” the University’s alleged illegal conduct. From this, Relators spin out a whole
10 web of arguments relating to the timing of the “ratification” and the extent of the
11 government’s knowledge in making the “ratification.” The University, of course, has not
12 argued – nor need it – that a government agent “ratified” illegal conduct.
 - 13 ■ Second, Relators contend that the Settlement Agreement entered into between the
14 Department and the University in 2004 resolves the issues raised on this Motion. That
15 agreement, however, simply stated that it was not resolving FCA claims, not that the FCA
16 claims now at issue have any merit or are not subject to defenses (such as the one now
17 asserted). Likewise, the 2004 Settlement Agreement related to the resolution of a
18 program review covering the period from 1998 to 2004, while this Motion argues that
19 Relators’ claims going *forward* are barred.

20 Similarly, Relators fail to adequately address their failure to allege any post-2004 conduct in
21 their SAC and instead respond with a series of inapt arguments:

- 22 ■ First, Relators contend that their Complaint, filed in 2004, actually *does* include
23 allegations of violations continuing up until today, 2009, and – somehow – up until trial in
24 2010. This, of course, is ludicrous, considering that Relators logically could not have
25 alleged facts in the SAC in March 2004 before they occurred.
- 26 ■ Second, Relators contend that this issue has already been decided in their favor by
27 Magistrate Judge Drozd and the Ninth Circuit. It simply has not. Magistrate Drozd has
28 made clear that his rulings were limited to discovery and that he was not ruling on these
dispositive legal issues. Similarly, the Ninth Circuit has never addressed the issues raised
by this Motion.
- Third, Relators resort to their last strawman, contending that the University has argued
that Relators do not have any “evidence” supporting post-Complaint violations. While the
University certainly believes that Relators have not provided any “evidence” of post-
Complaint violations, that is not the argument that the University made in its Motion and

1 is a red herring.¹ The University's argument is simply a legal one based on Relators'
2 failure to plead fraudulent conduct after March 2004.

3 Accordingly, and for the reasons explained further below, the University requests that the
4 Court enter judgment in its favor that Relators' claims in this action cut off at and do not continue
5 past the signing of the July 2, 2003 PPA or, at the latest, on February 5, 2004 (when the program
6 review report was issued), March 5, 2004 (when the SAC was filed), or September 7, 2004 (when the
7 program review was settled).

8 **II. JUDGMENT SHOULD BE ENTERED BECAUSE THE GOVERNMENT**
9 **BECAME AWARE OF RELATORS' ALLEGATIONS IN 2003 AND 2004**

10 It is a common sense principle that a party can no longer be "defrauded" once it becomes
11 aware of the alleged underlying facts leading to the purported fraud. Restatement (Second) of Torts
12 § 541 (1965). This is true in FCA cases as well – once the government has become aware of the
13 alleged facts underlying the purported "fraud," a relator cannot claim that the government was
14 thereafter "defrauded" based on those facts. *See, e.g., U.S. ex rel. Durcholz v. FKW Inc.*, 189 F.3d
15 542, 544-45 (7th Cir. 1999) ("The government's prior knowledge of an allegedly false claim can
16 vitiate a FCA action."); *see also, e.g., U.S. ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321,
17 327 (9th Cir. 1995) ("the extent and nature of government knowledge may show that the defendant
18 did not 'knowingly' submit a false claim"). Otherwise, in a case such as this, the government could
19 become aware of the alleged facts underlying the purported fraud, sit back and continue providing
20 program funds to the "defrauder" while receiving the benefits of those funding payments (*i.e.*,
21 students receiving an education), and then have a relator later claim that all of those funds have to be
22 returned to the government, plus treble damages and civil penalties, on account of the violation that
23 the government knew about all along. The FCA simply is not, and never has been a means for such
24 game playing, and for the government to get goods and services for free by continuing to provide

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28 ¹ Indeed, it appears that Relators simply used their opposition as a vehicle to inform the Court
about their recently invented, new "theory" regarding the meaning of the contingent
compensation provision and sling mud against the University. Relators' assertions are irrelevant
and need not be considered. Moreover, they are simply wrong.

1 funding after it has concluded there is a violation of the law that it will later rely upon to get all of
2 that funding back.

3 These same principles apply here to preclude Relators’ claims. Indeed, it is now undisputed
4 that the government became aware of Relators’ allegations that the University was violating the
5 contingent compensation provision as early as January of 2003. RSUF ¶ 16 (stating Relators
6 provided Disclosure Statement to government in January 2003). By March of that year, Relators had
7 also provided the government a copy of their Complaint and a supplemental Disclosure Statement,
8 which purported to include 18 witnesses and approximately 160 pages of exhibits. RSUF ¶¶ 16-18.
9 By May of that year, the Department had already concluded that it had “substantial evidence” in
10 support of Relators’ allegations and “was considering what administrative action to take against the
11 University on account of the violation.” RSUF ¶ 20.² As a result of this determination, the
12 Department began a program review of the University, the “purpose” of which, by the Department’s
13 own admission, “was to quantify the extent of the violation in order to determine an appropriate
14 fine.” RSUF ¶ 26. In July, the Department interviewed Relators, anticipating that litigation would
15 result from the program review and that there would be a “fine action” against the University. RSUF
16 ¶¶ 23-24. And by February 2004, Department staff had issued a program review report to the
17 University accusing the University of violating the contingent compensation provision. RSUF ¶ 31.
18 In September 2004, after receiving a multitude of information from the University regarding its
19 compensation plans, the Department settled the program review. RSUF ¶¶ 30, 32-34.

20 Thus, based upon these undisputed facts, the government’s knowledge of the University’s
21 alleged contingent compensation violations in early 2003 and 2004 was clear. It simply cannot be
22 said, therefore, that the Government was “duped” or “defrauded” in the July 2003 PPA as a result of
23 the University’s statement that it would comply with the contingent compensation provision – the
24 government had already concluded that the University was not in compliance. *See, e.g.*, John T.
25 Boese, *Civil False Claims and Qui Tam Actions* § 2.03[F][3] (3d ed. 2009) [hereinafter, “Boese”]
26

27 ² Amazingly, Relators do not even address the sworn declaration provided by a Department of
28 Education attorney in which she makes these critical admissions.

1 (the government knowledge argument is particularly strong when government knows “not only of the
2 activity that ultimately forms the basis of a [FCA] complaint, but of a [FCA] investigation, and still
3 authorizes performance”) (emphasis added). Similarly, it just cannot be said that the government was
4 “defrauded” out of Title IV funds as a result of the University’s alleged non-compliance following
5 the February 2004 program review report, where Department staff explicitly accused the University
6 of violating the contingent compensation provision, or following the September 2004 Settlement
7 Agreement. Simply put, the government was aware of the University’s alleged non-compliance. It
8 cannot be said that the government was “defrauded” thereafter as a result of that alleged non-
9 compliance. *See, e.g., Durholz*, 189 F.3d at 545 (“If the government knows and approves of the
10 particulars of a claim for payment before that claim is presented, the presenter cannot be said to have
11 knowingly presented a fraudulent or false claim. In such a case, the government’s knowledge
12 effectively negates the fraud or falsity required by the FCA.”).

13 In their opposition, Relators try to avoid this result by asserting a host of arguments. None of
14 these hold water.

15 **A. The University Did Not Argue That The Government “Ratified” Illegal Conduct**

16 Relators’ primary response to the University’s argument is to claim that the University is
17 improperly arguing that the government “ratified” illegal conduct. Opp. Part II.B. Relators use this
18 contention to spin out a whole host of arguments, including that a government agent cannot “ratify” a
19 statutory violation, those regarding the timing of the government’s “ratification” in this case, and
20 assertions relating to the nature of the government’s knowledge (and the University’s opposition to
21 the government’s position) in making the “ratification.” *Id.* This is nothing other than a classic
22 strawman – the University does not argue in its Motion that the government “ratified” illegal
23 conduct. In fact, this argument does not appear once in its brief.³

24 Rather, what the University argues is the common sense proposition, supported by the FCA
25 case law, that a relator simply cannot claim that the government was *defrauded* out of federal funds

27 ³ The word “ratify” appears once in the University’s opening brief, but it says that even if the
28 government was not fully informed when it signed the PPA, once it concluded the program
review it ratified the PPA by allowing it to continue in effect. *See Mot.* at 12.

1 as a result of alleged illegal conduct once the government has become aware of that alleged illegal
2 conduct. Mot. Part III.A. That does not mean, of course, that the government has “ratified” the
3 conduct or cannot pursue other remedies. It just means that a relator cannot sue on the government’s
4 behalf for “fraud.” The government is no longer “snookered” or “hoodwinked” once it becomes
5 aware of the underlying alleged facts. *See U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 955 (10th
6 Cir. 2008) (“whether the government is estopped from bringing a claim because one of its agents
7 assured the defendant that some action was legal presents a very different question than whether
8 reliance on government assurances can be relevant to deciding if a defendant ‘knowingly’ presented a
9 false claim”). *See also U.S. ex rel. Herbert v. Nat’l Academy of Sciences*, 1992 WL 247587, at *8
10 (D.D.C. Sept. 15, 1992) (“The clearest fact negating any claim of fraud is that the U.S. was aware of
11 the [relator’s] claims”).

12 Furthermore, the other arguments that Relators advance in tow of their “ratification”
13 strawman are simply incorrect. First, the case law clearly establishes that, even when it comes to
14 statutory or regulatory violations, the government cannot claim that it was “defrauded” as a result of
15 those violations once it becomes aware of them. *See, e.g., Burlbaw*, 548 F.3d at 937, 954 (finding
16 that FCA claims were precluded because government was potentially aware of school’s failure to
17 satisfy statutory criteria); *U.S. v. Southland Management Corp.*, 326 F.3d 669 (5th Cir. 2003)
18 (finding that defendants were entitled to make the disputed claims despite HUD’s awareness of
19 regulatory noncompliance). *See also Boese, supra* § 2.03[F][1][b] (“In a number of relevant contract
20 cases the government has been estopped from requiring strict compliance with regulatory or
21 contractual requirements because it knew of the contractors’ actions and failed to act.”) (citing
22 various cases).

23 Second, Relators – and the government in its Statement of Interest – simply mischaracterize
24 the facts when it comes to the timing involved. As the undisputed facts outlined above show, and as
25 is confirmed by a declaration from a Department of Education lawyer (completely ignored by
26 Relators in their brief), the Department had concluded as early as May of 2003 that it had “substantial
27 evidence” in support of the allegation that the University was violating the contingent compensation
28 provision. RSUF ¶ 20. This was *before* the PPA was signed in July of 2003. RSUF ¶¶ 27-28.

1 Further, in avoiding various discovery, the government had stated that by this time, it also had
2 already concluded that litigation would result from the ensuing program review of the University and
3 that there would be a “fine action” – *i.e.*, it would make “findings” against the University. RSUF
4 ¶ 24. Thus, the government cannot claim that it was “tricked” by the University’s statement in the
5 PPA that it was in compliance with the contingent compensation provision – the government had
6 already decided by that point that it was not. Moreover, and at any rate, the government was
7 certainly fully knowledgeable of the allegations at issue here when its staff made those allegations in
8 the February 2004 program review report. *See* RSUF ¶ 31. At the least then, the government cannot
9 claim “fraud” for Title IV funds disbursed to the University’s students after that point.

10 And third, Relators advance a whole host of arguments regarding the extent of the
11 government’s knowledge and “mutual modification of contract.” *Opp.* Part II.B.2-3. In essence,
12 these arguments boil down to Relators’ – and apparently the government’s – contention that the
13 University’s argument must fail because the University disputes Relators’ allegations in this case and
14 disputed the government’s allegations in the program review report. *Id.* This, however, is irrelevant.
15 It does not matter whether the University agrees with or disagrees with the allegations. What matters
16 for purposes of this analysis is that the **government** was fully aware of the allegations, apparently
17 believed in them, yet nevertheless entered into a new PPA and has continued providing Title IV
18 funding since. *Cf. U.S. ex rel. Englund v. Los Angeles County*, 2006 U.S. Dist. LEXIS 82034, at *38
19 (E.D. Cal. Oct. 31, 2006) (“[s]ince the crux of an FCA violation is intentionally deceiving the
20 government, no violation exists where the government has not been deceived”). *See also U.S. ex rel.*
21 *Harrison v. Nat’l Semiconductor Corporation*, 105 F.3d 650, 1997 WL 3637, at *2 (4th Cir. 1997)
22 (unpublished) (relators’ claims barred because government was aware of relators’ allegations at the
23 time it accepted “false” claims). In light of these facts, the government could not have thereafter
24 been “defrauded.” Relators’ arguments regarding “mutual modification” of contract are simply

1 inapplicable to this situation.⁴ Thus, Relators’ – and the government’s – arguments relating to
2 “ratification” fail as a matter of law.

3 **B. The Settlement Agreement Does Not Resolve The Arguments Presented On This**
4 **Motion**

5 Relators’ secondary argument is that the Settlement Agreement that the University and the
6 Department entered into following the program review resolves the issues raised on this Motion.
7 Opp. Part II.B.3.a. It does not. In fact, that Settlement Agreement stated nothing more than that it
8 was *not* resolving or settling FCA claims. *See* RSUF ¶¶ 35-37. It did not state that the FCA claims
9 asserted by Relators here have any merit, nor that the FCA claims are not subject to defenses – such
10 as that now asserted by the University. *Id.* Relators truly overreach by contending that it bars the
11 arguments that the University makes here.

12 Further, Relators’ argument regarding the Settlement Agreement fails for an additional
13 reason. While the September 2004 Settlement Agreement resolved the program review that covered
14 the period from 1998 to 2004 (*id.*), the University’s argument here is that Relators’ claims *going*
15 *forward* are barred due to the government’s knowledge of the allegations at issue in this lawsuit.
16 Consequently, the Settlement Agreement is simply irrelevant and inapplicable to the issues raised by
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20 ⁴ Indeed, Relators’ attempt to pigeonhole all of the cases into “mutual modification of contract”
21 situations where the defendant had “worked cooperatively with the government” to “modify the
22 contract” is entirely without support. In *Burlbaw*, 548 F.3d 931, for instance, the court found that
23 the relators’ claims of “fraud” were barred simply because the government was aware of the
24 information allegedly underlying the purported fraud. *Id.* at 931, 937, 954. This makes perfect
25 sense, and it is similar to the position that the University asserts here, where it contends that it
26 could not have “defrauded” the government because the government had already made its own
27 conclusion relating to the University’s conduct. *Id.* Moreover, and at any rate, the University
28 also argues that following the issuance of the program review report, it *did* work cooperatively
with the government to address the government’s concerns. Mot. Part IV.A.2. It does not matter
whether the University also agreed with the government’s conclusions. Further, the mud slinging
that Relators engage in regarding the University’s alleged “cover up” during the program review
(Opp. at 6 n.3 & 9-10) is not only unsupported, but it is irrelevant – it is undisputed that the
government was aware of the allegations at issue in this matter by 2003 and 2004. RSUF ¶¶ 16,
31. Indeed, the alleged “cover up” was in the Department staff’s own report in 2004. *See* Def.’s
Response to Relators’ Statement of Additional Facts (“RSAF”) ¶ 25. It cannot, therefore, provide
a basis for saying that the government did not know the full extent of the “fraud.”

1 the University on this Motion, and – like Relators’ other arguments – does not provide grounds for
2 denial.⁵

3 **C. The Government’s “Materiality” Argument Misses The Mark**

4 The Government, in its Statement of Interest, joins in Relators’ opposition to the University’s
5 Motion based upon the assumption that the University is arguing that violations of the contingent
6 compensation provision are not “material” to the government. *See* Statement of Interest (“SOI”) at 1.
7 As a preliminary matter, the government’s arguments are irrelevant because the University is not
8 arguing that contingent compensation violations are universally immaterial to the government.
9 Rather, the University’s Motion argues that Relators simply cannot claim “fraud” on behalf of the
10 government and contend that the University submitted “false” claims once the government became
11 fully aware of those alleged violations. Courts have recognized that this implicates a variety of
12 elements under the FCA, not just materiality. *See* Boese, *supra* § 2.03[F] (stating that “[g]overnment
13 knowledge has been found relevant to both the purported falsity of claims and the states of mind of
14 defendants”) (citing various cases). *See also, e.g.,* *Durcholz*, 189 F.3d at 545 (stating that in such a
15 situation, “the government’s knowledge effectively negates the *fraud or falsity* required by the
16 FCA”) (emphasis added).

17 Moreover, to the extent materiality is implicated in the instant analysis, the government’s
18 arguments are simply in error. In short, the government contends that the Ninth Circuit has already
19 decided that violations of the contingent compensation provision are “material” to the government.
20 *See* SOI at 2. However, the Ninth Circuit’s opinion was based only on the *pleadings*, and, as the
21 government itself recognizes, issues of materiality involve a “mixed question of law and fact.” *Id.* at
22

23 ⁵ Relators also finally argue that the University’s argument results in an illogical “all or nothing,”
24 where the government will either need to cut off Title IV eligibility or “ratify” illegal conduct.
25 Opp. at 9. This again relies upon Relators’ strawman. The University is not arguing that the
26 government has “ratified” illegal conduct. Rather, it is merely stating that the government cannot
27 sue a defendant for “fraud” for conduct following the period after which it became aware of that
28 alleged conduct. Furthermore, it is Relators who have posited an “all or nothing” approach.
According to Relators, even though the government chose to continue funding student education
at the University, and even though the University provided the education, the University gets
nothing as it must give all the money back – actually less than nothing as Relators would also
have the University pay a substantial penalty.

1 1 (quoting *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 914 (4th Cir.
2 2003)). Here, despite the government’s conclusory assertions otherwise, the actual *facts* demonstrate
3 that an alleged violation of the contingent compensation provision was not “material” to the
4 government’s decision to enter into a new PPA or to continue Title IV eligibility for the University.
5 Indeed, not only did the government actually sign a new PPA with the University in this case after
6 concluding that there was “substantial evidence” regarding the alleged violation, but it has continued
7 paying out Title IV funding for over four years since its staff issued a program review report accusing
8 the University of violating the contingent compensation provision. RSUF ¶¶ 20, 28, 31, 38. This is
9 entirely inconsistent with the contention that these particular violations were “material,” but wholly
10 consistent with established Departmental policy. *See* RSUF ¶¶ 39-40 (October 30, 2002 Department
11 Policy Memorandum, stating that violation of contingent compensation provision does not render
12 student at institution ineligible to receive Title IV funds at institution).

13 Accordingly, the government’s arguments, like Relators’, do not provide grounds for denying
14 the University’s Motion. The government’s knowledge of the allegations at issue in this case is clear.
15 Relators should not be able to continue to seek liability and damages for “fraud” against the
16 government for events that occurred after that point.

17 **III. ALTERNATIVELY, JUDGMENT SHOULD BE ENTERED THAT**
18 **RELATORS’ CLAIMS CUT-OFF AT THE FILING OF THEIR COMPLAINT**

19 If the Court finds that, for some reason, Relators’ claims should not be cut off in 2003 or 2004
20 due to the government’s knowledge of Relators’ allegations at that time, it should alternatively find
21 that Relators’ claims cut off at the filing of their Second Amended Complaint in March of 2004.⁶
22 This is because Relators’ SAC simply does not include any allegations post-dating the filing of their
23 Complaint. In other words, Relators allege nothing that entitles them to tack on an additional *five*
24 *years* to this litigation, from 2004 to today and, presumably, up until trial, in addition to the seven
25 years from 1997 to 2004 that the Complaint already purports to put at issue. As explained by the
26 University in its Motion, any other conclusion would be contrary to Relators’ own pleadings and

27 ⁶ The Department of Justice, in its Statement of Interest, takes no position on this argument. SOI at
28 1 n.1.

1 would completely undermine the purposes of the Federal Rules, including Rule 9(b). *See* Mot. Part
2 IV.B. *See also, e.g., Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (one of purposes
3 of Rule 9(b) is to not allow plaintiffs to proceed on unpled claims).

4 In response to this argument, Relators advance a number of arguments that can be broken
5 down into two groups. First, Relators advance a series of arguments that at least portend to discuss
6 the scope of Relators' own pleadings. Second, Relators – perhaps realizing the weakness of their
7 arguments – follow this up by using their brief to inform the Court of their new, creative “theory”
8 conceived of during the course of this litigation and ultimately resort to mud slinging in a purported
9 attempt to show that they have “evidence” against the University. Both types of arguments should be
10 rejected.

11 **A. Relators' Arguments Relating To The Pleadings Are Unavailing**

12 Relators begin their response to the University's Motion on the scope of their Complaint by at
13 least portending to directly respond to that issue. *Opp.* Part II.C.1-2. None of the arguments that
14 Relators advance, however, are persuasive.

15 First, Relators essentially revert back to their old argument that the plain language of the
16 Complaint demonstrates that they have alleged an “ongoing” fraud. *Opp.* Part II.C.2. This, however,
17 is simply not true, and Relators have not alleged anything entitling them to tack on an additional *five*
18 *years* of liability and potential damages in this case. In fact, every allegation in Relators' 2004
19 complaint naturally and only relates to conduct that occurred prior to the filing of the Complaint.
20 RSUF ¶¶ 4-8. For instance, Relators allege in their 2004 SAC that in “*Fall 2002*” Hendow “won a
21 Sony DVD player,” and that in “*March 2003*” there was a “contest.” Decl. of James L. Zelenay, Jr.
22 in Support of Mot. (“Zelenay Decl.”) Ex. 1 (SAC) ¶ 51. Relators have not alleged anything regarding
23 events occurring in 2004, 2005, 2006, 2007, 2008, 2009, or 2010. There is simply no excuse to allow
24 them to seek liability and potentially billions of dollars in additional damages for these years. They
25 are not part of this case.

26 Moreover, and as outlined in the University's Motion, Relators' allegation in their Complaint
27 that the University's conduct continued “through the present” does not entitle them to seek liability
28 and damages up to “today,” 2009 or 2010. *Mot.* Part IV.B.1. Rather, courts have correctly and

1 naturally understood that “the present” in a complaint means the date that the complaint was filed.
2 *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007); *United States v. Fisher*, 112 F.
3 Supp. 233, 235 (W.D. Ky. 1953); *see also Cohen v. Gerber Prods. Co.*, No. 96-3071, 1996 U.S. Dist.
4 LEXIS 15253, at *2-3 (E.D. Pa. Oct. 21, 1996); *Franze v. Equitable Life Assurance Soc’y*, No. 94-
5 2036, 1995 U.S. Dist. LEXIS 20140, at *22 (S.D. Fla. Sept. 29, 1995). Although Relators try to
6 undermine these cases, they cannot refute their simple, common-sense conclusions. Nor have
7 Relators been able to cite one case where a court has found that “the present” in a complaint means
8 that a plaintiff’s allegations are never-ending, and continue to include events occurring five years into
9 the future.

10 For the same reason, Relators’ allegation that the University submits false claims “every
11 year” does not change the fact that their Complaint is limited to pre-Complaint conduct. RSUF ¶¶ 4-
12 8. It certainly does not mean that Relators have alleged, in general terms or with any particularity,
13 that the University submitted false claims five years later, in 2009 or 2010. *Id.* Accordingly,
14 Relators simply have not alleged any post-Complaint conduct entitling them to massively increase
15 the stakes in this litigation. Nor is the onus on the University with respect to his matter, as claimed
16 by Relators. Rather, the scope of this litigation is controlled by Relators’ Complaint. And Relators’
17 Complaint is clearly limited to the time period from 1997 to 2004. RSUF ¶¶ 4-8.

18 Second, Relators contend that Magistrate Judge Drozd and the Ninth Circuit have already
19 found that the “liability period” in this case extends up to today, and that the University is therefore
20 estopped from making the argument it does here. Opp. at 11-14. Such could not be further from the
21 truth. Magistrate Judge Drozd’s rulings were clearly and explicitly limited to discovery matters, as
22 Judge Drozd himself made clear: “[F]or *discovery purposes*, [I] have found that the complaint
23 alleges a continuing violation. . . . Judge Burrell may or may not agree with me, *but for discovery*
24 *purposes*, I’ve already found that the complaint states a – alleges a continuing violation.” Zelenay
25 Decl. Ex. 7 (Transcript of Apr. 9, 2009 Hearing) at 16:11-16:17; RSUF ¶¶ 12-13. In fact, when
26 University’s counsel specifically raised the issue regarding the “liability” period in this action, Judge
27 Drozd stated that was “not for [him] to decide” and Relators’ counsel responded: “Exactly. That’s a
28

1 motion for summary judgment.” Decl. of Peter Leckman in Opp. to Mot. (“Leckman Decl.”) Ex. 2
2 (Transcript of Apr. 11, 2008 Hearing) at 10:21-10:25; RSUF ¶¶ 12-13.⁷

3 Likewise, the Ninth Circuit never made a decision regarding the time period at issue in this
4 litigation. In fact, that issue was never presented to the Ninth Circuit, raised in the parties’ briefs, or
5 mentioned in the Court’s opinion. RSAF ¶ 9. Thus, it is simply frivolous for Relators to contend that
6 the Ninth Circuit has already decided this matter. Nor can anything be read, as Relators attempt to
7 do, into the fact that the Ninth Circuit occasionally used the “present tense” to describe Relators’
8 claims. The “present tense” is often used in legal papers to describe past allegations, and – at any
9 rate – the Ninth Circuit just as freely used the past tense in describing Relators’ allegations. *See, e.g.,*
10 *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1177 (9th Cir. 2006) (stating that
11 Relators “*alleged* that the University fraudulently *violated* a regulation”) (emphasis added); *id.*
12 (stating that “relators allege that the University *submitted* a claim”) (emphasis added). And finally,
13 Relators also completely mischaracterize the Ninth Circuit’s finding that the government “care[s]
14 about an institution’s *ongoing conduct*” and that the PPA “constrain[s] . . . *ongoing conduct.*” Opp.
15 at 13. This discussion from the Ninth Circuit did not relate to the timing at issue in this case, but
16 rather whether the statement in the 2003 PPA that the University “‘will’ comply” with the contingent
17 compensation provision was sufficient to assert a “false certification” claim. *See Hendow*, 461 F.3d
18 at 1176.

19 Third, Relators assert the wholly frivolous argument that the University’s contention in this
20 Motion means that a plaintiff could never recover for post-Complaint conduct and that the
21 University’s arguments are contrary to Federal Rules relating to injunctions. Opp. at 14. These
22 arguments are silly. The University is not stating that a plaintiff could never proceed on post-

24 ⁷ Moreover, even Judge Drozd recognized that Relators’ claims cannot continue into the never-
25 ending future. Leckman Decl. Ex. 2 at 3:24-3:25 (“I do think [the University’s counsel] make a
26 very good point, and what, this just goes on forever?”). Moreover, to the extent Relators actually
27 attempt to claim that Magistrate Judge Drozd made a ruling regarding the “liability period” in this
28 case, then such a ruling would have been beyond the magistrate’s authority and would be *void ab*
initio. Local Rule 72-302. Indeed, if Magistrate Judge Drozd ever made such a decision, the
University would certainly have appealed it. Magistrate Judge Drozd, however, did not, and thus
the University did not appeal his limited discovery orders.

1 complaint conduct. It is just stating that Relators cannot do so here, when they have not alleged any
2 post-complaint conduct in their Complaint, have not alleged an “ongoing fraud,” and are seeking to
3 extend their action out by *five years* beyond the filing of their Complaint. Meanwhile, the issue here
4 is not whether Relators could have sought an injunction in 2004 based upon the University’s alleged
5 past conduct – tellingly, Relators did not seek such an injunction. Rather, the issue is whether
6 Relators can retroactively seek to tack on five years of events that they never alleged. They clearly
7 cannot, and the University’s Motion should be granted.

8 **B. Relators’ Arguments Based Upon The “Evidence” Are Irrelevant and Unavailing**

9 Finally, Relators ultimately revert to slinging mud against the University through submitting
10 alleged “evidence” of the University’s ongoing conduct and giving the Court a “preview” of their
11 new, recently created legal “theory” regarding the Higher Education Act (“HEA”). Opp. Part II.C.3.
12 Relators’ arguments are irrelevant and unpersuasive.

13 **1. Relators’ “Factual” Arguments Are Irrelevant**

14 The University bases the second portion of its Motion upon the pleadings in this matter. *See*
15 Mot. Part IV.B. Specifically, it argues that Relators’ Complaint, *as pled*, does not include any
16 allegations regarding post-Complaint conduct entitling Relators to tack on an additional five years of
17 potential liability and damages. *Id.* The University did not argue in its Motion, as Relators falsely
18 contend, that “Relators have no evidence to prove HEA violations past” the filing of their Complaint.
19 Opp. at 2. Although the University believes that this is true, it is simply not the point of the
20 University’s Motion. Rather, it is just another strawman used by Relators to provide the Court with a
21 preview of their new legal “theory” and attack the University with unsupported accusations. Because
22 the University did not argue that Relators do not have “evidence” of post-Complaint conduct (which
23 they do not), the Court need not consider Relators’ various “factual” arguments. They are irrelevant
24 to the instant Motion and designed to obscure the merits of this Motion by giving the appearance of a
25 factual dispute.

26 **2. Relators’ “Factual” Arguments Are Incorrect**

27 To the extent that the Court chooses to consider Relators’ “factual” arguments, however, it
28 will quickly find that they do not “prove” anything. Indeed, because Relators now realize that the

1 evidence does not prove a violation of the HEA, they have recently created – and are now proffering
2 before this Court – an entirely new, unsupported, and “inventive” interpretation of the HEA.
3 Apparently, Relators are fans of the old adage that if the facts don’t work, “argue the law.”
4 Unfortunately for Relators, they are wrong about both in this case.

5 **a. The Legal Standard**

6 Relators claim that the University violated the contingent compensation provision of the
7 HEA, which was enacted in 1992. RSUF ¶ 4. The HEA provides that an academic institution shall
8 not pay any employee involved in the recruiting of students “any *commission, bonus*, or other
9 *incentive payment* based directly or indirectly on success in securing enrollments or financial aid.”
10 20 U.S.C. § 1094(a)(20) (emphasis added). This provision was added to the HEA for the “purpose of
11 preventing an institution from providing incentives to its staff to enroll unqualified students.”
12 67 Fed. Reg. 67,048, 67,053 (Nov. 1, 2002). And, from the beginning, it has been recognized that
13 this provision does *not* bar academic institutions from paying student recruiters a salary, and even
14 adjusting that salary based in part based upon the recruiter’s success at enrolling students, provided
15 that the number of enrollments was not the sole or only factor considered in adjusting the recruiter’s
16 salary. *See, e.g.*, H.R. REP. NO. 102-630, pt. G, at 499 (1992) (Conf. Rep.), *as reprinted in* 1992
17 U.S.C.C.A.N. 334 (legislative history stating that HEA does not prohibit schools from “bas[ing]
18 salaries on merit” provided that such compensation is not “solely . . . a function of the number of
19 students recruited, admitted, enrolled, or awarded financial aid”).

20 Indeed, in 2002, this view of the statute was confirmed in regulations enacted by the
21 Department of Education. In that year, the Department enacted regulations “clarifying” the HEA
22 provision and making absolutely clear that an academic institution does not violate the contingent
23 compensation provision merely by paying a recruiter:

24 fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as
25 that compensation is not adjusted up or down more than twice during any twelve
26 month period, and any adjustment is not based *solely* on the number of students
recruited, admitted, enrolled or awarded financial aid.

27 34 C.F.R. § 668.14(b)(22)(ii)(A) (emphasis added). In enacting this regulation, the Department
28 recognized that the word “solely” is being used in its “dictionary definition,” (67 Fed. Reg. at 67,055)

1 – that is, “alone,” “singly,” or “exclusively.” Supp. Declaration of James Zelenay (“Supp. Zelenay
2 Decl.”) Ex. 18 (Webster’s II, New College Dictionary (2001)) at 1050. The Department also
3 recognized that “by the very job description, a recruiter’s job is to recruit.” 67 Fed. Reg. at 67,056.
4 In other words, pursuant to this regulation, the Department recognized that recruiters are legal and
5 that a school may pay a student recruiter a salary, and adjust that salary up or down as frequently as
6 twice during any twelve month period, provided that any adjustment is not based solely or
7 exclusively on the number of students that the recruiter enrolls. Moreover, the Department could
8 have, but did not, include any limitations regarding the amount by which a salary could be adjusted.

9 In their Complaint, Relators claim that the University paid its recruiters a salary, but that the
10 salary was illegal because it was based “solely” on enrollments. *See* Zelenay Decl. Ex. 1 (SAC).⁸
11 Now, however, after conducting discovery, Relators have realized that they will not be able to prove
12 that claim. This is because the University has always considered a variety of factors, not just
13 enrollments, in adjusting the salaries that recruiters would receive. *See, e.g.*, Leckman Decl. Ex. 12
14 (Local Enrollment Counselor And University Rep Policy Guide) at 11, 14-17 (stating recruiters are
15 reviewed based upon several factors, including Job Performance, Judgment, Communications,
16 Working Relationships, Professional Development, and Customer Service).

17 Because Relators will not be able to prove their case under the controlling legal standard, they
18 decided to simply create a new one. So, starting a few months ago, Relators began advancing a new
19 argument that the University did not actually pay recruiters a “salary,” but instead paid them a
20 prohibited “incentive payment,” because their salaries (even though paid out in fixed sums every two
21 weeks like a salary) were based *in part* upon the recruiters’ success in enrolling students. *See, e.g.*,
22 Joint Statement re Discovery Disagreement (March 30, 2009) at 5-6, 10-11. Relators also
23 complained that these salaries could go up or down, and the adjustments could be substantial. *Id.*
24 These features, however, are *precisely allowed for by the Department’s own regulation.*

25
26 ⁸ For instance, in their Complaint, Relators alleged that “[a]n enrollment counselor thus knows his
27 or her salary level, based solely on her enrollment numbers.” Zelenay Decl. Ex. 1 (SAC) ¶ 41(b).
28 Similarly, in the Disclosure Statement that they provided to the government under penalty of
perjury, Relators claimed that “UOP salary compensation is based solely on securing student
enrollments.” Zelenay Decl. Ex. 10 (Disclosure Statement) at 15.

1 (Fed. Cir. 1998). The legislative history of the contingent compensation provision dispels any
2 conceivable doubt as to whether merit-based compensation is prohibited, as contended by Relators.
3 In it, Congress clarified that merit-based compensation is permissible, as long as it is not *solely* a
4 function of the number of students enrolled:

5 The conferees wish to clarify, however, that use of the term “indirectly” [in the
6 contingent compensation provision] does not imply that schools cannot base salaries
7 on merit. It does imply that such compensation cannot *solely* be a function of the
8 number of students recruited, admitted, enrolled, or awarded financial aid.

9 H.R. REP. NO. 102-630, pt. G, at 499 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 334
10 (also reported at Institutional Eligibility Under the Higher Education Act of 1965, 67 Fed. Reg.
11 51718, 51723 (proposed Aug. 8, 2002) (to be codified at 34 C.F.R. pt. 600 *et seq.*)) (emphasis
12 added); *see also* 67 Fed. Reg. at 67,053 (“[T]he conference report resolving the different House and
13 Senate versions of the Higher Education Amendments of 1992 indicated that the statutory words
14 ‘directly’ and ‘indirectly’ in section 487(a)(20) of the HEA did not imply that institutions could not
15 base salaries or salary increases on merit.”).

16 Thus, the plain text of the statute, as well as its legislative history, demonstrate how
17 completely incorrect Relators are in now contending that the HEA prohibits merit-based salaries for
18 recruiters – which, obviously, includes an evaluation of the recruiter’s performance in recruiting
19 students.

20 (ii) **The Department of Education’s Own Regulations – With Which
21 All Schools Must Comply – Prove That Relators’ “Theory” Is
22 Incorrect.**

23 As if the plain language and legislative history of the HEA were not enough, the Department
24 of Education’s regulations on the subject further demonstrate the lunacy of Relators’ new “theory.”
25 Specifically, in 2002, due to the fact that there was some uncertainty regarding the scope of the HEA
26 provision,⁹ the Department engaged in formal negotiated rulemaking and enacted regulations
27 designed to “clarify” what was not – and never had been – illegal under the HEA provision. 67 Fed.

28 ⁹ Much of the uncertainty was generated by a series of *qui tam* actions filed against a number of schools alleging violations of the HEA provision relating to contingent compensation.

1 Reg. at 67,049. These regulations made very clear that an academic institution does not violate the
2 contingent compensation provision by paying a recruiter:

3 fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as
4 that compensation is not adjusted up or down more than twice during any twelve
5 month period, and any adjustment is not based solely on the number of students
6 recruited, admitted, enrolled or awarded financial aid.

7 34 C.F.R. § 668.14(b)(22)(ii)(A). In other words, the contingent compensation provision does not
8 prevent an academic institution from paying a recruiter a salary, and adjusting that salary up or down
9 as much as twice a year based upon performance, as long as any adjustment is not based “solely” on
10 the number of students that the recruiter enrolls. In the commentary to this regulation, the
11 Department explained that such compensation simply does not constitute an “incentive payment”
12 under the contingent compensation provision. 67 Fed. Reg. at 67,054-55. After all, “by the very job
13 description, a recruiter’s job is to recruit,” 67 Fed. Reg. at 67,056, and it must therefore be possible
14 for a school to pay a recruiter based upon performance.

15 Accordingly, the plain language of the federal regulation also defeats Relators’ new argument
16 that a school provides its recruiters an illegal “incentive payment” when it pays its recruiters a salary
17 that is adjusted based upon the recruiter’s performance, including, in part, the number of students the
18 recruiter enrolls. All that an institution cannot do is base that salary “solely” on enrollments.¹⁰

19 (iii) The Ninth Circuit, Too, Has Already Rejected Relators’ “Theory”

20 In addition to the above, the Ninth Circuit has also already rejected Relators’ theory that the
21 contingent compensation provision prohibits schools from paying recruiters a salary based upon their

22 ¹⁰ The regulations completely undermine Relators’ theory that the University did not pay a “salary.”
23 First, Relators contend that the University’s salary plan was not actually a “salary” because
24 adjustments could be made twice a year (*see, e.g.*, Joint Statement re Discovery Disagreement
25 (Jan. 13, 2009) at 8) – something that the regulations explicitly permit. Second, Relators claim
26 that the salary plan was not a “salary” because the salaries could go up or down every six months
27 (*id.* at 9) – something else explicitly allowed for by the regulations. Third, Relators contend that
28 the salary plan did not constitute a “salary” because the adjustments to recruiters’ salaries every
six months could be “substantial” (*id.*) – but the regulations do not limit the amount of any
adjustment provided that any adjustment is not based “solely” on enrollments. And finally,
Relators argue that the University’s salary plan was not a true “salary” because it was based in
part upon enrollment success (*id.* at 9-10) – again, something explicitly allowed by the
regulations.

1 performance in recruiting students. In *United States ex rel. Bott v. Silicon Valley Colleges*, the
2 relators – like Relators here – sued an academic institution under the FCA claiming that the
3 institution had knowingly violated the contingent compensation provision. 262 Fed. Appx. 810, 811-
4 12, 2008 U.S. App. LEXIS 381, at *2-3 (9th Cir. 2008).¹¹ The district court in *Bott* dismissed the
5 relators’ action for failure to allege an underlying violation of the contingent compensation provision,
6 and the Ninth Circuit affirmed. *Id.*

7 In affirming, the Ninth Circuit specifically found that the HEA and its associated regulations
8 do not prohibit “salary reviews generally.” *Id.* at 811. Rather, the Ninth Circuit held that the HEA
9 only prohibits a ““commission, bonus or other incentive payment’ *solely* on the basis of recruitment
10 success.” *Id.* (emphasis added). In other words, just because something may have the “practical
11 effect” of providing “incentives” to increase enrollments, or otherwise reward recruiters’
12 performance, does not mean that it is a prohibited “incentive payment.” Under the HEA, salary
13 compensation is only prohibited if it is based “solely” on the number of students enrolled.

14 Indeed, the Ninth Circuit also rejected the position now apparently taken by Relators that the
15 word “indirectly” in the statute means that salary reviews based “indirectly” on success in securing
16 enrollments violate the law. During oral argument, the Court noted that “maybe the statutory
17 language could be read as extremely as [relators’ counsel] are doing it, but then we have regulations
18 that say that this is okay.” See Link to Audio Transcript of Oral Argument for Case No. 06-15423
19 (December 7, 2007) at 7:10, available at <http://www.ca9.uscourts.gov/media>.¹² According to the
20 Court, the clarifying “regulation specifies permissible means by which to calculate base salaries.”
21 *Bott*, 262 Fed. Appx. at 812.

22 Indeed, the Ninth Circuit recognized during oral argument (and in its opinion) that an
23 academic institution had to have the freedom under the law to compensate recruiters based in part
24

25 ¹¹ *Bott*, albeit unpublished, has much more persuasive weight than Relators’ *ipse dixit* assertions.
26 Fed. R. App. P. 32.1; 9th Cir. R. 36-3(b).

27 ¹² For the Court's convenience, Gibson, Dunn & Crutcher has prepared a transcription of the
28 December 7, 2007 hearing. A copy of the transcription is attached as Exhibit 19 to the
Supplemental Declaration of James L. Zelenay, Jr.

1 upon enrollment success. Otherwise, as Judge Kozinski noted, “you could never have any
2 performance criteria for that particular job.” Oral Argument at 5:25. It would be the “one job where
3 they can’t consider how well you’re doing your job.” Oral Argument at 6:15.

4 The *Bott* decision was then appealed to the Supreme Court on the grounds that the
5 Department’s regulation was inconsistent with the statute – the very argument that Relators have
6 made, for the first time, in their Opposition. *See* Opp. at 17. The Supreme Court denied certiorari.
7 *U.S. ex rel. Bott v. Silicon Valley Coll.*, 129 S. Ct. 573, 172 L. Ed. 2d 431, 2008 U.S. LEXIS 8220
8 (U.S. 2008).¹³

9 (iv) **Common Sense Dictates That Relators’ “Theory” Is Incorrect**

10 And finally, common sense dictates that Relators’ theory does not pass muster. Ultimately,
11 Relators’ new “theory” boils down to their contention that either (1) recruiters at educational
12 institutions are illegal, or (2) if they are not illegal, then they cannot be compensated based in any
13 fashion that serves a “revenue-generating, performance-rewarding purpose.” *See, e.g.*, Joint
14 Statement re Discovery Disagreement (March 30, 2009) at 10. Of course, neither Congress nor the
15 Department has ever asserted that employing recruiters is illegal. Quite the contrary, they have fully
16 recognized that recruiters are appropriate, and that they may be paid a salary based upon merit. *See*
17 *supra* Parts III.B.2.a.(i)-(ii). And as to the second point, Relators simply have not and cannot provide
18 any insight into what type of compensation for recruiters would *not* serve a “revenue-generating,
19 performance rewarding purpose.” Indeed, *all types of compensation* – whether a salary, an hourly
20 wage, a commission, a bonus, or an incentive payment – *of any amount*, serve a “revenue-
21 generating, performance rewarding purpose” for both the employer and the employee. What makes
22 something illegal under the HEA is if it is a “bonus, commission, or other incentive payment.” 20
23 U.S.C. § 1094(a)(20). And, as Congress and the Department have made clear, paying a salary to a

24
25 ¹³ Relators, realizing that they cannot get around *Bott*, argue that *Bott* is inapplicable because the
26 *Bott* court found that the relators in that case had not pled that “the salary review system was
27 merely a sham for funneling improper incentive pay.” Opp. at 18 n.12. This does not change the
28 legal standard that the *Bott* court said was at issue. Moreover, the *Bott* court found that the
relators in that case had not alleged such a “sham” because the relators had not demonstrated that
the salary payments at issue were based “solely” on enrollments. *Bott*, 262 Fed. Appx. at 812.
That is the standard that the University asks the Court to employ here.

1 recruiter is not any one of these, provided it is not based solely on the number of enrollments
2 achieved. 34 C.F.R. § 668.14(b)(22)(ii)(A).

3 Thus, although Relators contend that there are “competing theories” of the HEA at issue here,
4 there is not. There is the law, and there are Relators’ fantasies.¹⁴ With the correct legal standard in
5 mind, it is time to turn to Relators’ “factual” allegations.

6 **b. None Of Relators’ “Factual Contentions” Show A Violation Of The**
7 **Contingent Compensation Provision Following March of 2004**

8 Relators throw a whole slew of alleged “facts” out against the University, which they claim
9 show that they have “evidence” that the University illegally compensated recruiters after March of
10 2004. Opp. Part II.C.b. None of these “facts,” however, show that the University compensated
11 enrollment counselors based solely on the number of enrollments that they procured.

12 First, Relators dedicate a large portion of their Opposition to arguing that the University’s
13 recruiters are “salespeople,” and that the University’s salary plan for recruiters rewards them based
14 upon performance and provides them an “incentive” to increase enrollment numbers. See Opp. Part
15 II.C.3.b.i. But there is nothing wrong with academic institutions employing salespeople. After all, as
16 the Department of Education recognized, “by the very job description, a recruiter’s job is to recruit.”
17 67 Fed. Reg. at 67,056. Relators’ attempt to make “sales” a pejorative term is simple gamesmanship.
18 There is nothing wrong with being a salesperson in the academic field – all schools have recruiters or
19 salespeople. Similarly, the various “evidence” proffered by Relators that the University’s
20 compensation plans rewarded recruiters for performance and provided them an “incentive” to
21 increase enrollments does not prove anything. Rather, as outlined above, the law clearly allows
22 schools to pay recruiters a salary, and base that salary upon performance, provided that any
23 adjustment to that salary is not based “*solely*” on the number of students enrolled. See *supra* Part
24 III.B.2.a. Indeed, the actual “facts” cited by Relators show that the University was squarely *within*
25 this guidance, not outside of it. For instance, the June 2004 compensation plan cited by Relators

26 ¹⁴ Boiled to its essence, Relators are claiming that the University defrauded the government and are
27 seeking billions of dollars in damages from the University, before trebling, because the
28 University hired student recruiters and paid those recruiters, in part, on how well they did their
job.

1 provides that the salary that enrollment counselors received could be adjusted every six months based
2 upon a performance review, and that the review included a variety of factors, such as judgment and
3 customer service. Leckman Decl. Ex. 12 (Local Enrollment Counselor And University Rep Policy
4 Guide) at 11, 14-17.

5 Relators' attempt to try to mischaracterize the salary that recruiters received under this plan as
6 "bonuses" is without support. Everyone, including Relators themselves, recognized that recruiters
7 were paid a salary pursuant to the compensation plans – *i.e.*, a fixed amount every two weeks, with
8 that amount changing only after a six month salary review or after a promotion. *See, e.g.*, Supp.
9 Zelenay Decl. Ex. 20 (Sept. 20, 2006 Depo. of Mary Hendow) at 18:6-11 ("I was told that my
10 numbers would determine my salary increase . . ."); Ex. 21 (Sept. 19, 2006 Depo. of Julie
11 Albertson) at 23:1-23:3 ("My original salary was \$32,000."); Ex. 22 (sample testimony from other
12 individuals deposed in this action stating that they received a salary).¹⁵ Nor is it relevant that the
13 salaries for recruiters could be adjusted twice a year, could be adjusted up or down, or were adjusted
14 based in part on recruitment success – all of that is *explicitly allowed* for by the HEA and the
15 Department's regulation. Thus, Relators are essentially trying to claim that the University violated
16 the law by complying with the Department's regulation.¹⁶

17 Second, Relators do make a token effort at arguing that the University actually did pay
18 recruiters a salary based solely on enrollments. *See* Opp. Part II.C.3.b.i. However, in doing so, they

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20 ¹⁵ Relators also try to play word games with the term "fixed compensation," as if that is something
21 incapable of understanding. *See* Opp. at 17. Fixed compensation, as indicated by Department of
22 Education guidance, simply means that a recruiter is paid out the same amount every two weeks
23 or every month for a fixed period, rather than in amounts that change every pay period as occurs
24 in a traditional commission system. Supp. Zelenay Decl. Ex. 23 (1995 guidance from
25 Department stating that a "straight salary plan" is one where "employees are paid neither more
26 nor less than a fixed amount each pay period [*i.e.*, every two weeks], regardless of any
27 performance measures . . . within the salary period"). Here, Relators and other recruiters were
28 paid the same amount every two weeks until they received an adjustment either at their six month
review or upon a promotion. Supp. Zelenay Decl. Exs. 20-22. It is simply silly for Relators to
claim that they did not receive "fixed compensation" or a "salary."

¹⁶ In addition to what has been mentioned above, the *Bott* court also found that "if defendants
complied with a facially valid regulation, relators cannot show the required scienter under the
False Claims Act." *Bott*, 262 Fed. Appx. at 812. The University will very likely raise this issue
in the Motion for Summary Judgment that it files at the close of discovery. Simply put, the
University cannot be liable for fraud when it was complying with the Department's regulation.

1 completely mischaracterize the evidence in this case. For instance, they cite to a series of calendar
2 entries of one-on-one meetings and emails where managers or other employees set enrollment goals
3 for recruiters and correlated those goals with a potential salary. *See Opp.* at 22. Setting goals, of
4 course, is not illegal. There is absolutely nothing wrong with schools setting and using enrollment
5 goals or quotas provided the number of enrollments achieved is not the sole basis upon which the
6 school adjusts the recruiters' salaries. And, given that job performance made up 65% of a recruiter's
7 review (RSAF ¶ 13), consistent with the Department's regulation, it made perfect sense to give
8 recruiters an enrollment goal to shoot for and to correlate that goal with a potential salary range. This
9 did not mean that the ultimate review and salary adjustment that recruiter received was based only on
10 this one factor. In fact, Scott Lewis, the author of many of the documents Relators cite, also sent out
11 similar entries mentioning factors other than enrollments. *See Supp. Zelenay Decl. Ex. 24* (sample S.
12 Lewis documents, stating: "I let him know that the matrix and soft skills and retention and
13 enrollments all played a part," and "He had lots of questions about why I put him into a requires
14 improvement in Customer Service."); RSAF ¶ 13. Mr. Lewis further testified in this case that these
15 emails simply were goal-setting emails, and did not reflect or constitute the ultimate review that a
16 recruiter received. *Supp. Zelenay Decl. Ex. 25* (Depo. of Scott Lewis) at 43-45; RSAF ¶ 13. At that
17 review, Mr. Lewis took into account all of the factors that recruiters were evaluated on, not just
18 enrollments. *Id.*¹⁷ Moreover, a review of the actual salary adjustments received by similarly-
19 situated recruiters evaluated by Mr. Lewis during the same three month period conclusively
20 demonstrates that factors other than enrollments were considered and impacted the salary

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23 ¹⁷ Relators also cite what appears to be another one of Mr. Lewis's documents as Exhibit 27. That
24 document, however, does not "prove" that recruiters were compensated based solely on
25 enrollments. Rather, it simply reflects another goal-setting conversation where a recruiter was
26 informed that his salary might decrease if he did not meet his enrollments expectation; it does not
27 indicate what his ultimate salary would be – which was determined by a variety of factors. For
28 the same reason, the document cited by Relators as Exhibit 17, and discussed in their Opposition
at pages 21 through 22, does not demonstrate that recruiters were compensated solely on
enrollments. Rather, it simply reflects an email where someone states that recruiters' job
performance is poor if they do not achieve a certain number of enrollments. That does not mean
that when those recruiters were actually evaluated, their salary was determined based solely on
enrollments.

adjustments that recruiters received:¹⁸

Name	Date of Salary Change	Starting Salary	New Salary	Percent Salary Change	Enrollments Since Salary Change	Enrollments Per Month	Overall Evaluation
Employee A	9/1/2004	\$28,000	\$31,640	13.00%	56	5.09	Often Exceeds Expectations
Employee B	11/1/2004	\$28,000	\$33,320	19.00%	34	4.86	Always Exceeds Expectations
Employee C	9/1/2004	\$28,000	\$29,400	5.00%	31	3.44	Meets Expectations
Employee D	10/1/2004	\$28,000	\$31,080	11.00%	26	3.25	Often Exceeds Expectations
Employee E	11/1/2004	\$28,000	\$29,120	4.00%	14	2.00	Meets Expectations
Employee F	11/16/2004	\$28,000	\$27,160	-3.00%	18	2.00	Requires Improvement

As can be seen from the above, factors other than enrollments impacted the compensation of Mr. Lewis's recruiters. For example, Employee B achieved 34 enrollments (4.86 enrollments per month) and received a salary increase of 19% while Employee A achieved 56 enrollments (5.09 enrollments per month) and received a smaller salary increase of 13%. Similarly, both Employee E and Employee F achieved an average of 2 enrollments per month, but Employee E received a 4% increase in salary while Employee F received a 3% *decrease*. Moreover, Employee D, with 26 enrollments (3.25 enrollments per month), received a higher overall evaluation, Often Exceeds Expectations, than Employee C, who received an overall evaluation of Meets Expectations despite achieving 31 enrollments (3.44 enrollments per month).

Relators also cite the declaration and testimony of Thomas Corbett, a former director of enrollment at the University.¹⁹ However, even Mr. Corbett's own declaration states that factors

¹⁸ This chart was created from review and enrollment data that has been produced in this litigation. Similar charts can be produced for every manager at the University due to the fact that factors other than enrollments did, indeed, affect salary determinations. So as not to unduly burden the Court, the University has not attached the underlying data to the accompanying declaration, but can provide this data if the Court so desires.

¹⁹ The University respectfully contends that the Court should not consider this evidence from Mr. Corbett, as Relators' counsel contacted Mr. Corbett in violation of Rule 2-100 of the Rules of Professional Conduct. See Def.'s Memo. of Points and Authorities In Support of Mot. to

[Footnote continued on next page]

1 *other* than enrollments were considered in adjusting salaries. *See* Leckman Decl. Ex. 3 (Corbett
2 Decl.) ¶ 3 (stating that compensation was determined based on “enrollment numbers,” which can
3 include things such as retention and other activities, not just “enrollments”). And when the lights
4 were shining brightly at his deposition, Mr. Corbett testified that a whole slew of factors besides
5 enrollments were considered and contributed to the salary that a recruiter would receive. *See* Supp.
6 Zelenay Decl. Ex. 26 (Depo. of Thomas Corbett) at 85:5-85:10 (“Q: [S]o you’re saying that factors
7 other than the number of enrollments were considered? A: Yes.”); 62:18-62:24 (“Q: So individual
8 managers would rate soft skill categories [such as judgment and customer service] differently and – is
9 that correct? A: Yes. Q: And so ECs working for individual managers would get different salary
10 increases because they would get a different rating on their soft skills? A: Yes.”).²⁰

11 Likewise, Relators cite a host of misleading deposition testimony from a securities case
12 involving the University’s parent. Opp. at 21-22. As a preliminary matter, this testimony is
13 inadmissible hearsay. Fed. R. Evid. 801. And, at any rate, the testimony is not probative. For
14 instance, Relators cite the deposition testimony of Jenny Kahn, a recruiter, who admitted during her
15 deposition in *this* case that she actually does not know what was considered in determining her salary
16 as a recruiter. Supp. Zelenay Decl. Ex. 27 (Depo. of Jenny Kahn Depo.) at 65:23-66:7 (“A: I don’t
17 know what was taken into consideration really.”). Similarly, Karen Matthews, another individual
18 whose deposition testimony from the securities case is also cited by Relators, testified just last week
19 in this case that recruiters were *not* compensated based solely on enrollments. Supp. Zelenay Decl.
20 Ex. 28 (Depo. of Karen Matthews) at 23:2-23:16 (Q: “So it’s your belief that Enrollment Counselors
21 are compensated based on enrollments, but that is not the *only* factor that they’re compensated on?
22 A: Yes.”) (emphasis added).

23 _____
24 [Footnote continued from previous page]

25 Disqualify (Docket No. 238-6). Moreover, as Relators concede in their opposition to the
26 University’s Motion to Disqualify, the testimony of Mr. Corbett and others at or below his
27 position of employment do not bind the University for purposes of Rule 2-100. Accordingly, the
28 University contends that they should not be considered for purposes establishing liability under
the FCA.

²⁰ It is somewhat surprising that Relators would cite to the Corbett declaration when his deposition
testimony thoroughly refutes it.

1 Grasping for straws, Relators finally make the outlandish claim that the University’s own
2 counsel admitted that “establishing UOP’s liability under the plan prior to mid-2005 would also
3 establish UOP’s liability under that plan continuing to the present.” Opp. at 22. It did not. The
4 University’s counsel simply confirmed that the salary compensation plan for recruiters had not
5 significantly changed since June of 2004. *See* Leckman Decl. Ex. 1 (Apr. 9, 2009 Hearing
6 Transcript) at 13-14. It was compliant then, and it is compliant now. This does nothing to advance
7 Relators’ cause.²¹

8 And finally, Relators contend that the University “continued to act with scienter after the
9 filing” of the SAC. Opp. Part II.C.3.b.iii. None of the “evidence” cited by Relators, however,
10 suggests that the University was violating the law, let alone intentionally so. For instance, Relators
11 cite a statement from Tom Corbett claiming that he heard that the University changed its
12 compensation system for recruiters “so ‘no one will ever prove it’s based on regs.’” Opp. at 23.
13 Well, that is because it was *not* based solely on enrollments. This statement does not show some
14 mischievous motive. Indeed, Mr. Corbett himself testified that this was said in a joking manner.
15 Supp. Zelenay Decl. Ex. 26 (Depo. of Thomas Corbett) at 268-69. Similarly, Relators cite purported
16 testimony from both Mr. Corbett and Ms. Matthews stating that they thought that the compensation
17 plan for recruiters was “smoke and mirrors.” Opp. at 24. So what? That does not show that
18 University executives, such as the individual who signed the PPA, were acting with scienter or that
19 the University was actually compensated recruiters based solely on enrollments.²² And finally,

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21 ²¹ Relators also throw in a hodgepodge of other miscellaneous allegations that either misrepresent
22 the facts or take documents wholly out of context. As an example, Relators cite two documents
23 and brazenly claim that the University “falsely calculated” overtime for recruiters “without regard
24 to the number of overtime hours actually worked.” Opp. at 23 n.14. Nothing in the documents,
25 however, even remotely suggests that recruiters were paid for overtime that they did not work.
26 Similarly, Relators accuse the University of providing illegal “trips.” *Id.* But they conveniently
fail to inform the Court that the Department of Education has approved of “trips,” even if
recruiters are selected based upon recruitment success, provided the “trips” have a business
purpose. Supp. Zelenay Decl. Ex. 29 (Department Guidance Letter). Ultimately, all of these
various allegations by Relators do not get them anywhere, and – at any rate – are simply
irrelevant to the Motion posed by the University.

27 ²² Relators also cite a series of other “evidence” in support of their contention that the University
28 acted with “scienter.” *See* Opp. at 24-25 nn. 15-17. Not only does the University disagree with
Relators’ characterization of this “evidence,” but it is ultimately irrelevant to the instant Motion

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1 Relators rely upon a statement from the University's founder, John Sperling, stating that he disagreed
2 with the contingent compensation provision. Opp. at 24-25. That, of course, does not mean
3 anything. It does not mean that the University has not always made the fullest effort to comply with
4 the law – which it has – or that it ever violated the law – which it has not. See Supp. Zelenay Decl.
5 Ex. 31 (Depo. of John Sperling) at 108:20-22 (Dr. Sperling testifying that senior executives knew
6 that “compliance was one of the things [he] insisted on”).

7 **IV. CONCLUSION**

8 Thus, for the reasons set forth above, the University's Motion should be granted. Nothing
9 that Relators state in their opposition demonstrates otherwise. Accordingly, the University
10 respectfully requests that the Court enter judgment finding that Relators' claims are cut off at and do
11 not continue past the signing of the July 2, 2003 PPA or, at the latest, on February 5, 2004 (when the
12 PRR was issued), March 5, 2004 (when the SAC was filed), or September 7, 2004 (when the program
13 review was settled).

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15 DATED: June 1, 2009

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

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28 because it all relates to events purportedly occurring prior to Relators' filing their Second
Amended Complaint. *Id.*

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TIMOTHY J. HATCH, SBN 165369
JAMES L. ZELENAY, JR., SBN 237339
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel (213) 229-7000/Fax (213) 229-7520
thatch@gibsondunn.com
jzelenay@gibsondunn.com

WAYNE W. SMITH, SBN 54593
JOSEPH P. BUSCH, SBN 70340
JARED M. TOFFER, SBN 223139
KRISTOPHER P. DIULIO, SBN 229399
JESSICA A. TAGGART, SBN 240575
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612-4412
Tel (949) 451-3800/ Fax (949) 451-4220
wsmith@gibsondunn.com, jbusch@gibsondunn.com,
jtoffer@gibsondunn.com, kdiulio@gibsondunn.com,
jtaggart@gibsondunn.com

Attorneys for Defendant University of Phoenix

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2009, the attached document, as well as the accompanying Defendant's Reply to Relators' Response To Defendant's Statement Of Undisputed Facts, Defendant's Response To Relators' Statement Of Additional Facts, and Supplemental Declaration of James L. Zelenay, Jr. was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send notification of such filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Cliff Palesfsky	uroy@aol.com
Daniel R. Bartley	DanielBartleyLaw@aol.com
James M. Finberg	jfinberg@altshulerberzon.com
Michael Rubin	mrubin@altshulerberzon.com
Nancy G. Krop	nkrop@kroplaw.com
Peter E. Leckman	pleckman@altshulerberzon.com
Robert J. Nelson	rnelson@lchb.com
Jonathan D. Weissglass	jweissglass@altshulerberzon.com
Kendall J. Newman	Kendall.newman@usdoj.gov

I further certify that copies of the foregoing were sent on June 1, 2009, via U.S. Mail to the following parties not registered on the CM/ECF:

Jay D. Majors
U.S. Department of Justice
Civil Division
601 D. Street, N.W., Room 9550
Washington, DC 20004
E-Mail: Jay.Majors@usdoj.gov

DATED: June 1, 2009

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