UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04 16247

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

Plaintiffs/Appellants,

v.

UNIVERSITY OF PHOENIX,

Defendants/Appellees.

Appeal from Judgment on F.R.C.P. 12(b)(6) Motion
The Hon. Garland Burrell, Judge - United States District Court
Eastern District of California, Sacramento
Case No. CV-03-0457 GEB DAD

APPELLANTS' OPENING BRIEF

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JURISDICTION

The district court had jurisdiction of this action by virtue of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729, et seq.

This court of appeals has jurisdiction under 28 U.S.C. §1291.

The district court final judgment under review herein was entered May 20, 2004 (ER 208). The judgment is based upon the district court order dated May 20, 2004, dismissing Relators' Second Amended Complaint with prejudice (ER 203). The district court judgment entered May 20, 2004, is the final appealable order in this action.

Relators filed their Notice of Appeal June 14, 2004 (ER 210). This appeal is timely pursuant to Fed.R.App.P. 4(a)(1).

STANDARDS OF REVIEW

The Ninth Circuit reviews de novo a dismissal of a complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure, 12(b)(6). *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199 (9th Cir. 2003).

Rule 12(b)(6), testing the legal sufficiency of the complaint claims, must be read in conjunction with Rule 8, requiring a "short and plain statement showing that the pleader is entitled to relief" and containing "a powerful presumption against rejecting pleadings for failure to state a claim." *Id.; Gilligan v. Jamco Dev. Corp*., 108 F.3d 246, 248-49 (9th Cir. 1997) (internal citation omitted).

A Rule 12b(6) dismissal is proper only in "extraordinary" cases. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

The complaint must be construed in a light most favorable to the plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

The court must accept as true all material complaint allegations as well as reasonable inferences to be drawn from those allegations. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *Broam*, 320 F.3d at 1028.

ISSUES PRESENTED

1. In an FCA express false certification case, whether the "false statement" of compliance with the underlying federal law, conditioning the defendant's eligibility to request the federal funds, may be set forth in an agreement between the defendant and the federal government.

   (The district court dismissed Relators' FCA express false certification case on the ground that Defendant UOP's express false statement of compliance with the Higher Education Act ("HEA") incentive compensation ban is contained in an agreement executed with the federal government rather than in UOP's requests for the federal funds.)

2. In an FCA false certification case, whether liability arises when compliance with the underlying law is required for participation in a federal program or payment of federal funds, regardless of the specific language of the underlying federal law.

(The district court dismissed Relators' FCA implied false certification case on the ground that the underlying statute, the HEA, requires an "agreement" of compliance rather than a "certification" of compliance with the HEA incentive compensation ban.)

3. In a FCA promissory fraud case, whether liability exists separate from pleading the existence of a federal law requiring a certification of compliance with the federal law.

(The district court dismissed Relators' promissory fraud case ruling that the HEA does not require a certification of compliance with the HEA and that such lack of certification requirement prohibits Relators from pursuing recovery under the separate FCA promissory fraud theory.)

STATEMENT OF THE CASE

Relators Mary Hendow and Julie Albertson, senior enrollment counselors at defendant University of Phoenix ("UOP"), filed this False Claims Act *qui tam* action to recover damages and civil penalties on behalf of the United States of America arising out of false claims made by UOP pursuant to the Higher Education Act of 1965, Title IV ("HEA").

On March 7, 2003, Relators filed their Complaint under seal (ER 1).

On September 2, 2003, prior to serving UOP, Relators' filed a First Amended Complaint (ER 22).

On February 24, 2004, the District Court granted UOP's motion to dismiss Relators' First Amended Complaint, and granted Relators ten days leave to amend their First Amended Complaint to better define the "claim" within the meaning of the FCA (ER 38).

On March 4, 2004, Relators filed their Second Amended Complaint detailing the nature of UOP's "claim" for the federal funds within the meaning of the False Claims Act (ER 44).

On May 3, 2004, the District Court took under submission UOP's motion to dismiss the Second Amended Complaint, without permitting oral argument.

On May 20, 2004, the Court ordered the Second Amended Complaint dismissed with prejudice (ER 203).

On May 20, 2004, the District Court entered judgment for UOP (ER 208).

On June 14, 2004, Relators filed their Notice of Appeal (ER 210).

On September 7, 2004, UOP executed a Settlement Agreement with the DOE, to pay $9.8 million in regulatory fines for the purpose of resolving the Department's program review regarding compliance by UOP with 20 U.S.C. § 1094(a)(20) and 34 C.F.R. §668.14(b)(22) during the period September 1, 1998, through June 30, 2004. The Settlement Agreement followed a DOE Program Review of UOP's recruiter compensation practices, initiated in response to the Relators' allegations about UOP's violations of the HEA. **The DOE Program Review findings confirm Relators' allegations that UOP knowingly violated the HEA incentive compensation ban. The consequential DOE-UOP Settlement Agreement expressly *does not* release UOP for liability under the FCA.** Please see "Relators' Request for Judicial Notice of U.S. Department of Education Administrative Proceedings," with the DOE Program Review and the DOE-UOP Settlement Agreement attached as Exhibits A and B, respectively.

STATEMENT OF FACTS

A. The Parties

UOP is the United States' largest private, for-profit higher education institution, providing educational programs for working adult students. When the lawsuit was filed, UOP had approximately 45 campuses nationwide and an online program, enrolling approximately 174,900 students (ER 46-47, ¶ 9).

From at least January 1, 1997, continually through the present, UOP has received, annually, over $500,000,000 in federal funds from the United States Department of Education, pursuant to the Higher Education Act, Title IV ("HEA") (ER 44, ¶ 1).

In requesting and receiving such federal funds, using what UOP management terms "smoke and mirrors" and "flying under the radar" (ER 49, 56-57, ¶¶ 19, 58), UOP management each year has falsely represented that UOP is in compliance with HEA's prohibition against using incentive payments for recruiters for recruiting activities, which representation is a core prerequisite to eligibility for the Title IV funds (ER 50-52, ¶¶ 29, 30, 34, 36).

Relators Mary Hendow and Julie Albertson, at the time of bringing their *qui tam* FCA action, were Senior Enrollment Counselors at the Northern California campus of UOP. As Senior Enrollment Counselors, Relators were established as exemplary, dedicated, knowledgeable, and hard-working employees. Their individual contributions were respected at all university levels and departments (ER 46, ¶¶ 5, 6).

Shortly after each Relator was hired, UOP recognized each as a top performer based on her enrollment numbers. Within eight months of Relator Julie Albertson's date of hire, UOP, in direct violation of the HEA incentive compensation ban, jumped Albertson from a starting salary of $32,000 to $88,000, based upon Albertson enrolling 148.5 students (ER 54, ¶ 48).

Relators consistently ranked in the top ten percent of enrollment counselors, receiving trips, contest awards and gifts exceeding the $100 HEA value limit based on their enrollment numbers (ER 55, ¶¶ 17, 49-51).

B. The Higher Education Act Grant and Loan Programs

Congress established the Guaranteed Student Loan Program ("GSLP") in 1965 under the HEA, Title IV. The Program was enacted "to provide access to every student who wants to better himself through higher education." *Abuses in Federal Student Aid Programs*, 102 S.Rep. 58 (1991) ("Report").

The HEA supports higher education through educational grants (paid directly by the Department of Education) and government-insured loans (paid by banks, guaranteed by the Department of Education). The vast majority of funding stems from the Federal Family Education Loan Program ("FFELP"), 20 U.S.C. §1071, et seq., (a government-insured loan program) and the Federal Pell Grant Program, 20 U.S.C. §1070(a), et seq. (an educational grant program). Other programs include the Federal Supplemental Educational Opportunity Grant Program ("FSEOG") the Federal Perkins Loan Program ("Perkins") (ER 49, ¶ 23).

Students do not request or receive the HEA education grants and loans. Instead, educational institutions, such as UOP, request these grants and loans on behalf of alleged eligible students. In response to UOP's funding requests, the federal government and the banks wire the funds directly into a UOP account (ER 48, 51, 52, ¶¶ 15, 32, 33, 35).

Given that UOP's tuition exceeds the size of the grants and loans, UOP retains the federal funds, crediting students for tuition paid (ER 6, ¶¶ 15, 33, 35). The vast majority of UOP's revenues are Title IV funds. UOP's SEC filings reveal over $3 billion in Title IV funds requested *and retained* by UOP over the past six years, $950 million for the 2002-2003 academic year alone (ER 44, 50-51, ¶¶ 1, 29).

As John Sperling, Chair and CEO of the Apollo Group that owns UOP, bluntly states:

> "This is a corporation, not a social entity. Coming here is not a rite of passage. We are not trying to develop their value systems or go in for that 'expand their minds' bullshit." ("Phoenix Ascending," Ana Marie Cox, *In These Times*, May 13, 2002.)

(ER 195, 1:26-28).

C. Historical Background on the HEA Title IV Funding Statute Incentive Compensation Ban

The Higher Education Act of 1965 ("HEA") ban strictly prohibits educational institutions from paying commissions or incentive payments to enrollment counselors based "directly or indirectly" upon the number of students enrolled. (ER 49, 50, ¶¶ 24-27).

The HEA expressly conditions an institution's eligibility to receive Title IV funds on compliance with the commission sales ban. For an institution to be an "eligible institution," it

> shall . . . enter into a program participation agreement with the Secretary. The *agreement shall condition the initial and continuing eligibility of an institution* to participate in a program upon compliance with the following requirements:

> (20) The institution will not provide any commission, bonus or other incentive payment based directly or indirectly on success in securing enrollments . . .

20 U.S.C. §1094(a) and (a)(20) (emphasis added);

The incentive compensation ban prohibits institutions from compensating counselors based upon recruitment and enrollment activities. 34 C.F.R. §688.14(b)(22).

Congress enacted this ban in 1992, following hearings and amid reports of numerous institutions enrolling unqualified students, just to receive the federal student-aid funds from the government. During these hearings, the Senate Permanent Subcommittee on Investigations learned that "[o]ne of the most widely abused areas of those observed during the Subcommittee's investigation lies in admissions and recruitment practices." Report, *id*.

The Subcommittee found that proprietary schools victimized their students:

> Fraud and abuse in the GSLP have had perhaps the most profound and disastrous effect on the intended beneficiaries of the Federal student aid, the students. The Subcommittee heard testimony that unscrupulous and dishonest school operators victimize students, leaving them with huge debts and little or no education.

Id.

The Subcommittee noted that the difference between colleges and universities, and proprietary trade schools, lead to such abuses:

> For example, colleges and universities do not employ commissioned sales representatives, while proprietary schools commonly use such personnel in their marketing efforts. . .

Id.

At UOP, the abuses discovered during the 1990s hearings are ongoing. Corporate Enrollment directs enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university. Counselors are told to "do whatever it takes to get the [enrollment]. It's ALL about the numbers – nothing else matters." This process leads to student disqualification from UOP (or additional financial costs for the students to take additional classes) and financial disaster for the students forced to repay the federal loans while UOP collects the federal funds for these fraudulently "enrolled" students (ER 48-49, 55-56, ¶¶ 18, 54, 56).

D. UOP's Express False Statements of Compliance with the HEA Incentive Compensation Ban as a Prerequisite to Requesting and Receiving the Title IV Funds

The Title IV funding statute, the HEA, thus requires eligible institutions, including UOP, as a prerequisite to requesting and receiving the Title IV funds, to expressly state their compliance with the HEA incentive compensation ban.

The HEA requires UOP to annually sign a Program Participation Agreement ("PPA") setting forth this promised compliance to refrain from paying enrollment counselors directly or indirectly based upon enrollments. 20 U.S.C. §1094(a) and (a)(20). Without a signed PPA, containing this promise to comply with the incentive compensation ban, UOP could not apply for or receive the federal funds (ER 49-50, ¶¶ 24-26).

Mirroring the language of the HEA funding statute, each PPA states, in bold print, on the first page:

> **The execution of this agreement by the Institution and the Secretary is a prerequisite to the institution's initial or continued participation in any Title IV HEA Program.**

(ER 50, ¶ 25; ER 69, 84).

The PPA terms include that UOP "understands and agrees that it is subject to and will comply with the program statutes and the implementing regulations for institutional eligibility as set forth in 34 CFR Part 600 and for each Title IV, HEA program in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA." (ER 50, ¶ 26; ER 70, 85).

The PPA includes an express prohibition concerning the incentive compensation ban:

> **By entering into this Program Participation Agreement, the Institution agrees that:**
>
> **(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority. . . .**
>
> **(22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments . . . .**

(ER 50, ¶¶ 26, 27; ER 71, 73, 85-87.)

In addition to the PPA, the HEA also mandates that schools provide to the Secretary of Education an annual financial statement and compliance audit certifying compliance with the incentive compensation prohibition. 20 U.S.C. §1094(c). The audit must be performed by an independent certified public accountant. 20 U.S.C. §1094(c)(1)(a); 20 U.S.C. §1099(c); 34 C.F.R. §668.23.

As a mandatory part of the audit, UOP provides its auditors with a "management assertion letter" asserting that UOP is in compliance with the HEA requirements, including the incentive compensation ban, during the previous reporting period. (ER 51, ¶ 31; ER 94-97). *See,* 20 U.S.C. § 1094(c); 34 C.F.R. §§ 600.7(g) and 668.23(b). The implementing regulations for compliance or attestation audits and audited financial statements are found at 34 C.F.R. § 668.23.

The audit reports are a prerequisite to an institution's initial and continued eligibility to receive funding under the Title IV, HEA Programs. Retention of the program funds received by UOP during the course of a year depends on the filing of such compliance audits with the Department of Education. Failure to file these audit reports can lead to termination of the UOP eligibility to receive Title IV funds. 34 C.F.R.§600.41. Receipt of the compliance audit conditions UOP's eligibility to continue to receive any Title IV funds after the audit (ER 51, ¶¶ 30, 31).

The auditor may rely on management's representations in the management assertion letter. The Department of Education also may rely on those management assertions, regardless of whether the Department receives the assertion letter. (ER 51, ¶¶ 30, 31).

E. UOP's Claims for Higher Education Act Title IV Funds

Eligible institutions — not students — request and retain the HEA Title IV funds (ER 48, 51-52, ¶¶ 15, 33, 35). As a first step in the Title IV grant and loan process, every student seeking federal financial aid must fill out a FAFSA ("Free

Application for Federal Student Aid") application. 34 C.F.R. §690.12. This application determines the student's eligibility for any federal student loan.

The FAFSA does not request any government funds. The *educational institution* then submits the claim for funds directly to the United States Department of Education (for Pell Grant funds) or the third party lender (for government-insured funds) (ER 48, 51-52, ¶¶ 15, 33, 35).

1. UOP Requests the Federal Pell Grant Funds Directly from the U.S. Department of Education

After entering the PPA with the U.S. Secretary of Education, UOP is eligible to request and receive Title IV funds, including Pell Grant funds. UOP submits lump funds requests for Pell Grant funds directly to the Department of Education. 34 C.F.R. §668.162. The Secretary of Education transfers the funds electronically into a UOP account. 34 C.F.R. §§668.163, 668.161(b). Given that UOP tuition exceeds the Pell Grant amount, upon receiving the Pell Grant funds, UOP credits various UOP students for tuition paid. 34 C.F.R. §668.164(a). A UOP student does not request or receive a dime of the Pell Grant funds (ER 51, ¶ 33).

2. UOP Requests for Government-Insured Loan Funds

Most post-secondary students finance their education through loans obtained under the FFELP. Under the FFELP, UOP submits the request for funds to a private lender and a guarantee agency (usually a state agency or nonprofit organization) for a loan on behalf of the student. The request includes the student FAFSA eligibility application and a UOP certification, "Federal Stafford Loan School Certification" (ER 52, ¶ 35; ER 98-99).

In the certification, UOP requests the Title IV amounts — the "claim" for the funds. **In the certification, UOP falsely certifies that the student "is an eligible borrower in accordance with the Higher Education Act of 1965."** The student is not eligible because the student attends an institution ineligible for Title IV funds due to its incentive compensation ban violations (ER 52, ¶ 35; ER 98-99).

The lender, typically a bank, transfers the funds *directly into a UOP account.* UOP credits the student for tuition. (ER 52, ¶ 35).

The U.S. Government pays all interest on the FFELP loans while the students are enrolled in classes and during authorized grace periods. If a student defaults, the guarantee agency reimburses the lender. If the guarantee agency cannot collect from the student, the Department of Education reimburses the agency. 20 U.S.C.§1078(c)(1)(A); 34 C.F.R. §§682.400(b)(3), 682.404, 682.409(a)(1) (ER 52-53, ¶ 37).

The Department monitors loan defaults of post-secondary schools and calculates a "cohort default rate" every year for UOP. The Department calculates the loss to the U.S. Government relying upon this rate.[1] (ER 53, ¶ 38).

F. UOP Compensates Enrollment Counselors Based Solely Upon Enrollments and Enrollment Recruitment Activities

In direct violation of the HEA incentive compensation ban, UOP compensates enrollment counselors through salary, and trips and gifts exceeding the HEA

[1]Of the over $500 million in federal funds UOP receives from the U.S. Government annually, UOP's default rates are increasing every year — from 4.6 percent in 1999, to 5.2 percent in 2000, to 5.8 percent in 2001. (ER 52-53, ¶¶ 37,38 ; ER 115, p. 8, n. 1.)

$100 value limit, based solely on enrollments and non-clerical enrollment recruitment activities (ER 48, 53-55, ¶¶ 17, 39-51).

To determine enrollment counselor salary, the UOP Corporate Enrollment Department publishes charts, called "matrix," setting forth the enrollment numbers and recruitment activities necessary for a performance rating for an enrollment counselor. The enrollment recruitment activities include telephone calls (soliciting student interviews), appointments (with prospective students), leads (prospective students), and enrollments. UOP tracks these quantitative enrollment activities on a daily, weekly, monthly, quarterly and annual basis.

UOP inputs the enrollment and recruitment numbers into the matrix under the performance rating categories of "always exceeds expectations," "often exceeds expectations," "meets expectations," "requires improvement," and "unsatisfactory." (ER 48, 53, ¶¶ 17, 39, 40).

Along with the matrix charts, UOP Corporate Enrollment publishes salary schedules. The salary schedules show the salary range and salary merit increase corresponding to each performance rating on the matrix. An enrollment counselor thus knows her salary level, by comparing her matrix enrollment numbers with the salary schedules (ER 53, ¶ 41).

The early UOP matrix listed the salary on the matrix. To deceive the Department of Education, UOP removed the salary from the matrix and now separately lists the salary levels corresponding to each performance rating (ER 53, 57, ¶¶ 42, 59(b)).

In addition to illegally compensating enrollment counselors via higher salaries for enrollments and enrollment recruitment activities, UOP also illegally compensates them via free trips, contest awards, and other gifts exceeding the HEA $100 limit. Counselors achieving enrollment numbers set by management are rewarded with "Sperling Club" overnight trips. Contest awards include, for example, a Sonoma Mission Inn Hotel and Spa Package, lottery tickets, DVD players or gift certificates. (ER 48, 55, ¶¶ 17, 49-51).

G. UOP Terminates the Employment of Counselors Failing to Meet Enrollment Goals

UOP places enrollment counselors failing to reach acceptable enrollment numbers on a "performance plan" setting forth minimum enrollment activity goals. Unsuccessful completion of a "performance plan" leads to termination of the counselor's employment. (ER 55, ¶ 52).

H. UOP Boasts It Uses "Smoke and Mirrors" and "Flying under the Radar" to Conceal UOP's Violations of the HEA Incentive Compensation Ban

While executing its annual PPAs and management letters certifying compliance with the HEA incentive compensation ban, UOP knowingly and intentionally deceives the U.S. Department of Education regarding its violations of the ban.

As Bill Brebaugh, head of UOP Corporate Enrollment openly brags to UOP employees, UOP masks its illegal compensation scheme through "smoke and mirrors," so that UOP can "fly under the radar" of the Department of Education. Mr. Brebaugh repeatedly emphasizes to the enrollment counselors: "It's all about the numbers. It will always be about the

numbers. But we need to show the Department of Education what they want to see." (ER 49, 56-57, ¶¶ 19, 58).

UOP engages in a number of tactics designed to deceive the Department:

1) **One tactic is *keeping two sets of books — one real set and one bogus set for the Government.*** UOP accomplishes maintaining separate personnel files on each enrollment counselor (ER 49, 57, ¶¶ 20, 59(a)). Corporate Human Resources maintains the "official" file shown to the Department of Education. The "official" file performance reviews contain legitimate qualitative review criteria allegedly used to assess performance. The criteria include "job related skills," "working relationships," "customer service," and "supervisory skills." Corporate Enrollment and the local campuses maintain the other "unofficial" files containing the performance reviews actually used to assess performance and determine compensation, based upon the illegal matrix quantitative enrollment activities.

2) **Another tactic UOP uses to mask its illegal compensation scheme is removal of the salary ranges from its compensation matrix.** The matrix now sets forth only the performance ratings tied to each quantitative enrollment activity. A separate salary schedule sets forth the salary corresponding to each performance rating. (ER 57, ¶59(b)).

3) **Yet another tactic is UOP's use of code terms for an "enrollment" on the various matrix determining compensation, to conceal that compensation is based on "enrollments."** An "enrollment" on the various UOP matrix is

falsely labeled either an "application," a "Student info card," or a "level one card." (ER 49, 57-58, ¶¶ 22, 59(c)).

4) **As an additional tactic in its systematic and deliberate deception scheme, UOP re-named enrollment compensation documents.** For example, UOP monthly reports verifying enrollments for each counselor to determine their compensation formerly blatantly listed enrollments as "*commissionable* starts"(a "start" is an enrollment) (ER 58, ¶ 59(d)).

5) **UOP also uses code terms to refer to enrollment goals for contests.** For example, the enrollment goal of 52 for a particular enrollment contest was set by Corporate Enrollment by stating "you know how many states there are." (ER 58, ¶ 59(f)).

I. U. S. Department of Justice Response to this *Qui Tam* Action: Declination of Intervention.

DOJ has so far declined to intervene in this lawsuit; however, the declination to intervene is no reflection on the case merit (See ER 11, Exh 1, p.2, n.2; see also 106 Cong. Rec. E1546-E1548 (1999) (statement of Rep. Berman))[2].

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[2]In 1999, Congressman Howard Berman, one of the two sponsors of the 1986 Amendments to the False Claims Act, declared:

> One of the principal goals of the 1986 Amendments was to ameliorate the "lack of resources on the part of Federal enforcement agencies." S. Rep. 99-345 at 7. That was one of the reasons we strengthened the qui tam provisions of the law. Thus, **we expected some meritorious cases to proceed without the Government's intervention, and we fully expected that the Government and relators would work together in many cases to achieve a just result.** By dismissing relators based on spurious interpretations of the [FCA], the courts are depriving the Government of these additional resources. And those resources have been considerable.

DOJ also declined to intervene in an FCA case against Computer Learning Centers ("CLC"), involving similar allegations; yet, the Department of Education fined CLC $187 million for violating the incentive compensation ban.

J. U. S. Department of Education Response to this *Qui Tam* Action: Program Review Confirming Relators' Allegations that UOP Knowingly Violates the HEA Incentive Compensation Ban.

The U.S. Department of Education ("DOE") conducted a program review of the UOP policies and procedures regarding recruiter compensation. The DOE conducted site visits, gathered documents and interviewed more than 60 current and former employees. The DOE then issued a 45-page "Program Review" report, detailing that "UOP is in direct violation of Sec. 487(a)(20) of the Higher Education Act" (the HEA incentive compensation ban). (See Request to Take Judicial Notice of U.S. Department of Education Administrative Proceedings, Exh. A, p. 29.) **In its Program Review report, the DOE expressly found that UOP "systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection." (Program Review, p. 29.)**

The DOE Program Review led UOP on September 7, 2004, to execute a Settlement Agreement to pay $9.8 million in regulatory fines. Such Settlement Agreement expressly *does not* release UOP for liability under the FCA. (See Request to Take Judicial Notice of Department of Education Administrative Proceedings, Exh. B, p. 2, ¶ I.E.)

SUMMARY OF ARGUMENT

Relators filed this FCA action regarding the over $3 billion in Title IV federal funds that UOP, all the while boasting about "using smoke and mirrors" and "flying under the radar," fraudulently requested and retained from the federal government over the past six years, in a blatant, systematic illegal compensation scheme violating the HEA incentive compensation ban.

The HEA mandates that an educational institution is ineligible to submit any requests for Title IV funds without first executing an agreement with the Secretary of Education, the Program Participation Agreement ("PPA"), promising to comply with the incentive compensation ban. 20 U.S.C. §1094(a) and (a)(20). The HEA also mandates that an educational institution is ineligible to continue requesting Title IV funds unless it submits an annual compliance audit based upon a "management assertion letter" confirming UOP compliance with the HEA. 20 U.S.C. §1094(c).

UOP knows, from its executed annual PPAs and "management assertion letters," that adherence to the HEA ban is a core prerequisite to requesting and receiving the Title IV funds. UOP nonetheless openly boasts to its employees about its elaborate "smoke and mirrors," created so that UOP can "fly under the radar" of the Department of Education regarding its illegal compensation scheme.

Relators' complaint alleges UOP's FCA liability through UOP's false certification (both express and implied) and promissory fraud theories of liability. UOP's express false certification liability is based upon UOP's annual PPAs and UOP management assertion letters, wherein UOP expressly falsely states its

present and future compliance with the HEA incentive compensation ban. UOP's implied false certification liability arises from UOP's requests for the Title IV funds, implying continuing compliance with the incentive compensation ban that is a core prerequisite to requesting and retaining the Title IV funds. Finally, UOP is liable for promissory fraud based upon UOP's annual false promises in the PPA to abide by the HEA incentive compensation ban.

The district court dismissed Relators' express false certification claim on the ground that UOP's requests for the Title IV funds do not contain any false statements of compliance with the incentive compensation ban. In dismissing the false certification liability theory, the Court ruled, "[b]ut they [the Relators] do not allege that those claims contain express false statements." (ER 204, 2:9-12).

The express false certification liability theory, however, does not require that the defendant's funding requests contain the defendant's "false statements" of compliance with the federal law. Express false certification lawsuits proceed under the FCA statutory language imposing liability based upon the use of a "false statement" to get a claim paid by the federal government. 31 U.S.C. §3729(a)(2); see, e.g., *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997).

False certification cases pose two major questions, "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relations exist between the subject matter of the false statement and the event triggering Government loss." *Hopper*, 91 F.3d at 1266. Neither the FCA nor false

certification case law require that the "false statement" of compliance used to get the claim paid exist in the submitted funding request. Rather, the "false statement" need only be in a document (for example, an agreement, a contract, a plan, etc.) causing the Government to provide the benefit.

In this case, ***UOP's express statement in the PPA, its annual agreement executed with the federal government, that it "will not" violate the HEA incentive compensation ban is the "false statement" imposing FCA express false certification liability on UOP*** (ER 49-50, ¶¶ 24-27; ER 70, 71, 73, 84-87). UOP's false PPA statement causes the federal government to pay Title IV funds to UOP. The HEA funding statute conditions UOP's "initial and continuing eligibility" to request and retain Title IV funds upon the execution of an annual PPA. Without an executed PPA, UOP cannot request and retain any Title IV funds.

Additionally, UOP's "false statement" in its "management assertion letters" of past compliance with the incentive compensation ban imposes false certification liability on UOP. The HEA requires an annual compliance audit for an institution's eligibility to continue to receive Title IV funds. 20 U.S.C. § 1094(c). The Department of Education terminates the eligibility of institutions to submit claims for Title IV funds if they fail to submit the annual compliance audit based upon these statements of compliance with the DOE regulations. 34 C.F.R.§600.41. (ER 51, ¶¶ 30, 31).

The District Court erroneously dismissed the Relators' implied false certification claim, ruling that the underlying funding statute must require a

"certification" of compliance with the incentive compensation ban to receive the federal funds, rather than the "agreement" mandated by the HEA to comply with the ban. (ER 204-05, 2:12-3:8).

The District Court's focus on the language of the underlying statute is misplaced. The seminal focus in a false certification case is whether a defendant sought money to which it was not entitled because it was in violation of a prerequisite to either payment under, or participation in, the program. *Hopper*, 91 F.3d at 1266. Liability does not depend on whether the underlying federal law requires such compliance to be set forth in a "certification," an "agreement," a contract, or otherwise. So long as compliance with the federal law is the core prerequisite for receiving the government benefit, false certification liability exists.

The District Court's ruling, requiring "magic words" in the underlying statute, would lead to the absurd result that Congress would have to re-write every statute conditioning compliance with the statute for funding to specifically state that a"certification" is required for FCA liability. No authority exists for this opinion. The District Court's narrow construction of false certification liability theory ignores the plain language of the FCA, and congressional and Supreme Court directive to broadly interpret the FCA, and FCA false certification case law.

In this case, the HEA funding statute and the PPA both expressly state that compliance with the HEA incentive compensation ban is a core prerequisite to UOP requesting and retaining the Title IV funds. The HEA provides that executing the PPA, containing the promise to comply with the

incentive compensation ban, establishes UOP's "initial and continuing eligibility" to request and retain Title IV funds. 20 U.S.C. §1094(a) and (a)(20). **This case accordingly satisfies the false certification test that compliance with the federal law is the cause of the federal government payment of benefits to UOP.**

As recognized by six appellate courts, and numerous district courts, including the Central District of California, under the implied false certification liability theory, every time UOP requests the Title IV funds, UOP is liable for implying continuing compliance with the HEA incentive compensation ban that is a core prerequisite to UOP's eligibility to request the funds. This liability stems from the FCA language imposing liability based upon the knowing submission of a claim for payment for which the defendant is not entitled. 31 U.S.C.§ 3729(a)(1).

Finally, the District Court erroneously dismissed the Relators' promissory fraud claim, ruling that a "false certification" is a necessary element of Relators' separate claim for promissory fraud. (ER 205, 3:9-17). The district court based its ruling on a misunderstanding that the Ninth Circuit required this element for a promissory fraud claim in *Hopper v. Anton*. In *Hopper*, however, the Ninth Circuit did not rule that a false certification is a necessary element of a promissory fraud claim in a lawsuit also alleging a false certification claim. Rather, the Ninth Circuit granted summary judgment for the defendant on the promissory fraud claim due to the lack of evidence supporting one of the promissory fraud elements, that "the promise must be false

when made." *Id*. at 1267. Given that Relators' complaint pleads all the elements of a promissory fraud claim, the district court's dismissal of this claim was erroneous (ER 48-51, 56-58, ¶¶ 18-21, 27, 29, 58, 59(a)-(f)).

Furthermore, even were a false certification required for the promissory fraud claim, such false certification requirement exists in this case. As noted above, **the "false statement" of compliance with the HEA is set forth in the PPA UOP executes annually with the Department of Education, and the UOP management assertion letters.**

Relators' complaint accordingly pleads UOP's FCA liability under the alternative theories of express false certification, implied false certification and promissory fraud. Relators respectfully request that this Court reverse the lower court order and remand this matter for further proceedings.

ARGUMENT

A. Statutory Background: The False Claims Act *Qui Tam* Actions

The FCA, "Lincoln's Law," with roots in the Civil War, and, before that, England ("qui tam" being the abbreviation for the Latin phrase *"qui tam pro domino rege quam pro se ipso in hac parte sequitur,"* which translates as "he who pursues this action on our Lord the King's behalf as well as his own") is the Government's "primary litigative tool for combating fraud" against the United States. See S. Rep. No. 345, 99th Cong., 2d Sess. at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266; *Kelly v. Boeing Co.,* 9 F.3d. 743, 745 (9th Cir. 1993).

FCA lawsuits may be brought by the Attorney General or by an individual *qui tam* relator. 31 U.S.C. §3730. An individual brings a civil action under the FCA "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. §3730(b)(1). The individual's action is termed a *"qui tam"* lawsuit, and the person bringing the action is referred to as a "relator." *Kelly*, 9 F.3d at 745. FCA imposes for a civil penalty between $5,000 and $10,000 for each false claim, plus treble damages. 31 U.S.C. §3729(a).

The Supreme Court mandates a broad statutory interpretation because the FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (emphasis added).

In 1986, Congress amended the FCA to broaden the availability of the FCA to"enhance the Government's ability to recover losses sustained as a result of fraud against the Government." See S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. The Congressional action was in response to judicial decisions taking a restrictive approach to the False Claims Act. See *Id.* at 4, reprinted in 1986 U.S.C.C.A.N. at 5269.

The legislative history of the 1986 amendments indicates that Congress intended the FCA to apply whenever a defendant was ineligible for program payments. The Senate Report states 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. 99-345 at 9, *reprinted in* 1986 U.S.C.C.A.N.

5266, 5274. The Senate Report furthermore notes that false claims "may take many forms, the most common being a claim for goods or services . . . *provided in violation of* contract terms, specification, *statute or regulation* . . ." *Id.* at 5274 (emphasis added).

FCA establishes civil liability when a person or entity:

> (1) knowingly presents, or causes to be presented, to an officer of employee of the United States Government . . .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;

31 U.S.C. §3729(a)(1)-(2).

FCA actions are sustained under different theories of liability, including "false certification" (express and implied) and "promissory fraud." *Hopper*, 91 F.3d at 1266, 1267*; United States ex rel Plumbers & Steamfitters Local Union v. C.W. Roen Construction Co.*, 183 F.3d 1088, 1092 (9th Cir. 1999)*; United States ex rel. Holder v. Special Devices, Inc.*, Case No. 99-8298, 11:8-13:12 (C.D.Cal. Dec. 5, 2003) (ER 178, 188-190).

False certification liability (express or implied) arises when a defendant falsely states or implies compliance with a federal law conditioning the defendant's receipt of federal funds. *Hopper*, 91 F.3d at 1266. Implied false certification FCA causes of action proceed under 31 U.S.C. §3729(a)(1), establishing liability based upon the presentation of a "false claim" for payment that "implies" certification with the applicable federal laws. Express false certification FCA causes of action proceed under 31 U.S.C. §3729(a)(2), regarding the submission

of a "false record or statement" of compliance with the applicable federal laws to get a claim paid. *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000); see also *Holder,* at 11:8-13:12 (ER 178, 188-190).

B. Relators' Complaint Pleads an Express False Certification Case Based Upon UOP's Annual Express False Statements in the PPAs That UOP "Will Not" Pay Incentive Commissions

Relators' complaint alleges that UOP annually, in the PPA, expressly states that it "will not" pay incentive compensation, and (2) the HEA requires this compliance as a prerequisite to UOP requesting and retaining any Title IV funds (ER 49-50, ¶¶ 24-27). As such, Relators plead a valid express false certification case. *Hopper*, 91 F.3d at 1266.

The district court ruling that an express false certification case requires that UOP's subsequent requests for the HEA funds, submitted after UOP executes its agreement with the Secretary of Education assuring compliance with the HEA, must contain the statements of compliance is erroneous. **For express false certification liability, the false statements of compliance need only be in a document causing the government to pay the benefit to the defendant.** The FCA, its legislative history and case law confirm that the "false statement" imposing FCA liability may be in a contract, an agreement, a local plan, all preceding the submission of the funding requests.

The FCA does not require that the "false statement" of compliance exist in the defendant's request for the federal funds following its false statement in a contract with the federal government setting forth the eligibility conditions for federal funds. Express false certification liability arises from the FCA statutory

language imposing liability based upon the submission of a "false statement." The FCA establishes civil liability when a person or entity:

> (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;

31 U.S.C. §3729(a)(2).

The statute does not mandate that the false record or statement be in the funding request. The statute simply requires that the defendant use the false statement to get the Government to pay a fraudulent claim.

The FCA legislative history expressly indicates Congress' intent that FCA liability reach defendants seeking government payments in violation of a contract or statutory requirements. In the 1986 FCA amendments, Congress emphasized that courts should broadly construe liability under the FCA:

> [The FCA] is intended to reach *all fraudulent attempts* to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services . . . *provided in violation of* contract terms, specification, *statute or regulation* . . .

S.Rep. 345, 99th Cong., 2d Sess. 25, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

Congress furthermore expressly referred to violations of contractual obligations as imposing FCA liability, such that a FCA "claim" included:

> each and every claim submitted under *a contract*, loan guarantee, *or other agreement which was originally obtained by means of false statements* or other corrupt or fraudulent conduct, *or in violation of any statute or applicable regulation, constitutes a false claim*.

S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274 (emphasis added).

Ninth Circuit case law discussing the application of express false certification liability does not require that the "false statement" exist in the funding request. In *Hopper*, a teacher brought a qui tam action against the Los Angeles Unified School District ("LAUSD"). The relator alleged that her employer, LAUSD, submitted a triennial certification ("Local Plan") containing false general assurances that LAUSD will comply in the future with applicable federal law. *Id*. at 1267. The relator alleged that LAUSD then accepted federal funds for special education while violating the applicable federal law.

The Ninth Circuit held that in evaluating the express false certification claim, two major questions must be addressed: "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relations exist between the subject matter of the false statement and the event triggering Government loss." *Hopper*, 91 F.3d at 1266.

The Ninth Circuit granted summary judgment on the FCA claim because little to no relationship existed between the false statements in the Local Plan assuring regulatory compliance and LAUSD's receipt of the federal funds. In *Hopper*, federal funds were disbursed to school districts regardless of compliance with the federal law.

As the California Central District Court emphasized in another false certification case, the Ninth Circuit in *Hopper* dismissed the false certification claim because the promised compliance with the federal law in the Local Plan was not required for receipt of the federal funds, "no matter how *Hopper* is interpreted, it could not be more clear that the defendant in *Hopper* did not have

to comply with regulations in order to receive government funds." *Holder,* 10:8-10 (C.D.Cal. Dec. 5, 2003) (ER 178, 187).

The Ninth Circuit thus does not interpret the FCA to require that the "false statement" of compliance with the federal law be in the request for the federal funds in an express false certification case. The Ninth Circuit simply requires (1) a "false statement" of compliance with the federal law, and (2) a causal relationship between that false statement and the Government's payment of the benefit. In *Hopper*, the false statement existed in the Local Plan — not in the subsequent requests for the federal funds. The fatal flaw with the Hopper lawsuit, however, was not that the false statement existed in the Local Plan (instead of any requests for funds), but that the underlying funding statute, the IDEA, did not require the statements of compliance with the federal law.

In *Holder v. Special Devices, Inc.*, the relator alleged that his employer, SDI, executed contracts with the federal government requiring his employer to comply with environmental, health and safety requirements mandated by federal, state and local law. *Holder*, 5:1-5 (ER 178, 182). The employer then submitted funding requests to the government while violating the applicable laws. *Holder* at 3:4-11 (ER 178, 180).

The Central District of California denied the defendant's motion for summary judgment on the false certification claim, distinguishing *Hopper*. The court ruled that express false certification liability arose from the false statements in the contracts the defendant executed with the government:

> In the instant case, by contrast, the contract unequivocally stated that SDI was required to "comply with all applicable Federal, State and local laws." . . . it is clear that its compliance with federal regulations was the *sine qua non* of payment because the contract specifically requires compliance.

Holder at 11:1-7 (ER 178, 188).

In this case as well, it is clear that UOP's compliance with the HEA incentive compensation ban, as promised in UOP's agreement (the PPA) executed with the federal government, is the *sine qua non* of payment of HEA Title IV funds. The HEA mandates that UOP execute the PPA wherein UOP must promise compliance with the HEA incentive compensation ban as a core prerequisite to UOP's "initial and continuing eligibility" to submit Title IV funding requests. For an institution to be an "eligible institution" it

> shall . . . enter into a program participation agreement with the Secretary. The *agreement shall condition the initial and continuing eligibility of an institution* to participate in a program upon compliance with the following requirements:
>
> (20) The institution will not provide any commission, bonus or other incentive payment based directly or indirectly on success in securing enrollments . . .

20 U.S.C. §1094(a)and (a)(20) (emphasis added).

The PPA, the agreement that UOP executes with the federal government, furthermore mirrors the HEA language, stating in bold print on the first page:

> The execution of this agreement by the Institution and the Secretary is a prerequisite to the institution's initial or continued participation in any Title IV HEA Program.

(ER 50, ¶ 25; ER 69, 84).

The PPA includes an express provision concerning the incentive compensation ban:

> By entering into this Program Participation Agreement, the Institution agrees that:
>
> (1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority. . . .
>
> (22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments . . .

(ER 50, ¶ 26, 27; ER 71, 73, 85-87).

The district court ruling in this case — that Relators Hendow and Albertson fail to plead an express false certification case because the false statements of compliance are in UOP's agreement with the United States, rather than in its subsequent funding requests — is thus plainly erroneous. The district court's ruling **ignores the plain language of the FCA imposing liability based upon "false statements" to get a claim paid, without requiring that those statements be contained in the actual funding requests.** Such ruling **ignores legislative history indicating the FCA liability arises when government benefits are provided in violation of a contract with the government.** And the ruling **contradicts the Ninth Circuit ruling in *Hopper* that false certification liability arises when the false statement of compliance is the cause of the Government providing the benefit.**

Given that Relators' complaint alleges that UOP can only submit funding requests upon executing the PPA containing the assurances of compliance with the HEA incentive compensation ban, the complaint pleads a valid express false certification lawsuit.

C. Relators' Complaint Pleads an Express False Certification Case Based Upon UOP's Annual Express False Statements in its "Management Assertion Letters" of Compliance with the HEA Incentive Compensation Ban

The district court dismissed Relators' express false certification case alternatively based upon UOP's "management assertion letters," stating that Relators failed to identify a statute or regulation making this certification a prerequisite to receiving the Title IV funds (ER 205, p. 3, n. 1).

This dismissal is erroneous because **the HEA provides that an institution's audit reports containing the "management assertion letters" are a prerequisite for the institution's initial and continued eligibility to receive Title IV funds.** 20 U.S.C. 1094(c). Retention of Title IV funds depends upon UOP filing this annual compliance audit. The audit necessarily includes a "management assertion letter" affirming UOP's compliance with the HEA regulations. Failure to file the audit, including the letter, can lead to termination from the HEA program. 34 C.F.R. §600.41(a)(1). As such, the management letters impose FCA liability as "false statements" used to get a claim paid. 31 U.S.C. §3729(a)(2).

HEA and its accompanying regulations condition UOP's continued eligibility to apply for Title IV funds on the submission of an annual compliance audit performed by an independent certified public accountant. 20 U.S.C.

§1094(c)(1)(a); 34 C.F.R. §600.7(g) and §668.23(b). Compliance with the HEA and its accompanying regulations, including the commission sales prohibition, is ensured via the compliance annual audits:

> These audits — in particular, the compliance audit — are the vehicles by which the Department [of Education] attempts to ensure adherence to the statutory prohibition against commission sales along with the other requirements contained in the HEA and accompanying regulations.

(United States Combined Statement of Interest (ER 147)).

As part of the audit, UOP certifies in a management assertion letter compliance with the HEA incentive compensation ban. *Id.* at p. 6. The UOP "assertions may be relied upon by the Department whether or not a copy of the assertions is provided." *Id*. at p. 7.

It is immaterial that the letters are submitted to the auditor, rather than directly to the Department of Education. FCA imposes liability on those who make a false statement to get a claim paid. FCA establishes civil liability when a person or entity:

> (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;

31 U.S.C. §3729(a)(2); see also *United States v. Veneziale*, 268 F.2d 504, 505-06 (3rd Cir. 1959) (indirect and direct submissions for approval of claims impose FCA liability); *United States v. Neifert-White Co.*, 390 U.S. at 232 (FCA liability extends to all fraudulent attempts to cause the United States to pay out sums of money).

In this case, the false statement of compliance with the HEA in the management letters causes the United States to continue to pay on UOP's claims for Title IV funds. The HEA Title IV funding statute conditions UOP participation in the Title IV program upon UOP submitting these audits showing its compliance with the HEA incentive compensation ban. 20 U.S.C. §1094(c); see also 34 C.F.R. §600.7(g) and §668.23(b).

UOP is ineligible to submit any claims for HEA funds after the audit unless it submits this annual audit. UOP's failure to submit an audit can lead to termination from the HEA program. 34 C.F.R. §600.41(a)(1) (providing that the Secretary of Education may terminate an institution's eligibility designation if the institution fails to satisfy the regulatory requirements, with such requirements including the submission of an audit compliance report).

UOP's false statements of compliance in the management assertion letters cause the Government to approve UOP's continued eligibility for Title IV funds, in violation of the FCA.

As the United States explains:

> Each time [an educational institution's managers] signed a "management assertion letter," [the institution] expressly, or impliedly, certified its compliance with the Title IV requirements, including the commission sales prohibition. Although submitted to the auditor and not directly to the Department of Education, the FCA extends liability to those who cause a false statement to be used to get a claim paid.

(United States Combined Statement of Interest (ER 148, n. 6)).

Relators' Complaint alleges that the Government requires the annual compliance audit for UOP's continued eligibility to request Title IV funds (ER 51, ¶ 30). The Complaint furthermore alleges that the annual compliance audit incorporates and relies upon the management assertion letters (ER 51, ¶ 30). The Complaint alleges that the management assertion letter specifically falsely certifies compliance with the HEA incentive compensation ban (ER 51, ¶ 31).

Accordingly, the lower court erroneously dismissed Relators' express false certification claim based upon UOP's management assertion letters.

D. Relators' Complaint Alleges a Valid Implied False Certification False Claim Act Case

1. The Implied False Certification FCA Liability Theory

Every time UOP requests Title IV funds, UOP is liable under the FCA implied false certification theory for "impliedly" certifying compliance with the HEA incentive compensation ban that is a core prerequisite to requesting and receiving the Title IV funds. As one court explains, an "implied false certification claim is based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." *Mikes v. Straus*, 274 F.3d 687, 689 (2d Cir. 2001).

Implied false certification liability arises from the plain language of the FCA and its legislative history, as endorsed by six appellate circuits, and numerous district courts, including the Central District of California.

The plain language of the FCA establishes liability for the submission of a false claim in the absence of an express false statement. One way FCA premises liability is on the submission of a "false or fraudulent claim for payment or

approval," without the additional element of a false record or statement. 31 U.S.C. §3729(a)(1); *compare*, 31 U.S.C. §3729(a)(2) (liability imposed based upon the submission of a false statement). See also *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000) (explaining the different FCA statutory basis for express versus implied false certification liability).

The implied false certification theory is consistent with the FCA legislative history. This history indicates that Congress intended the FCA to apply whenever a defendant is ineligible for payment. The Senate Report concerning the FCA 1986 amendments states 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"*** (emphasis added). S.Rep. 99-345 at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274. The Senate Report furthermore notes that false claims "may take many forms, the most common being a claim for goods or services . . . *provided in violation of* contract terms, specification, *statute or regulation* . . ." *Id.* at 5274 (emphasis added).

Based on the plain language of the FCA, and its legislative history, six appellate circuits and numerous district courts, including the Central District of California, embrace the implied false certification liability theory. See *United States ex rel. Holder v. Special Devices, Inc.*, at 11:8-13:12 (ER 178, 188-190); United States Amicus Brief in *Holder* (citing to numerous district courts and six appellate circuits upholding the implied false certification theory) (ER 166 -173) *Shaw,* 213 F.3d at 531; *United States ex rel Augustine v. Century Health Services, Inc.*, 289 F.3d 409 (6th Cir. 2002); *Ab-Tech Constr., Inc. v. United States*, 31 Fed.

Cl. 429, 433-34 (Fed. Cl. 1994) (Ab-Tech liable based upon its submission of payment vouchers to the Small Business Administration (SBA) representing an implied certification of its continued compliance with the SBA program requirements), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision); *Mikes v. Straus*, 274 F.3d at 700 (implied false certification is appropriately applied where the underlying statute or regulation expressly states that payment is conditioned on compliance); *United States ex rel. Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2003) ("Courts have been ready to infer certification from silence, but only where [the implied] certification was a prerequisite to the government action sought"); *Scolnick v. United States*, 331 F.2d 598 (1st Cir. 1964) (imposing FCA liability based upon mere cashing of a check to which payee was not entitled, without any express representation of entitlement); *Murray & Sorrenson v. United States*, 207 F.2d 119, 124 (1st Cir. 1953) ("[I]n this case there was an implied false representation that bids were at a figure which the corporate defendant would have submitted in competition").

2. FCA Implied False Certification Liability Arises When Compliance with the Underlying Federal Law is Required, Without a "Magic Words" Analysis of the Underlying Statute

The district court dismissed Relators' implied false certification claim on the grounds that the HEA requirement of an "agreement" to abide by the incentive compensation ban and not a "certification" of compliance was fatal to a false certification lawsuit. In dismissing the claim, the district court held:

> Relators argue that UOP's claims constitute "implied certification" that UOP is in compliance with its agreement with the government. 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 the government benefit . . . Since this statute [the HEA] only requires that UOP enter into an agreement, and does not require a certification, Relators' argument is unpersuasive.

(ER 204-05, Order, 2:12-3:8) (citation omitted).

This ruling unduly narrows liability under the FCA, misconstruing the premise of false certification liability. False certification liability arises whenever *compliance* with the underlying federal law is a precondition to payment under, or participation in, a program. No authority exists that the focus of a false certification case is whether the language of the underlying federal law (federal statute or regulation) specifically requires a "certification" of such *compliance* for FCA liability.

The district court's ruling unduly restricts FCA liability to a "magic words" test. Only those federal statutes and regulations expressly stating that a "certification" is required would lead to FCA liability. The district court's narrow ruling contradicts the plain language of the FCA, its legislative history and false certification case law that instead focuses on whether defendant's knowing non-compliance with the particular statute or regulation renders the defendant ineligible for payment.

Nothing in the text of the FCA or its legislative history indicates that Congress intended the FCA to only reach those statutes or regulations expressly stating that a "certification" of compliance is required. The false certification liability theory stems from the plain language of the FCA. Under the express false certification theory, the defendant is liable for submitting a "false statement" of compliance with the law causing the government to pay on the claim. 31

U.S.C. §3729(a)(2); *Hopper*, 91 F.3d at 1266 ("whether the false statement is the cause of the Government's providing the benefit"). Under the implied false certification theory, the defendant is liable for submitting a false claim, without a false statement, implying compliance with the governing federal statute or regulation. 31 U.S.C. §3729(a)(1); see *Shaw* , 213 F.3d at 531. **Nowhere does the FCA state that the underlying law that the defendant violates must include only the magic word of a "certification" required for FCA liability.**

The FCA legislative history also focuses on the existence of false representations of *compliance* with the underlying governing law, without focusing on the express language of the underlying statute, or that such statute must require a "certification." The legislative history is very explicit that courts are to broadly interpret the FCA language to reach all false statements and implications of compliance with the law. This legislative history expressly refers to "agreements" forming the basis of FCA liability. Congress expansively defined a FCA "claim" as follows:

> each and every claim submitted under a contract, loan guarantee, *or other agreement which was originally obtained by means of false statements* or other corrupt or fraudulent conduct, *or in violation of any statute or applicable regulation, constitutes a false claim*.

S. Rep. No. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274 (emphasis added).

The seminal focus is whether the claim was submitted in a "violation of any statute or applicable regulation," and not that the wording of such statute or regulation must specifically include the "magic word" of "certification" required.

Following this Congressional directive, the Supreme Court mandates a broad statutory interpretation because FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (emphasis added).

The Supreme Court emphasizes that "the Court has consistently refused to accept a rigid, restrictive reading" of the conduct constituting a FCA "claim." *Id.* The Supreme Court thus mandates that FCA extends "to all fraudulent attempts to cause the United States to pay out sums of money." *Id*; see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 390 U.S. 228, 233 (1943); *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir.1983).

The district court's narrow ruling, requiring only the use of word "certification" in the underlying statute for a false certification case, leads to the absurd result that every defendant knowingly falsely claiming government funds would escape FCA liability if the underlying statute failed to contain the magic word of "certification" required, as opposed to other statutory language indicating that compliance with the statute was necessary for payment of claims. Following the district court's ruling, Congress would have to rewrite every statute to include the magic word "certification" required, rather than other language clearly indicating that compliance with the statute is mandated for receipt for government funds, or else the government would lose its primary litigative tool of combating fraud through the FCA.

False certification case law does not follow this narrow interpretation of imposing a "magic words" test on the underlying statute. **Courts do not analyze the underlying statute for whether it contains the specific word "certification." Instead, courts focus on whether compliance with the underlying statute at issue is a prerequisite to participation or payment.**

In a case very similar to the instant case, *Ab-Tech Construction Inc. v. United States*, Ab-Tech Construction won a minority-owned small business contract with the government pursuant to the Small Business Administration's (SBA) program for minority-owned businesses. Business organizations participating in the SBA 8(a) program are required to sign a "Statement of Cooperation" acknowledging their understanding of, and promised compliance with, the program's requirements for continuing eligibility. After signing the "Statement of Cooperation," Ab-Tech violated the program requirements by entering into a co-management contract with a non-minority owned enterprise, while continuing to payment vouchers to the government. 31 Fed. Cl. at 431-33. The vouchers that Ab-Tech submitted to the SBA did not contain any express misrepresentations. The Court upheld implied false certification FCA liability on Ab-Tech:

> Do the progress payment vouchers that Ab-Tech submitted to the Government represent false claims within the meaning of this statute? The answer is yes. The False Claims Act reaches beyond demands for money that fraudulently overstate an amount otherwise due; it extends "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, 88 S.Ct. 959, 962, 19 L.Ed.2d 1061 (1968). Seen from this broader perspective, Ab-Tech's claims clearly were fraudulent. *The payment vouchers represented an implied certification by Ab- Tech of its continuing adherence to the requirements for participation in the 8(a) program.*

Id. at 434 (emphasis added).

That the SBA statute in *Ab-Tech* required a "Statement of Cooperation" rather a "certification" was irrelevant. The sole focus of the court inquiry in *Ab-Tech*, consistent with false certification case law, was whether compliance with the underlying statute was a core prerequisite to participation in the federal program and receipt of the government funds.

In the instant case, as in *Ab-Tech*, the underlying statute, the HEA, mandates that educational institutions such as UOP sign the PPA promising to comply with the incentive compensation ban. Just as in *Ab-Tech*, UOP is ineligible to participate in the Title IV program, and request Title IV funds, unless it promises compliance with the HEA incentive compensation ban in the PPA. Just as in *Ab-Tech*, UOP's submission of claims for Title IV funds, while knowingly violating the HEA incentive compensation ban, subjects it to FCA liability for implying continuing adherence to the incentive compensation ban.

As one circuit court explained in upholding a verdict in an implied certification FCA lawsuit, liability attaches "if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned." *United States ex rel Augustine v. Century Health Services, Inc.*, 289 F.3d at 415. In *Augustine*, the defendant submitted cost reports for reimbursement to the federal government pursuant to the Medicare program knowing defendant was not in compliance with the applicable federal regulations that were a prerequisite to participation in the Medicare program. The *Augustine* court conducted no analysis of whether the language of the underlying statute expressly required a "certifica-

tion." Instead, the court focus, as with all false certification cases, was whether compliance with the federal law (regulations in that case) conditioned eligibility for payment. See also *Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2003) (summary judgment granted on the implied false certification case because the government contracts did not require compliance with the federal law at issue, 18 U.S.C. §207; no court analysis of the language of the underlying federal law, Section 207).

Again, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997), the Fifth Circuit denied the defendant's motion to dismiss because it could not determine whether payment was conditioned on defendant's compliance with the statute in question. *Id*. at 902-903. The Fifth Circuit remanded the case for further development by the district court. If the Fifth Circuit believed that the claims were subject to dismissal unless the underlying statute required expressly a "certification," the Fifth Circuit could have decided the case merely by looking at the express language of the statute for that "magic" language of "certification" required.

Again in *Shaw v. AAA Eng'g & Drafting, Inc.*, the court focus was whether compliance with the underlying federal law was a prerequisite to payment of federal funds, and not the wording of the underlying law. The defendant entered into a contract with the Government to take photographs for the United States Air Force. The contract required defendant to comply with the Environmental Protection Act guidelines and standards regarding "silver recovery." *Id*. at 527.

The United States alleged that the defendant not only submitted inflated invoices for the photography services but also failed to do the promised "silver recovery" in compliance with the EPA regulations. The defendant argued no FCA violation because it never falsely represented it did the "silver recovery" in the submitted invoices. The Court rejected this argument, ruling that defendant "impliedly" falsely certified compliance with the EPA regulations by submitting the invoices, knowing such compliance was a prerequisite to receiving the government funds. The *Shaw* court noted that FCA liability based on a false certification of compliance is permitted "whether the certification is express or implied." *Id*. at 531. Notably, the *Shaw* court did not address the language of the underlying EPA regulations as to whether they required a "certification" of compliance. The sole focus of the Court inquiry was whether the defendant's compliance with the EPA regulations conditioned the defendant's ability to request the federal funds under its contract with the government.

The Ninth Circuit upholds FCA liability in the absence of an express certification of compliance with federal law where compliance with federal law is a prerequisite to requesting and receiving federal funds. In *United States v. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999), *cert. den.*, 120 S.Ct. 2657 (2000), the relator brought a qui tam FCA lawsuit, alleging that his employer knowingly violated federal regulations that were a prerequisite to payment under the employer's contract with the government. Federal regulations required the defendant contractor to disclose to the federal government the identities of its subcontractors. In violation of the regulations, defendant withheld the name of a

subcontractor from the government ("Parsons ES did not list I&M among these companies, despite the fact that it was required to provide a 'complete and accurate' disclosure under the regulations.") The Court reversed summary judgment for the employer, ruling that this submission to the federal government, in violation of federal law constituted a false claim under the FCA, although the defendant never expressly certified that it disclosed all companies as required by federal law.

In *Holder, supra,* the Central District of California denied summary judgment for the defendant, upholding the Relator's implied false certification claim. The Relator alleged that his employer, SDI, executed contracts with the federal government requiring his employer to comply with environmental, health and safety requirements mandated by federal, state and local law. *Holder*, 5:1-5 (ER 182). As in the PPA in the instant case, the *Holder* contracts "specifically state that SDI must comply with a series of laws and regulations" *Holde*r, 13:17-26 (ER 190). The employer then submitted funding requests to the government while violating the applicable laws. *Holder* at 3:4-11 (ER 180). Upon reviewing the numerous appellate and district court opinions upholding implied false certification liability, the Central District of California in *Holder* denied the defendant's motion for summary judgment, ruling:

> Pursuant to the cases cited, *supra*, the Court finds that the false implied certification theory is consistent with the language and spirit of the FCA. *Hopper*, 91 F.3d 1261 does not discuss the theory of implied certification. Accordingly, *Hopper* does not control the outcome of the instant case. Defendant SDI may be liable under the FCA for failure to comply with federal regulations, whether or not affirmative certification of compliance was required.

Holder at 13:8-12 (ER 190).

The focus of the *Holder* opinion, consistent with implied false certification cases, was whether compliance with the federal law was required for payment of the federal funds. There was no analysis of the underlying federal laws for whether they required a "certification."

In *United States ex rel Bidani v. Lewis*, 264 F. Supp. 2d 612 (N.D.Ill.2003), the court denied the defendant's motion for summary judgment on the relator's implied certification claim based on the defendant's alleged violations of Medicare's anti-kickback statute ("AKS"). *Id.* at 615-16. The court found that compliance with the AKS was material to the Government's treatment of claims for reimbursement. *Id*. The court reached this finding even though the AKS does not expressly state that the Government's payment is conditioned on compliance with the AKS. See 42 U.S.C. §1320a-7b(b)(1). The court looked to the entire language of the statute, as well as the legislative history, to conclude that it was a prerequisite to payment.

Following implied false certification case law, Relators Hendow and Albertson plead a valid FCA implied false certification lawsuit. Relators' complaint alleges that compliance with federal law — the HEA and its regulations — is a prerequisite to UOP's "initial and continuing eligibility" to participate in the Title IV program and apply for Title IV funds (ER 49-50, ¶¶ 24-27).

The underlying statute, the HEA, is unequivocal that compliance with the incentive compensation ban is a core prerequisite to requesting Title IV funds. 20 U.S.C. §1094(a) and (a)(20) (emphasis added). UOP's agreement with the federal government — the PPA — is also unequivocal that compliance with the HEA is a core prerequisite to eligibility to request and retain Title IV funds, as set forth in bold print on the first page, and in the PPA terms expressly providing that UOP must adhere to the incentive compensation ban. (ER 50, ¶¶ 25-27; ER 70, 71, 73, 84-87).

As such, this case is indistinguishable from the body of implied false certification case law imposing FCA liability based upon the requests for federal funds, while the defendant knows it is not in compliance with the federal laws conditioning eligibility to request and retain such funds. The district court ruling, erroneously focusing on the language of the underlying statute and requiring it to contain the word "certification," directly contradicts this body of case law, as well as the plain language of the FCA, legislative intent, and Supreme Court directive to broadly interpret the FCA.

E. Relators' Complaint Alleges a Valid Promissory Fraud False Claims Act Case

The district court dismissed Relators' alternative liability theory of promissory fraud, on the ground that a false certification, prerequisite to receiving the federal funds, is a required element of the promissory fraud case. The court ruled that since the HEA did not require a certification, Relators could not recover under the separate legal theory of promissory fraud.

This ruling is erroneous because a false certification is not a required pleading element of a promissory fraud claim. The promissory fraud claim is an alternative liability theory to the false certification liability theories plead in this complaint.

This ruling is furthermore erroneous because a false statement of compliance with the HEA incentive ban, prerequisite to receiving the federal funds, is expressly set forth in UOP's annual PPAs, as mandated by the HEA for UOP's "initial and continuing eligibility" to request and receive Title IV funds.

1. The Complaint Satisfies the Promissory Fraud Pleading Requirements

Promissory fraud is simply a promise made without intending to honor the promise. Promissory fraud is actionable under the False Claims Act. *Hopper v. Anton*, 91 F.3d at 1267, citing *United States v. Shah*, 44 F.3d 285 (5th Cir. 1995).

Promissory fraud claims proceed under the FCA statutory language imposing liability for a "false statement" made to get a claim paid. 31 U.S.C. §3729(a)(2). As the *Shah* court explained, "[i]n practical effect, a false promise fraudulently given amounts to a *false statement* of an existing intent and it can be as destructive as the false statement of a material fact." *Shah*, 44 F.3d at 292, quoting the Fourth Circuit in *Elmore v. United States,* 267 F.2d 595, 603 (4th Cir.), *cert denied,* 361 U.S. 832 (1959). (emphasis added).

Promissory fraud exists when a party enters into an agreement without intending to be bound by its terms. See *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 367 (1997). In this case, promissory fraud liability arises when UOP

annually executes the PPAs with the Secretary of Education, without intending to be bound by its promise in the PPA that "[i]t will not provide . . . any commission, bonus or other incentive payment based directly or indirectly on success in securing enrollments . . . " (ER 50, ¶ 27).

In *Shah*, the court discussed the legal implications of the use of the word "will" in a promissory fraud claim. The court noted that the phrase "I will" signifies more than a mere prediction. The use of the word "will" means that the maker intends to do what is promised:

> In the present context, the statement "I will not disclose prices" is something more than a prediction; it clearly contains a necessary implication, signified by the phrase "I will," that the maker intends to do what he promises.

Shah, 44 F.3d at 291.

The *Shah* court reasoned that , "[s]ince a promise necessarily carries with it the implied assertion of an intention to perform, it follows that a promise made without such an intention is fraudulent . . . ." (citation omitted).

Relators' complaint pleads the elements of a promissory fraud cause of action. The California Supreme Court recognizes "promissory fraud" as a "subspecies of the tort action for fraud and deceit." *City Solutions Inc. v. Clear Channel Communications, Inc.*, 365 F.3d 835, 839 (9th Cir.2004), citing *Lazar v. Superior Ct.*, 12 Cal. 4th 631, 638 (1996).

The essential elements of promissory fraud are (1) a false promise, (2) knowledge of falsity (made without intent to perform), (3) intent to defraud

(induce reliance), (4) justifiable reliance, and (5) resulting damage. *City Solutions Inc.*, 365 F. 3d at 839; *Lazar*, 12 Cal. 4th at 638; BAJI Jury Instr. 12.40.

Relators' complaint pleads these essential promissory fraud elements. The complaint alleges UOP's false promise in the PPA that it will not pay incentive commissions:

> (a) UOP, in requesting and receiving its over one-half billion dollars a year in Title IV funds, every year falsely certifies to the DOE compliance with the incentive compensation ban in the Agreement it submits annually to the DOE.

(ER 50-51, ¶ 29).

The complaint details that UOP knows the promise is false when made and fully intends to defraud the Department of Education through the false promise. The above-cited complaint paragraph continues as follows:

> (b) 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. (c) The promises when made are false.

(ER 50-51, ¶ 29).

The Complaint alleges direct statements by Corporate Enrollment evidencing UOP's intent to defraud, including blatant boasting to UOP employees about creating "smoke and mirrors" to "fly under the radar" of the DOE regarding its incentive compensation ban violations (ER 49, 56-57, ¶¶ 19, 58).

The Complaint also alleges UOP's "deceptive tactics" designed to defraud the United States into believing its false promise in an on-going carefully orchestrated compensation scheme based on enrollment activities (ER 49, 56-57, ¶¶ 20, 58, 59).

The Complaint furthermore alleges the Departments' justifiable reliance on UOP's false promise contained in the PPA.. Upon UOP executing the PPA containing the false promise, the Department of Education authorizes UOP as eligible to request Title IV funds. The Department responds to UOP's requests for Title IV funds by directly wiring funds into a UOP account. Upon UOP executing the PPA containing the false promise, the Department of Education furthermore authorizes UOP to request funds from third-party lenders who wire government-insured funds directly into a UOP account (ER 51-52, ¶¶ 32, 33, 35).

Finally, the Complaint details the damages to the United States Government. UOP fraudulently induced the federal government to pay out over $3 billion in Title IV funds to UOP over the past six years (ER 44, 59, ¶¶ 1, 62, 65). Additionally, the United States Government pays all interest on the fraudulently obtained government-insured loans while the students are enrolled in classes and during authorized grace periods (ER 52-53, ¶ 37). When a student defaults on a loan, the United States Government furthermore must reimburse the lender for the fraudulently obtained loans (ER 52-53, ¶¶ 37, 38).

2. The Ninth Circuit Does not Add a "False Certification" Pleading Element to a False Claims Act Promissory Fraud Claim

The district court dismissed the Relators' promissory fraud claim, contending that the Ninth Circuit *Hopper v. Anton* decision required Relators to plead a false certification as part of their promissory fraud claim. The district court ruling is erroneous because the *Hopper* court did not add a new pleading element of pleading a false certification in a promissory fraud claim. Instead, the

Hopper court granted summary judgment for defendant on the promissory fraud claim based on a lack of evidence regarding the promissory fraud element of "knowing fraud" when the promise was made. Given that the Relators' complaint pleads UOP's knowing fraud when UOP falsely promises that it will not pay incentive commissions in its annual PPA, the district court erroneously dismissed the promissory fraud claim.

In *Hopper*, the Ninth Circuit recognized that promissory fraud is actionable in a regulatory violation FCA action. *Id.* at 1267. In *Hopper*, the defendant School District submitted triennial certifications promising to comply in the future with the applicable federal law. *Id.* at 1267.

The *Hopper* court granted summary judgment for the defendant, finding a lack of evidence supporting the element of a promissory fraud cause of action of a promise false when made. The *Hopper* court stated that "the promise must be false when made." *Id*. at 1267. The Court emphasized that there must be evidence of "knowing fraud" to survive summary judgment. The Court granted summary judgment for defendant, ruling that "the record is devoid of any such showing" *Id*. at 1267. The Court noted that the undisputed evidence instead showed the defendant's intent when making the promise to be in compliance with the applicable laws. *Id.* at 1267.

In this case, as set forth above, Relators' Complaint pleads that UOP's promise is "false when made." The Complaint furthermore details allegations of UOP's "knowing fraud," including direct statements by Corporate Enrollment and actions taken to use "smoke and mirrors" to "fly under the radar" of the

Department of Education concerning UOP's violations of its annual promise to abide by the HEA incentive compensation ban.

The district court's dismissal of Relators' promissory fraud claim was error.

CONCLUSION

The district court's dismissal of Relators' Complaint contradicts the plain language of the FCA, its legislative history, the Supreme Court directive to broadly interpret the FCA, and FCA case law.

Relators' Complaint alleges a valid express false certification FCA case, based upon UOP's express false statements of compliance with the HEA incentive compensation ban in its annual PPA and management assertion letters. The district court's ruling that the false statements must appear directly in the submitted funding requests directly contradicts FCA authority.

The FCA imposes liability based upon the submission of a "false statement," without requiring that such false statement exist only in the funding request.

The FCA legislative history is unequivocal that FCA liability includes claims submitted in violation of agreements (such as the PPA) and federal law (such as the HEA and its regulations).

FCA case law upholds liability when the defendant expressly promises compliance with federal laws in agreements with the federal government, as in this case, rather than in the subsequent funding requests.

The district court's dismissal of Relators' implied false certification case also directly contradicts FCA authority. The FCA and case law do not require the underlying federal law to use the magic word "certification." Instead, the focus is whether compliance with the underlying federal law conditions eligibility for program participation or payment of federal funds. Relators' Complaint, alleging that compliance with the HEA incentive compensation ban is a core prerequisite to eligibility for Title IV funds, pleads a valid implied false certification case.

Finally, the district court erroneously dismissed Relators' promissory fraud FCA case. The Complaint alleges all elements of a promissory fraud claim, including those elements fatally missing in the *Hopper v. Anton* case cited by the district court as grounds for dismissing this action.

Relators' accordingly respectfully request that this Court reverse and remand this lawsuit for further proceedings.

STATEMENT OF RELATED CASES

Plaintiffs/appellants are unaware of any related cases pending in this Court.

Dated: November 29, 2004

NANCY G. KROP AND DANIEL R. BARTLEY
Attorneys for Relators Mary Hendow and Julie Albertson

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By: Nancy G. Krop

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

The undersigned hereby certifies that the foregoing "Appellant's Opening Brief" complies with the type-volume limitations of FRAP 32(a)(7)(B)(i).

According to the "Properties" function of the WordPerfect 11.0 word processing software program used to prepare this brief, it contains precisely 13,697 words of text.

We have used *14-point* proportionately spaced type face was utilized, accounting for the larger-than-usual number of pages.

Consistent with FRAP 32(a)(4), this brief's top, bottom, left, and right margins are each precisely one inch in width.

Dated: November 29, 2004

NANCY G. KROP AND DANIEL R. BARTLEY
Attorneys for Relators Mary Hendow and Julie Albertson

_____

By: Nancy G. Krop

Proof of Service

I declare I am employed in the county of Marin, State of California, by Daniel Robert Bartley Law Offices, P.O. Box 686, Novato, CA, 94948-0686. I am over the age of 18 and not a party to this action. On today's date, I caused to be served, via First Class U.S. mail, true and correct copies of **"Appellant's Opening Brief"** upon counsel as follows:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed on this 29th day of November, 2004, at Novato, Marin County, California.

_____

Daniel Robert Bartley