No. 04-16247

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

UNIVERSITY OF PHOENIX,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and 28 U.S.C. 517, the United States submits this brief as amicus curiae supporting reversal of the judgment below.

INTRODUCTION AND SUMMARY

In order to participate in various student loan and grant programs established under Title IV of the Higher Education Act of 1965, a post-secondary educational institution must first enter into a program participation agreement ("PPA") with the Department of Education ("DOE"). In turn, each PPA expressly

conditions a school's initial and continuing eligibility to receive funds under Title IV programs on compliance with specific statutory requirements, including a provision known as the incentive compensation ban, which prohibits schools from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. 1094(a)(20).

This case involves allegations under the False Claims Act, 31 U.S.C. 3729, et seq., that the University of Phoenix ("UOP") knowingly made false promises to comply with the incentive compensation ban in order to become eligible (and remain eligible) to receive Title IV funds, that these statements were false when made, and that these statements caused DOE to pay various claims under Title IV programs. The district court dismissed the complaint by the qui tam relators in this case because they failed to allege any actionable "false certifications" by UOP, which the court held were a necessary prerequisite for FCA liability under either a theory of implied certification or promissory fraud. RE 204-05. The court thus imposed significant new limits on what constitutes a "false claim" under the FCA by adopting a "false certification" requirement without any anchor in the text or the purpose of the statute. The court's reasoning is mistaken and, if its decision

is upheld, it could significantly impair enforcement of the False Claims Act not only in the federal student loan and grant programs at issue here but also in numerous other federal programs involving a two-step benefit process: where a person is expressly required to make initial representations concerning his eligibility to receive government benefits and later submits (or causes others to submit) claims for payment that do not expressly reiterate those initial promises.

It is the view of the United States that, where an educational institution knowingly makes false promises to comply with specific requirements that are a prerequisite to obtaining a government benefit, and later submits (or causes others to submit) claims for payment predicated upon those false statements, this conduct is actionable under both Section 3729(a)(1) and (a)(2) of the FCA, even if the claims themselves do not contain express false statements. Thus, although the United States declined to intervene in this case in district court, the United States is participating as amicus curiae on appeal to provide the Court with its views on the proper interpretation and application of the FCA and to urge reversal of the judgment dismissing the relators' claims. The United States has a substantial interest in the proper interpretation and application of the FCA because it is the government's primary tool to combat fraud and recover losses due to fraud in federal programs. However, the United States' participation as amicus curiae in no way diminishes the government's strong support for the important work of

proprietary institutions of higher education, like UOP, that are providing much-needed educational opportunities to people looking to advance their careers and to earn a better living for themselves and their families.

STATEMENT OF FACTS

A. The False Claims Act.

The False Claims Act, 31 U.S.C. 3729, et seq., prohibits the submission of false or fraudulent claims for payment to the United States or the making of false statements for the purpose of causing a false claim to be paid. A violation of the False Claims Act occurs, among other things, when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1), or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. 3729(a)(2). In addition, the FCA prohibits a variety of related deceptive practices involving government funds and property. See 31 U.S.C. 3729(a)(3)-(7).

A person who violates the FCA is liable to the United States for civil penalties and for three times the amount of the government's damages. 31 U.S.C. 3729(a). As this Court has recognized, however, "[n]o damages need be shown to recover the penalty." United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

Suits to collect statutory damages and penalties may be brought either by the Attorney General of the United States, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a qui tam suit. 31 U.S.C. 3730(a) and (b)(1). See also Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 769-78 (2000). When a qui tam action is filed, the government may intervene and take over the case "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), or "at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If the government declines to intervene, the relator conducts the litigation, and if a qui tam suit results in civil penalties, those penalties are divided between the government and the relator. 31 U.S.C. 3730(d).

B. The Higher Education Act of 1965.

1. Eligibility Under Title IV Programs.

Under Title IV of the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, Congress established a number of different student loan and grant programs, including the Federal Pell Grant Program ("Pell") and the Federal Family Education Loan Program ("FFELP"). Although the precise mechanism by which Title IV funds are disbursed to eligible schools under these programs varies, each requires compliance with specific requirements as a prerequisite to obtaining

federal funds. Thus, in order to become "eligible" to receive Title IV funds under these programs, a school must first enter into a program participation agreement with DOE which "shall condition the initial and continuing eligibility of the school to participate in a program upon compliance with" specific requirements. 20 U.S.C. 1094(a). See also 34 C.F.R. 668.14 (listing provisions required in PPAs).[1] The principal statutory requirement at issue in this case is that schools:

> will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.

20 U.S.C. 1094(a)(20). In other words, the governing statute makes clear that the initial and continuing eligibility of schools to obtain Title IV funding depends on a requirement that the schools not pay certain types of commissions.

Known commonly as the incentive compensation ban, this statutory mandate is echoed in a regulation specifying the requirements that schools must expressly agree to in PPAs. See 34 C.F.R. 668.14(b)(22)(i). That regulation was

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[1] To maintain their eligibility to receive Title IV funds, educational institutions must also provide DOE with an annual compliance audit and financial statements prepared by independent auditors. 20 U.S.C. 1094(c)(1)(A); 34 C.F.R. 668.23. These audit reports are then used to determine whether schools are adhering to applicable requirements for funding, including the incentive compensation ban.

amended in 2002 to clarify that schools may pay "fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid." 34 C.F.R. 668.14(b)(22)(ii)(A) (2004).

Congress enacted the prohibition against paying commissions, bonuses, or other incentive payments based on success in recruiting students because it determined that such payments were associated with high loan default rates, which in turn resulted in a significant drain on program funds where the government acts as a loan guarantor. When Congress amended the Higher Education Act in 1992 to prohibit schools from paying these incentives, it did so based on evidence of serious program abuses, of which incentive compensation was a part. See S. Rep. No. 58, 102d Cong., 1st Sess., at 8 (1991) ("Abuses in Federal Student Aid Programs") (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of students for a given period"); H.R. Rep. No. 447, 102d Cong., 2d Sess., at 10, reprinted in 1992 U.S.C.C.A.N. 334, 343 (noting new provisions that "include prohibiting the use of commissioned sales persons and recruiters").

2. Claims for Payment Under Title IV Programs.

After a school becomes eligible to receive Title IV funds by entering into a

PPA, claims for payment of those funds can be made in various ways. Under the Pell Grant program, students submit requests for funding directly to DOE, or to DOE with the assistance of schools, while under the FFELP, students and schools jointly submit requests for loans to private lenders which are guaranteed by state guaranty agencies that are, in turn, insured by DOE and paid only in the event of a default. No matter how a claim is ultimately submitted to the government, however, the disbursement of federal funds rests on required statements of eligibility made by schools that were necessary for requests for payment to be considered. Such statements thus directly or indirectly cause the submission of all subsequent claims for payment.

Specifically, under Pell, the student initiates the process with an application to DOE to have his or expected family contribution calculated in order to receive an accurate amount of Pell funds. See 34 C.F.R. 690.12(a). The student either sends the application directly to DOE or provides it to a school for the school to transmit it electronically to DOE on the student's behalf. See 34 C.F.R. 690.12(b). DOE sends the student's application information and expected family contribution, as calculated, to the student on a Student Aid Report ("SAR") and allows each school designated by the student to obtain an Institutional Student Information Record ("ISIR") for that student. See 34 C.F.R. 690.13. Although students thus initiate the process under the Pell Grant program, schools ultimately

request the appropriate amount of funds directly from DOE. See 34 C.F.R. 668.162.

Assuming a school's request for the disbursement of Pell funds is consistent with information DOE has, the agency transfers funds electronically to a bank account established by the school for holding the Title IV funds it receives for all the federal student aid programs in which it participates. See 34 C.F.R. 668.162(b); 34 C.F.R. 668.163. Prior to May 1998, schools were required to submit a payment voucher for each eligible student that received Pell Grant funds, but after this date the transfer of funds was made electronically. In order to receive Pell Grant funds, schools are specifically required to certify: "I certify, by processing this payment request and/or reallocation, that the funds are being expended within three business days of receipt for the purpose and condition of the grant or agreement." RE 149-50 (Govt's Stmt of Interest in Graves v. ITT Educ. Servs., No. 99-3389 (S.D. Tex.)).

Under the FFELP, which includes Stafford Loans, the guaranty agency makes the eventual claim for payment by the United States. The school and student submit an application to a private lender for a loan on behalf of the student. Notably, in the portion of the student's promissory note submitted to a private lender, schools are required to certify that the student/borrower "is making satisfactory progress in a program that is eligible for the loan type(s) certified,"

and "that the student is an eligible student under the Title IV program." RE 98 ("Federal Stafford Loan School Certification"). Schools are also required to enter a "School Code" on that form, which they will have only if they have previously signed a PPA promising compliance with all Title IV eligibility requirements. Ibid. If a student defaults in repaying a Stafford loan, a state guaranty agency reimburses the lender or the subsequent holder of the loan for the outstanding balance and takes assignment of the loan for collection action. 34 C.F.R. 682.401(b)(14). If, in turn, the guaranty agency is unable to collect from the borrower, DOE reimburses the guaranty agency for the loss it incurred in honoring the defaulted claims, 20 U.S.C. 1078(c)(1)(A), and DOE may, in its discretion, also take assignment of the loan. 20 U.S.C. 1078(c)(8). In this way, the government is ultimately called upon to satisfy claims for payment as of right.

3. Enforcement Under Title IV Programs.

The Department of Education has authority to enforce the requirements for participating in federal student loan and grant programs, including the incentive compensation ban. By expressly conditioning an educational institution's "initial and continuing eligibility" to participate in Title IV programs on compliance with specific statutory requirements, 20 U.S.C. 1094(a), the Higher Education Act of 1965 confers authority on DOE not only to take prospective enforcement actions (ranging from fines to disqualification from programs), but also to withhold

payment immediately upon the discovery of non-compliance with those requirements. Among other things, DOE has authority to take "emergency action" to withhold funds in certain circumstances where it receives reliable information regarding a violation of statutory requirements. 20 U.S.C. 1094(c)(1)(G). See also 34 C.F.R. 668.83. Examples of violations of requirements that justify an emergency action to withhold funds – because they cause misuse and the likely loss of Title IV funds – include various false certifications pertaining to eligibility for program funds, see 34 C.F.R. 668.83(c)(2)(iii), although a false certification relating to the incentive compensation ban is not specifically enumerated.

As noted above, DOE may impose prospective sanctions, including "the limitation, suspension, or termination of the participation" of the school in any Title IV program, 20 U.S.C. 1094(c)(1)(F), or civil penalties, id. at 1094(c)(3)(B). See also 34 C.F.R. 668.82(a) & (c); 34 C.F.R. 682.700(a). And, to round out the statutory sanctions for the program in general terms, DOE may recover its actual damages associated with violations of program requirements that make educational institutions ineligible for participation in various programs. See Chauffeur's Training School, Inc. v. Riley, 967 F. Supp. 719, 727 (N.D.N.Y. 1997) (allowing recovery of actual damages associated with violations of "ability

to benefit" requirements of 34 C.F.R. 668.14).[2]

C. Proceedings In This Case.

The instant case involves a qui tam suit filed against UOP, a post-secondary educational institution that allegedly receives over one-half billion dollars annually in Title IV funds. RE 45 (Second Amended Compl, ¶ 1).[3] The relators, Mary Hendow and Julie Albertson (enrollment counselors at UOP), allege that UOP falsely certifies each year that it is in compliance with the incentive compensation ban while intentionally and knowingly violating that requirement. Relators allege that these false representations, coupled with later claims for payment of Title IV funds, constitute false claims under 31 U.S.C. 3729(a)(1) &

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[2] The appropriateness of particular sanctions for specific violations or types of violations is a matter for DOE in its enforcement policy, and in 2002 the agency issued a policy memorandum concluding that violations of the incentive compensation ban will not generally be viewed as "resulting in monetary loss to the Department." Memorandum from William D. Hansen, Deputy Secretary, to Terri Shaw, Chief Operating Officer, Federal Student Aid (dated October 30, 2002) (attached as Addendum B). That memorandum confirms, however, that "[i]n some instances, violations of the [incentive compensation] prohibition, either themselves or in combination with other program violations, may constitute a basis for limitation, suspension, or termination action." Ibid. Thus, the incentive compensation memo confirms DOE's authority to terminate schools from Title IV programs as a result of sufficiently egregious violations in this context, and nowhere calls into question DOE's authority to withhold payment based on violations of the incentive compensation ban in appropriate circumstances.

[3] The United States takes no position on the truth or falsity of the relators' factual allegations. Because the district court was required to accept these allegations as true for purposes of ruling on UOP's motion to dismiss, however, the United States has treated these allegations as true for purposes of this appeal.

(a)(2). Ibid.

Relators allege, inter alia, that UOP falsely promises to comply with the incentive compensation ban in annual PPAs it submits to DOE, see RE 84-93 (PPA for 2000), and that "UOP falsely induces the Government to approve and/or pay out the Title IV funds, based on its false promises to comply with the incentive compensation ban." RE 50. Relators also allege that the "promises when made are false." Ibid. And, relators further allege that "UOP every year also falsely asserts compliance with the incentive compensation ban in 'management assertion letters' written by UOP management for an annual compliance audit." RE 51.

In addition to UOP's alleged false representations concerning its eligibility to receive Title IV funds, relators allege that UOP submits a variety of "claims" to the federal government for funds that UOP knows to be false based upon its non-compliance with the incentive compensation ban. RE 51-53. For example, relators allege that UOP submits requests for Pell Grant funds directly to DOE, which transfers those funds "directly into a UOP account," and that "UOP knows it is ineligible for those funds" based on its violations of the incentive compensation ban. RE 51-52. Relators also allege that UOP submits requests for government-insured loans to private lenders and that UOP knows it is ineligible for these funds based on its "intentional" violations of the incentive compensation

ban. RE 52.

The relators filed a qui tam suit against UOP in district court, and on May 20, 2004 the court dismissed their claims with prejudice.

The court first rejected the relators' argument that UOP could be held liable under the FCA on an "implied certification" theory (e.g., that all claims for the payment of Title IV funds submitted to DOE included an implied certification that UOP was in compliance with the terms of its PPA). The court stated that "[a] false certification of compliance with applicable law only gives rise to an FCA claim if certification of compliance with a particular statute is a prerequisite to obtaining a government benefit." RE 204. Rejecting the argument that 20 U.S.C. 1094(a) imposed a certification requirement – by requiring schools to agree to comply with certain requirements in annual PPAs – the court held that "this statute only requires that UOP enter into an agreement, and does not require certification." RE 205.

In addition, the court rejected the relators' FCA claims under a "promissory fraud" theory, stating that promissory fraud is only actionable where a claimant makes a "false certification" that it will comply with a particular law when such certification is a prerequisite for the receipt of federal funds. Because "[r]elators have not identified any certification which is a prerequisite for UOP to receive federal funds," the court concluded that the relators had not stated an actionable

claim. RE 205. Likewise, the court rejected the relators' argument that UOP's statements of compliance with the incentive compensation ban in letters written for independent auditors could qualify as actionable false claims because "[r]elators identify no statute or regulation which makes any certification in these letters a prerequisite to the receipt of federal funds." Id. at n.1.

Although the United States declined to intervene in this qui tam suit, the Department of Education recently completed a program review of UOP. See Relators' Request To Take Judicial Notice Of DOE's Administrative Findings, Exhibit B (filed Nov. 29, 2004). As a result of this program review, DOE and UOP entered into a settlement agreement on September 7, 2004, under which UOP agreed to pay DOE $9.8 million. Id., Exhibit A. That agreement disavowed any waiver of claims against UOP under the False Claims Act. Id. (¶E).

SUMMARY OF ARGUMENT

The False Claims Act broadly prohibits the knowing use of false statements or records to obtain government benefits. The FCA imposes liability not only for the direct submission of "false claims" to the government but also for causing others to make claims for payment to which they are not entitled. Thus, just as the FCA plainly prohibits the use of false statements or promises to obtain government contracts, it likewise prohibits misrepresentations to establish eligibility to receive government benefits under various federal programs (ranging

from student loans to Medicare), even if there is nothing independently "false" on the face of the actual claims for payment subsequently submitted under the relevant program.

In the increasingly-common circumstances where federal programs provide benefits in a two-step process – where a person is initially required to make express representations concerning his eligibility to receive government benefits and later submits (or causes others to submit) claims for payment that do not expressly reiterate those initial promises – Sections 3729(a)(1) and (a)(2) of the FCA impose liability on at least two independent but overlapping theories. First, courts have held that, by submitting a claim for payment to the government, a person implicitly certifies compliance with all statutory or regulatory requirements on which payment is conditioned, and therefore may be held liable if non-compliance with those requirements is potentially relevant to the government's decision to pay, even if there are no express false statements on the face of the claim itself. Second, courts have held that a person who falsely promises to comply with conditions on the receipt of government benefits may be held liable under the FCA on a theory of "promissory fraud," so long as the initial promise was "false when made." United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996), cert. denied, 519 U.S. 1115 (1997). Both of these theories are fully applicable to this case.

As explained above, the Higher Education Act of 1965 expressly conditions eligibility to receive Title IV funds on compliance with numerous statutory requirements, including the incentive compensation ban, and requires schools to enter PPAs in which they agree to comply with these requirements. See 20 U.S.C. 1094(a). Because compliance with these requirements is plainly a "prerequisite to obtaining a government benefit," Hopper, 91 F.3d at 1266, any subsequent claims for payment by UOP under the program may properly be deemed to include an implied certification of compliance with these requirements. In this case, relators have stated a claim under the FCA by alleging that UOP's claims to DOE for Pell Grant funds include both express and implied statements of compliance with all requirements for the receipt of Title IV funds. Likewise, by alleging that UOP's promises to comply with the incentive compensation ban were false when made, the relators have stated a claim based on a theory of promissory fraud to the extent these initial false statements caused the later submission of claims for payment.

The district court rejected both these theories of liability on the ground that the relators had not identified any "certifications" by UOP of compliance with requirements that were a prerequisite for the receipt of a government benefit. But the court erred in focusing solely on "certifications" as the necessary predicate for liability under the FCA, and compounded its error by discounting UOP's express promises to comply with the incentive compensation ban in its annual PPAs as

merely “agreements” rather than a “certifications” of compliance. For purposes of liability under an implied certification theory, the court’s distinction is utterly irrelevant; what matters is that compliance with this requirement is a condition of eligibility for Title IV funds. Likewise, the court’s distinction is irrelevant for purposes of liability under a promissory fraud theory; the critical question is whether the promise that induced the government to act – to allow participation in Title IV programs – was false when made. Because the district court improperly interpreted and applied the FCA, the judgment of the court should be reversed and the case remanded for further proceedings.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE RELATORS' FCA CLAIMS BASED SOLELY ON THE ABSENCE OF WHAT IT BELIEVED WERE NECESSARY "CERTIFICATIONS" OF COMPLIANCE WITH STATUTORY REQUIREMENTS THAT ARE A PREREQUISITE TO OBTAINING GOVERNMENT BENEFITS.

A. False Claims Act Principles.

A violation of the False Claims Act occurs when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1), or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," 31 U.S.C. 3729(a)(2). The FCA defines the term "claim" broadly to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient." 31 U.S.C. 3729(c) (emphases added).

Consistent with this broad definition of "claim," the Supreme Court has held that the FCA extends to false statement made in applications for government loans, because the Act "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." United States v. Neifert-White Co., 390 U.S. 228, 233 (1968). The legislative history of the 1986 amendments to the FCA confirms this broad interpretation, and

states further that "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program." S. Rep. No. 345, 99th Cong., 2d Sess., at 9, reprinted in 1986 U.S.C.C.A.N. 5266, 5274.

The FCA has consistently been applied not only to false claims for reimbursement submitted under government contracts but also to false claims for government benefits, money, or property under government programs. See, e.g., United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) (Medicare). And, although this Court has recognized that a person may not have the requisite "knowledge" to be held liable under the FCA if he reasonably believes he is entitled to payment, it has held that a claim's "falsity" is a separate question, which turns primarily on whether the defendant was entitled to payment "in light of applicable law." United States ex rel. Oliver v. The Parsons Co., 195 F.3d 457, 463 (9th Cir. 1999). Even where there is nothing false on the face of a claim submitted to the government, courts have repeatedly stated that withholding of "information critical to the decision to pay [such as non-compliance with conditions on participation in a funding program] is the essence of a false claim." United States v. TDC Mgmt. Corp., Inc., 288 F.3d 421, 426 (D.C. Cir. 2002) (citation omitted).

As noted, a person may be liable under Sections 3729(a)(1) & (a)(2) of the FCA not only for submitting a false claim directly to the government but also for

causing another to submit a false claim. See United States v. Bornstein, 423 U.S. 303, 309 (1976) (noting that FCA "gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 541-45 (1943) (holding electrical contractors who rigged bids on municipal contracts funded by federal government liable for causing municipalities to submit false claims); Tanner v. United States, 483 U.S. 107, 129 (1987) (noting prior cases in which the Court "recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United s States does not release the claimant from culpability under the Act"). Thus, this Court has specifically recognized that "a person need not be the one who actually submitted the claim forms in order to be liable." Mackby, 261 F.3d at 827.

Likewise, numerous courts have held that persons who cause loan applicants to provide false information to the government in applications for guaranteed loans may be held liable under the FCA where the government pays money upon default by the borrowers. See e.g., United States v. Rivera, 55 F.3d 703, 709-10 (1st Cir. 1995); United States v. Veneziale, 268 F.2d 504 (3d Cir. 1959). Indeed, at least one court of appeals has sustained a conviction under the criminal provisions of the FCA where the defendant's fraudulent student lending scheme caused banks to submit false claims for interest to the government. See

United States v. Wehling, 676 F.2d 1053, 1058 (5th Cir. 1982).

Moreover, where a contract (or eligibility to participate in a program) was "obtained originally through false statements or fraudulent conduct," courts have recognized a theory of "fraud-in-the-inducement" or promissory fraud under the FCA. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787-88 (4th Cir. 1999). As this Court has stated, this theory reflects the proposition "[t]hat a contract based on false information is a species of false claim." Hagood, 929 F.2d at 1420. However, in order to state a claim of promissory fraud, this Court has also noted that "the promise must be false when made." Hopper, 91 F.3d at 1267.

Finally, in the increasingly-common circumstances where a person's eligibility to receive government benefits under a federal program is expressly conditioned on compliance with certain statutory or regulatory requirements, courts have held that a claim for payment submitted under such a program constitutes an "implied certification" of compliance with those requirements, and that such a claim is therefore "false" when the prerequisites for obtaining the benefit have not been satisfied. See United States ex rel. Quinn v. Omnicare, Inc., 382 F.3d 432, 441-43 (3d Cir. 2004); United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 414-15 (6th Cir. 2002); United States ex rel. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001); United States ex rel. Siewick v. Jamieson Science & Engineering, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000);

Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519, 531-33 (10th Cir. 2000); Ab-Tech Construction, Inc. v. United States, 31 Fed. Cl. 429, 433-34 (Ct. Fed. Cl. 1994), aff'd mem., 57 F.3d 1084 (Fed. Cir. 1995). While this Court has not expressly adopted a theory of "implied certification," it explained in Hopper that a false certification of compliance with mandatory requirements "creates liability when certification is a prerequisite to obtaining a government benefit." Hopper, 91 F.3d at 1266. Thus, both this Court and others have imposed a requirement akin to materiality, holding that a person is not liable under an implied certification theory unless compliance with a given requirement is a prerequisite to the receipt of the government benefit. Omnicare, 382 F.3d at 443.

B. The District Court Erred In Its Analysis Of The Alleged False Claims By UOP Under Both An Express And An Implied Certification Theory.

The relators in this case have alleged that UOP knowingly and repeatedly violated a statutory condition (the incentive compensation ban) that is clearly "a prerequisite to obtaining a government benefit." Hopper, 91 F.3d at 1266. As a result, the claims for payment of Title IV funds that UOP submitted (or caused others to submit) to DOE can properly be deemed "false" under a theory that each contained implied certifications that UOP was in compliance with all prerequisites for participation – and thus for the receipt of benefits – under Title IV programs.

Moreover, relators have also alleged that UOP made at least some express

certifications on the face of the claims for payment submitted to DOE that were "false" in light of the school's knowing violations of the incentive compensation ban. For example, relators alleged that, in order to obtain payments from DOE under the Pell Grant program, UOP was required to certify that "the funds are being expended within three business days of receipt for the purpose and condition of the grant or agreement." RE 149-50. Here, the word "agreement" refers to the annual PPA, and one of the "conditions" of that agreement is compliance with the incentive compensation ban. See RE 87 (PPA). Given UOP's alleged non-compliance with the incentive compensation ban, this express certification that the funds would be used pursuant to the "conditions" stated in the PPA was false.

In any event, even if UOP had made no express certifications concerning its eligibility for Title IV funds on the face of any claim for payment, it could still be held liable under an implied certification theory to the extent it submitted claims (or caused others to submit claims) that implicitly certified its compliance with the requirements for obtaining benefits under Title IV programs. Indeed, the entire premise of implied certification liability is that the actual claim for payment will not contain any express representations – much less, any certifications – about compliance with specific statutory or other requirements, but that the claim will nonetheless be deemed to certify compliance with those requirements to the extent they are "a prerequisite to obtaining a government benefit." Hopper, 91 F.3d

1266. See also Siewick, 214 F.3d at 463 (noting that "[c]ourts have been ready to infer certification from silence, but only where certification was a prerequisite to the government action sought").

There can be no doubt that compliance with the incentive compensation ban is "a prerequisite to obtaining a government benefit." As noted above, the Higher Education Act expressly conditions a school's "initial and continuing eligibility" to participate in Title IV programs upon compliance with the incentive compensation ban and other requirements, 20 U.S.C. 1094(a) & (a)(20), and the regulations reiterate these conditions, 34 C.F.R. 668.14(b)(22)(i). Moreover, DOE has clear authority to withhold payment of funds based upon non-compliance with statutory or regulatory requirements. See 20 U.S.C. 1094(c)(1)(G) (allowing DOE to take "emergency action" to withhold funds where it receives reliable information regarding violations of statutory requirements). See also 34 C.F.R. 668.83 (same). Likewise, DOE may impose prospective sanctions for violations of statutory requirements, including "the limitation, suspension, or termination of the participation" of the school in any Title IV program, 20 U.S.C. 1094(c)(1)(F), or civil penalties, id. at 1094(c)(3)(B). See also 34 C.F.R. 668.82(a) & (c); 34 C.F.R. 682.700(a). Thus, compliance with the incentive compensation ban is at least potentially relevant not only to DOE's decision whether to terminate a school's participation in Title IV programs but also to its decision whether to

withhold funds or pay specific claims. See also Addendum B (DOE policy memorandum noting that sufficiently egregious or systemic violations of the compensation ban "may constitute a basis for limitation, suspension, or termination action").

Because the applicable statutory framework makes compliance with the incentive compensation ban both a condition of participation and a potential condition of payment in the event of material non-compliance, the distinction some courts have drawn between these two types of requirements for purposes of FCA liability is irrelevant in this case. See Mikes, 274 F.3d at 701-02 (stating that it is not enough for compliance with a requirement to be a condition of participation in the program if it is not also a condition of payment); United States ex rel. Willard v. Humana Health Plan of Texas, Inc., 336 F.3d 375, 382-83 (5th Cir. 3003) (same). Nonetheless, the United States submits that this distinction is misguided and reflects an unduly narrow approach to FCA liability. Because a statutory condition of participation is a requirement that Congress has deemed so important that its violation could justify dismissal from the relevant program, violations of such a condition – particularly repeated violations – could provide grounds for the relevant agency to withhold benefits under the program. This is particularly true where, as here, the governing statute expressly allows DOE to withhold funds.

In short, every condition of participation is, at some level of generality, also a condition of payment, particularly where (as here) the receipt of benefits under the program is ongoing and termination from the program will therefore also terminate future benefits. As a result, any purported distinction between these two types of requirements is meaningless for purposes of assessing FCA liability. Thus, the Third Circuit recently rejected the supposed distinction between conditions of participation and conditions of payment, noting that even if a statute or regulation "does not expressly condition payment on compliance with its terms, it hardly can be said that non-compliance with its terms is 'irrelevant to the government's disbursement decisions.'" Omnicare, 382 F.3d at 443.

Because DOE could potentially withhold payment of Title IV funds – and could also terminate a school's eligibility to participate in Title IV programs – based on non-compliance with the incentive compensation ban, the relators' claims in this case are distinguishable from the FCA claims rejected in Hopper. In that case, this Court emphasized that the defendant's alleged false statements regarding compliance with requirements under certain special education funding programs could not have "caused the United States to provide an improper benefit," because the funds were automatically disbursed pursuant to formulas that could not be affected by the false statements. 91 F.3d at 1266. As a result, the Hopper Court concluded that the relators had not stated an actionable "false

certification" claim under the FCA because they had not identified any false statement concerning a "prerequisite to obtaining a government benefit." Ibid. Here, by contrast, the statutory requirement at issue is plainly a prerequisite for program eligibility.

In dismissing the relators' claims in this case, the district court did not address whether DOE has authority to withhold payment of Title IV funds based upon non-compliance with the incentive compensation ban. The court thus failed to recognize that, unlike in Hopper, compliance with the incentive compensation ban is at least potentially relevant to the government's decision to make payments – and terminate eligibility – under Title IV programs.[4] Further, the district court also incorrectly suggested that Hopper imposes a "certification" requirement which was not satisfied in this case because the Higher Education Act "only requires that UOP enter into an agreement, and does not require certification." RE

[4] By assuming that DOE lacked authority to withhold payment of Title IV funds based upon non-compliance with the incentive compensation ban, the district court in this case committed the same error as the district court in United States ex rel. Graves v. ITT Educ. Servs., Inc., 284 F. Supp. 2d 487 (S.D. Tex. 2003), aff'd mem., 111 Fed. Appx. 296 (5th Cir. 2004), where the court simply asserted that "the regulation does not expressly condition the delivery of disbursement of funds to ITT students on ITT's certification of compliance with this requirement." Id. at 501. The decision in Graves is thus wrong not only because it rests on a misguided distinction between conditions of payment and conditions of participation for purposes of FCA liability, but also because it rests on an erroneous understanding of DOE's legal authority to withhold Title IV funds in this context.

205. By definition, however, making the applicability of an "implied certification" theory contingent on the existence of an express certification would negate that theory entirely. And, by concluding that UOP's express agreement in annual PPAs not to pay incentive compensation was not a "certification" sufficient for liability under the FCA, the court further misapprehended that theory. Whether or not UOP's promises to comply with the incentive compensation ban were "certifications" is irrelevant; what matters for purposes of FCA liability is that these statements make it reasonable to construe all subsequent requests for payment under the program as implicit representations of UOP's compliance with the ban.

C. The District Court Erred In Its Analysis Of The Alleged False Claims By UOP Under A Promissory Fraud Theory.

For all the same reasons, the district court also erred in dismissing the relators' promissory fraud claim on the ground that they "have not identified any certification which is a prerequisite for UOP to receive federal funds." RE 205. Like implied certification claims, promissory fraud claims do not require a false "certification" of any sort. Instead, an actionable promissory fraud claim requires only that "the contract or extension of government benefits was obtained originally through false statements or fraudulent conduct." Harrison, 176 F.3d at 787. This is simply an application of the FCA's prohibition on using "a false

record or statement to get a false or fraudulent claim approved by the Government." 31 U.S.C. 3729(a)(2). See also Hagood, 929 F.2d at 1420 (noting "[t]hat a contract based on false information is a species of false claim"). And, although this Court has stated that promissory fraud claims are actionable only if the original promise was false when made, see Hopper, 91 F.3d at 1267, the relators have stated a claim under this theory by alleging that UOP's promises to comply with the incentive compensation ban were false when made. RE 50. Thus, although these allegations may be difficult to prove, the relators have stated a valid FCA claim under a theory of promissory fraud, and the district court erred in dismissing that claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the relators' complaint should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 6974 words, according to the word count supplied by Corel WordPerfect 9.

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CERTIFICATE OF SERVICE

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ADDENDUM

31 U.S.C. 3729

Memorandum from William D. Hansen, Deputy Secretary, to Terri Shaw, Chief Operating Officer, Federal Student Aid (dated October 30, 2002)

31 U.S.C. 3729

§ 3729. False claims

(a) Liability for certain acts.–Any person who–

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000

and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property

which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.