IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. JASON SOBEK,	)	
Plaintiffs,	)	***Jury Trial Demanded***
v.	)	
EDUCATION MANAGEMENT, LLC; SOUTH UNIVERSITY, LLC d/b/a SOUTH UNIVERSITY ONLINE; ARGOSY EDUCATION GROUP, INC. d/b/a ARGOSY UNIVERSITY ONLINE; THE ART INSTITUTES INTERNATIONAL, LLC d/b/a THE ART INSTITUTES ONLINE; and EDUCATION MANAGEMENT CORPORATION,	)	**Civil Action No. 2:10-cv-00131-CRE**
	)	**Hon. Cynthia Reed Eddy**
	)	**Electronically Filed**
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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INTRODUCTION

Relator Jason Sobek's Complaint runs afoul of principles that both Congress and the courts of appeals have applied to prevent meritless claims under the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. ("FCA"). The Second Amended Complaint ("Complaint") mimics previous FCA lawsuits against Education Management Corporation (together with the other Defendants, "EDMC"), fails to bring forth the insider information that such claims require, states no legal basis for FCA liability, and falls well short of the basic pleading standards for fraud cases.[1] After conducting its own investigation of this case, the United States chose not to intervene.

Congress enacted the FCA to help police fraud against the government, not to serve as "a blunt instrument to enforce compliance" with federal regulations. *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 307 (3d Cir. 2011) (marks and citations omitted). Although it "offer[s] private relators bonanzas" if, using insider information, they prevail in *qui tam* actions brought on the government's behalf, the FCA and its treble damages and penalty provisions also drive some "individuals with not-so-valuable information to file *qui tam* suits." *United States ex rel. Leveski v. ITT Educ. Servs.*, No. 07-867, 2012 WL 1028794, at *2 (S.D. Ind. Mar. 26, 2012) (marks and citation omitted). The Complaint exemplifies the kind of opportunistic, unsubstantiated claims that should be dismissed with prejudice.

BACKGROUND

Private, for-profit educators, the largest of which are publicly traded, have become common targets for *qui tam* relators. As one court noted, while virtually every educational

[1] Mr. Sobek has also named a defendant that does not exist and another that has nothing to do with his allegations. No EDMC-affiliated entity does business as "The Art Institutes Online," and "The Art Institutes International LLC" is a parent company of various ground schools, none of which are named in the Complaint. These entities should be dismissed at the outset.

institution is subject to extensive federal regulations, schools like Defendants do not enjoy the sovereign immunity that insulates public institutions from FCA liability. *Id.*

EDMC is one of the largest providers of post-secondary education in North America. Compl. ¶ 11. Its accredited educational institutions offer a variety of programs at more than a hundred on-ground campuses in the United States alone, in addition to substantial on-line programs, and cater to more than 150,000 students every year. *Id*. ¶ 11-14. Many of the students at these schools and other proprietary institutions are simultaneously employed full-time, are raising families, or are from other groups that are typically underserved by public and non-profit schools, such as veterans and first-generation college enrollees.[2] EDMC's schools are accredited by national or regional accrediting agencies, licensed to offer educational programs in the States where they operate, and certified by the Department of Education ("DOE") as eligible to participate in federal student aid programs under Title IV of the Higher Education Act, 20 U.S.C. § 1070 *et seq*. ("HEA"). As is the case at virtually every public and non-profit school as well, these funds enable many students at EDMC's schools to obtain post-secondary degrees.

Also like other schools that receive federal funding, EDMC institutions agree to comply with a complex regulatory scheme. To participate in HEA programs, each institution enters into a contract with DOE known as a Program Participation Agreement ("PPA"), in which it agrees to comply with a plethora of federal laws, including, for instance, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Family Rights and Privacy Act of 1974, portions of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and all of

[2] *See* Def. Ex. 1, Dep't of Educ., National Center for Education Statistics, *Profiles of Undergraduate Students: 2007-08*, at Tables 3.2, 3.5-A, 3.7, 3.11, and 5.1 (Sept. 2010). Statistics from federal agencies can be judicially noticed and considered under Fed. R. Civ. P. 12(b)(6). *See Citizens Fin. Group, Inc. v. Citizens Nat'l Bank*, 383 F.3d 110, 127, n.2 (3d Cir. 2004).

the regulations implementing those statutes.[3] The PPA incorporates several hundred—if not several thousand—different laws and regulations with which an institution agrees to comply.[4]

Congress delegated to DOE the authority to enforce these regulations, and DOE utilizes a sophisticated administrative process, which entails, *inter alia*, a right to notice, hearing, and appeal. *See* 20 U.S.C. § 1094(c)(1)(F); *see also* 34 C.F.R. Subpart G. If the agency substantiates a suspected regulatory violation through this process, it may choose from a variety of possible responses, including: taking no action, imposing a fine, or restricting a school's HEA eligibility.

Qui tam relators are attempting to use the PPA to circumvent this regulatory process and to concoct million- and billion-dollar fraud claims under the FCA. In the PPA, institutions agree to comply with all "statutory provisions of or applicable to Title IV of the HEA [and] all applicable regulatory provisions prescribed under that statutory authority," including some that are more specifically enumerated in the agreement. *See* Def. Ex. 2 at 5; *see also id*. at 5-8. Among the DOE regulations that schools agree to follow are:

Misrepresentation Provisions	a series of regulations that enable DOE to address complaints that a school has misrepresented certain types of information to prospective students, 34 C.F.R. Subpart F (effective through June 30, 2011);
Administrative Capability ("SAP Regulation")	a requirement that schools must be "administratively capable" of handling HEA funds, and which presumes such capability if, *inter alia*, the school uses reasonable standards to measure students' satisfactory academic progress ("SAP"), 34 C.F.R. § 668.16(e) (effective through June 30, 2011); and

[3] *See* Def. Ex. 2, Program Participation Agreement at 5. Because the Complaint relies extensively on the PPA, this document can also be included with the pleadings and considered under Rule 12. *See Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 342 (3d Cir. 2004).

[4] DOE recognizes dozens of institutions within EDMC, each of which separately executes its own PPA. Each EDMC school offers a unique variety of programs and degrees, caters to different types of students, and, at any given time, may be implementing its own policies and procedures. Mr. Sobek's broad allegations that "Defendants" have violated the FCA inherently mischaracterize the degree of independence with which EDMC's institutions operate and interact with the government.

Ban on Incentive Compensation	a regulation restricting how schools may compensate the admissions personnel who recruit prospective students, 34 C.F.R. § 668.14(b)(22)(ii)(A) (effective through June 30, 2011).

Mr. Sobek is not the first relator to use the FCA as a vehicle for alleging the violation of DOE regulations at EDMC institutions. Indeed, the Complaint is at least the *third* FCA lawsuit to allege the same violations of the incentive compensation ban. *See infra*, Argument Part I.A.[5] As has been the case with many HEA-based *qui tam* suits prior to this one, each of Mr. Sobek's claims fails for multiple reasons, including jurisdictional defects, legal bars to relief, and fundamental insufficiencies of pleading.[6]

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[5] Because the FCA requires filing *qui tam* suits under seal, there may be other similar cases pending in this Court, of which EDMC is currently unaware.

[6] *See, e.g., United States ex rel. Pilecki-Simko v. Chubb Inst.*, No. 06-3562, 2010 WL 1076228 (D.N.J. Mar. 22, 2010) ("*Chubb I*") (dismissing claims regarding SAP, incentive compensation, and other DOE regulations), *aff'd*, 443 F. App'x 754 (3d Cir. 2011) ("*Chubb II*"); *United States ex rel. Torres v. Kaplan Higher Educ. Corp.*, No. 09-21733, 2011 WL 3704707 (S.D. Fla. Aug. 23, 2011) (dismissing with prejudice claims based on the incentive compensation ban); *United States ex rel. Diaz v. Kaplan Univ.*, No. 09-20756, 2011 WL 3627285 (S.D. Fla. Aug. 17, 2011) (dismissing with prejudice claims based on the incentive compensation ban and SAP regulations); *United States ex rel. Gatsiopoulos v. Kaplan Career Inst.*, No. 09-21720, 2011 WL 3489443 (S.D. Fla. Aug. 9, 2011) (dismissing with prejudice claims based on HEA advertising rules); *United States ex rel. Lopez v. Strayer Educ., Inc.*, 698 F. Supp. 2d 633, 644 (E.D. Va. 2010) (finding relator "is an opportunistic litigant" and dismissing incentive compensation claims); *Schultz v. DeVry Inc.*, No. 07-5425, 2009 WL 562286, at *2 (N.D. Ill. Mar. 4, 2009) (dismissing incentive compensation ban claim and citing other cases); *United States ex rel. Bott v. Silicon Valley Colleges*, 262 F. App'x 810 (9th Cir. 2008) (affirming dismissal of incentive compensation claims); *United States, ex rel. Gay v. Lincoln Tech. Inst.*, No. 01-505, 2003 WL 22474586 (N.D. Tex. Sept. 3, 2003) (dismissing with prejudice incentive compensation claims); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003) (same). *But see United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 07-461, 2012 WL 1658482 (W.D. Pa. May 11, 2012) (sustaining in part claims against EDMC based on alleged violations of the incentive compensation ban).

Meritless fraud claims based on alleged violations of DOE regulations are not limited to the FCA. Courts have also dismissed securities-fraud claims against EDMC and other proprietary educators that are based on the same regulations at issue in this case. *See, e.g., Gaer v. Educ. Mgmt. Corp.*, No. 10-1061, 2011 WL 7277447 (W.D. Pa. Aug. 30, 2011), *adopted*, 2011 WL 7277578, *appeal dismissed*, No. 11-3820 (3d Cir. Apr. 18, 2012) (dismissing incentive compensation and misrepresentation claims).

STANDARD OF PLEADING AND SUMMARY OF THE ARGUMENT

This lawsuit is premised on the allegation that violations of the misrepresentation, SAP, and incentive compensation regulations caused certifications of compliance to DOE to be false. *See* Compl. ¶ 47, 54, 60, 93, 122. The essential elements for "false certification" claims under 31 U.S.C. § 3729(a) require alleging "that (1) the defendant presented or caused to be presented … a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent." *Wilkins*, 659 F.3d at 305 (marks and citation omitted).[7]

Absent a violation of the underlying regulations, *qui tam* relators cannot establish the falsity necessary for false certification claims. *See Washington*, 2012 WL 1658482, at *8-10. In addition, to adequately plead the FCA's scienter element, plaintiffs must "allege facts that show the court their basis for inferring that the defendants acted with scienter." *Chubb I*, 2010 WL 1076228, at *7 (marks and citation omitted). FCA liability also cannot arise where the regulation that was allegedly violated does not constitute a condition of payment, but is a mere condition of participation in a federal program. *Wilkins*, 659 F.3d at 307.

In attempting to plead these elements, relators must allege "enough facts to state a claim to relief that is plausible on its face" and not merely speculative. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Pleading only "'a sheer possibility that a defendant has acted unlawfully'" will result in dismissal. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Additionally, Courts do not "credit bald

[7] Relevant portions of the FCA were amended pursuant to the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617 (2009) ("FERA"). FERA renumbered the provisions of 31 U.S.C. § 3729 and imposed staggered dates for the effectiveness of the various amendments to that section. *See Wilkins*, 659 F.3d at 303-04; *United States ex rel. Putnam v. E. Idaho Reg'l Med. Ctr.*, 696 F. Supp. 2d 1190, 1196 (D. Idaho 2010). The FERA amendments do not substantively affect this motion.

assertions or legal conclusions…. [L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Anspach v. City of Philadelphia*, 503 F.3d 256, 260 (3d Cir. 2007) (marks and citations omitted).

Because FCA claims sound in fraud, the heightened pleading standard of Rule 9(b) requires even greater particularity. *Washington*, 2012 WL 1658482, at *7. Rule 9(b) "serves the dual purposes of plac[ing] the defendants on notice of the precise misconduct with which they are charged and safeguard[ing them] against spurious charges of immoral and fraudulent behavior." *United States ex rel. Staniszewski v. Washington & Jefferson Coll.*, No. 05-1098, 2008 WL 2987213, at *2 (W.D. Pa. July 31, 2008) (marks and citations omitted). Thus, at a minimum, the Complaint must also plead the who, what, when, where and how of the alleged fraud. *Id*. *See also In re Rockefeller Ctr. Props. Litig*, 311 F.3d 198, 217 (3d Cir. 2002).

Here, Mr. Sobek alleges that Defendants violated each of the misrepresentation provisions, as well as DOE's SAP regulations and the ban on incentive compensation:

Misrepresentation Provisions	• Count I claims that in 2009, South University misrepresented the accreditation status of two nursing programs, erroneously informing prospective students that the Commission on Collegiate Nursing Education ("CCNE"), had accredited both programs. *See* Compl. ¶ 43. • Count II alleges that Defendants misled prospective students by gerrymandering certain employment statistics. *Id*. ¶ 50-53. • In Count III, Mr. Sobek alleges that EDMC misled prospective students by providing program cost information on a per-credit basis rather than on a total-cost basis, and by not discussing cost information for "more than fifteen minutes." *Id*. ¶ 59; *see also id*. ¶ 57.
Administrative Capability ("SAP Regulation")	• Count IV alleges that Defendants violated DOE requirements by not calculating SAP on a yearly basis for all students and by not strictly applying internal policies with respect to student appeals of SAP determinations, the calculation of SAP for students who transferred between programs, and class attendance. *Id*. ¶ 65-72.

Ban on Incentive Compensation	• Count V claims that Defendants paid their recruiters illicit incentive compensation by predicating salaries, promotions, and other employment decisions on the number of students each recruiter enrolled. *Id*. ¶ 73-93.
Reverse False Claims	• Finally, in Count VI, Mr. Sobek alleges that due to the foregoing violations, Defendants "failed to report students who should have been dropped … due to attendance violations and/or enrollment into … falsely certified" programs, and are therefore also liable for money that they purportedly should have returned to DOE. *Id*. ¶ 135.

But for multiple reasons, the Complaint does not state a claim and should be dismissed with prejudice in its entirety:

- ***First***, the Court lacks jurisdiction over the incentive compensation claims in Count V, which are substantively identical to those in prior *qui tam* lawsuits, including one in which the United States has intervened;

- ***Second***, Mr. Sobek has not made any factual allegations with respect to Argosy Education Group, Inc. and The Art Institutes International, LLC, and at the very least those Defendants should be dismissed. Mr. Sobek also cannot plausibly state any claim based on conduct that preceded or followed his employment at an EDMC institution. More generally, Counts I, II, III, and IV are not pled with either the plausibility or the particularity that federal rules require.

- ***Third***, the Complaint also fails to allege essential elements of an FCA claim. Mr. Sobek does not allege a violation of the placement and cost-misrepresentation regulations, or the SAP regulations at issue in Counts II, III, and IV; fails to plead facts raising an inference of scienter with respect to any claim; and the misrepresentation and SAP provisions do not constitute conditions of payment.

- ***Fourth***, other jurisdictional flaws undermine the Complaint. 31 U.S.C. § 3730(e)(4) precludes liability under Count II, which is based on publicly disclosed documents. Similarly, the administrative discretion that animates the SAP and misrepresentation provisions compels deferring adjudication of Counts I through IV under the doctrine of primary jurisdiction.

- ***Fifth***, Mr. Sobek may not repackage his allegations into a reverse FCA claim, and the allegations pertinent to Count VI otherwise fail to plead the necessary elements of a claim under 31 U.S.C. § 3729(a)(7).

Accordingly, the Complaint should be dismissed.

ARGUMENT

I. THE COMPENSATION CLAIM IN COUNT V IS BARRED BY THE FCA'S FIRST-TO-FILE PROVISION, 31 U.S.C. § 3730(b)(5).

Count V is premised on the alleged violation of the HEA's incentive compensation ban. However, at least two prior *qui tam* lawsuits have sought recovery from institutions that comprise EDMC for the same alleged violations. The existence of those *qui tam* suits mandates dismissal of this one based on the first-filed doctrine of 31 U.S.C. § 3730(b)(5) ("When a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."). Under this Section, "no *qui tam* plaintiff may recover for a false claim or share in a government settlement if his or her allegations repeat claims in a previously filed action." *United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 230 (3d Cir. 1998).

Section 3730(b)(5) is jurisdictional, and courts dismiss second-filed actions where a prior FCA case involves the same material elements and essential facts. *Id*. at 232-34. Otherwise, courts would "defeat the [FCA's] primary objectives…. [of] preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on the other." *Id*. at 233. *See also United States ex rel. Friedman v. Eckerd Corp.*, 183 F. Supp. 2d 724, 725 (E.D. Pa. 2001).

"When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). Moreover, where the challenge concerns "not an alleged pleading deficiency, but rather the actual failure of relator's claims to comport with the jurisdictional prerequisites," the court does not construe the allegations in a light most favorable to the plaintiff, and it is "entitled to consider and weigh evidence outside the pleadings." *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007) (citation omitted).

By the time Mr. Sobek filed his action on January 28, 2010, at least two other relators had already filed their own *qui tam* suits based on the same alleged violations of the incentive compensation ban. *See* Complaint, Docket No. 1, *United States ex rel. Washington v. Education Management Corp.*, No. 07-461 (filed April 5, 2007); Complaint, Docket No. 1, *United States ex rel. Buchanan v. South Univ. Online.*, No. 07-971 (filed July 12, 2007).[8] These lawsuits allege identical legal claims with respect to incentive compensation:

U.S. ex rel. Sobek **(Sec. Am. Compl.)**	***U.S. ex rel. Washington*** **(Compl.)**	***U.S. ex rel. Buchanan*** **(Compl.)**
¶ 93 – "Defendants' PPAs required they certify that they were in compliance with the … incentive compensation ban. Defendants' purposeful and flagrant disregard of [that] ban … caused their certifications to be false."	¶ 5 – "[E]ach of the defendant institutions entered into Program Participation Agreements (PPAs) with [DOE] in which it falsely promised it is obeying and will obey Title IV's incentive compensation ban, when in fact the institution was not in compliance with that ban."	¶ 17 – "Defendants, in violation of the PPA requirements of the HEA commission ban, base admissions representatives' salaries on their ability to secure enrollment."
¶ 76 – "Defendants' schools implemented the compensation 'Matrix' … to further increase student enrollments by incentivizing all of its admissions representatives to recruit as many new students as possible."	¶ 53 – "ADAs pressure prospective students to enroll in order to receive points on the Matrix and corresponding salary increases."	¶ 23 n.3 – "Each admissions representative is to think of something he/she has always wanted…. Then, based on Defendants' salary matrix, the admissions representatives are to compute how many students they would have to seat to achieve this goal."
¶ 93 – "[E]very federal student aid application submitted from one of Defendants' schools that violated the incentive compensation ban was a false claim for payment."	¶ 73 – "Every request for a federal grant, every GSL, and every interest payment on a subsidized Stafford loan made on behalf of a student attending an EDMC institution constitutes a separate false claim."	¶ 34 – "[W]hen Defendants request, receive and retain government-insured loan funds, Defendants know they are ineligible … because of their intentional unwillingness to adhere to the PPA…."

[8] As in this case, the United States declined to intervene in *Buchanan*, and even noted that Section 3730(b)(5) may have precluded relief in light of the *Washington* case. *See* Brief in Support at 2-3, Docket No. 67, *Buchanan*, No. 07-971. Mr. Buchanan eventually dismissed his claims voluntarily. *See also United States ex rel. Walters v. Educ. Mgmt. Corp.*, No. 10-2749 (E.D. Cal.) (voluntarily dismissing incentive compensation claims against EDMC that were filed after *Washington*).

The underlying facts on which Mr. Sobek relies were also pled in the previously filed *Washington* and *Buchanan* cases. For example, all three complaints allege that EDMC institutions illegally based employment actions, including promotions, favorable schedules, demotions, and terminations, on enrollment success, and that, as a result, EDMC's schools enrolled unqualified applicants or incompetent students. *Compare* Compl. ¶ 78, 85, 87, 91 *with Washington*, Compl. ¶ 51, 71 *and Buchanan*, Compl. ¶ 22, 27-28. Mr. Sobek's allegations regarding the need to "confirm" enrollment starts, the purportedly improper system for tracking enrollment numbers, and the alleged use of phantom non-enrollment considerations to deceive regulators also mirror claims that other relators already asserted. *Compare* Compl. ¶ 79, 81-82 *with Washington*, Compl. ¶ 54, 60, 66. Section 3730(b)(5) bars duplicative claims like this one.[9]

Moreover, the United States has intervened in *Washington* and supplemented the pleadings in that lawsuit with its own FCA and common law claims. *See* Joint Complaint in Intervention, Docket No. 128, *Washington*, No. 07-461 (filed August 8, 2011).[10] That intervention raises a second jurisdictional bar to Count V. Independent of Subsection (b)(5), the FCA also precludes any *qui tam* claim "which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. § 3730(e)(3). That the government's complaint-in-intervention in *Washington* is based on the same allegations and transactions and seeks the same types of relief as those enumerated in Mr. Sobek's Complaint thus prevents Mr. Sobek's attempt

[9] Mr. Sobek seems to recognize that prior *qui tam* cases preclude Count V, which was the lead claim in this lawsuit until the *Washington* and *Buchanan* actions were unsealed. *See* Complaint (Docket No. 2); Amended Complaint (Docket No. 7).

[10] The original relator in *Washington* has also filed two amended complaints. A chart comparing the operative pleadings in that case to Mr. Sobek's allegations makes clear the extent of the overlap between these lawsuits. *See* Def. Ex. 3.

to double-recover on the United States' behalf. *See United States ex rel. Batty v. Amerigroup Ill., Inc.*, 528 F. Supp. 2d 861, 876 (N.D. Ill. 2007); *Found. for Fair Contr., Ltd. v. G&M E. Contr., Inc.*, 259 F. Supp. 2d 329, 338-39 (D.N.J. 2003). Consequently, Count V should be dismissed for lack of subject matter jurisdiction under Sections 3730(b)(5) and 3730(e)(3).

II. THE MISREPRESENTATION CLAIMS IN COUNTS I, II, AND III, AND THE SAP ALLEGATIONS IN COUNT IV DO NOT SATISFY FED. R. CIV. P. 8 AND 9(b).

Mr. Sobek's other claims fail because the federal rules' plausibility and particularity pleading standards require more than the conclusory allegations in the Complaint.

A. Mr. Sobek Cannot Plausibly Allege That Any Fraud Occurred Over An Eight-Year Period Or At Argosy University And The Art Institutes.

At the outset, Mr. Sobek cannot plausibly state any FCA claim as broadly as he purports to do in the Complaint. The circumstances of his employment necessarily limit both the time period relevant to this case, and the parties against which he could possibly state a claim. As a general matter, Mr. Sobek's "information and belief cannot transform legal conclusions into plausible factual allegations." *Essex Ins. Co. v. Miles*, No. 10-3598, 2010 WL 5069871, at *3 (E.D. Pa. Dec. 3, 2010). The heightened pleading standard of Rule 9(b) requires even greater factual particularity, and courts dismiss FCA claims based on generalized assumptions that wrongdoing must have continued after a relator left. *See United States ex rel. Seal 1 v. Lockheed Martin Corp.*, 429 F. App'x 818, 821 (11th Cir. 2011); *United States ex rel. Corsello v. Lincare*, 428 F.3d 1008, 1013-1014 (11th Cir. 2005) (allegations based on "information and belief" lacked reliability because the relator "did not have access to company files outside his own offices"); *United States ex rel. Westfall v. Axiom Worldwide, Inc.*, No. 06-571, 2009 WL 1424213, at *4-5 (M.D. Fla. May 20, 2009).

Mr. Sobek only worked with the South University Online ("SUO") program at EDMC for a sliver of time, from June 2008 through November 2010, and apparently had no connection with

the ground schools affiliated with EDMC, including South University campuses. Compl. ¶ 9. Virtually all of the factual allegations in the Complaint stem from that period and relate only to South University, SUO, or to "Defendants" generally. *See, e.g.*, *id*. ¶ 39, 40, 43-45, 49, 58, 64, 70, 72. Mr. Sobek has not made factual allegations pertaining to Argosy Education Group, Inc. and The Art Institutes International, LLC, and he does not explain how he could plausibly allege what happened or what policies were in effect before June 2008 or after November 2010. Yet he baldly claims that all of Defendants were defrauding the government "[f]rom at least 2004, and upon information and belief, continuing through the present." Compl. ¶ 23.

More specific allegations are implausible for the same reason: Mr. Sobek alleges he was a recruiter for Online Higher Education-SUO, *id*. ¶ 9, and makes no allegation demonstrating how he could know what statements regarding accreditation *South University* made to prospective nursing students during *campus tours*. *Id*. ¶ 43. Similarly, Mr. Sobek's SAP allegations concern how Defendants tracked student progress *after* they were admitted and taking classes, and have no apparent connection to Mr. Sobek's responsibilities as a recruiter. Any claim that extends outside of SUO, Mr. Sobek's tenure or his job responsibilities is necessarily and impermissibly speculative. *See Seal 1*, 429 F. App'x at 821; *see also Staniszewski*, 2008 WL 2987213, at *3 (W.D. Pa. Jan. 30, 2008) (dismissing FCA claim where relator "failed to allege facts establishing how he came to know of the purportedly false claims").[11]

[11] The limited time period relevant to Mr. Sobek's claims precludes him from relying on versions of DOE regulations that did not take effect until 2011. *See* Compl. ¶ 42 (quoting 34 C.F.R. § 668.72 (effective July 1, 2011)); *id*. ¶ 55 (quoting 34 C.F.R. § 668.43 (effective July 1, 2011)). As a matter of both administrative law and constitutional due process, Mr. Sobek cannot retroactively impose new legal obligations on EDMC. *See* 5 U.S.C. § 551(4); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *E. Enters. v. Apfel*, 524 U.S. 498, 532-33 (1998) (plurality opinion). Unless otherwise noted herein, all citations to DOE regulations are to those versions in effect during Sobek's tenure at EDMC.

B. The Complaint Does Not Plead Plausible Or Particularized Factual Allegations To Support The Misrepresentation Claims.

Even with respect to the time in which Mr. Sobek was employed with EDMC, the misrepresentation claims of Counts I, II, and III fail as a general matter because the Complaint does not allege the "the who, what, when, where and how" of the alleged fraud.

DOE regulations afforded that agency the right to correct what it deems to be a "substantial misrepresentation made by [an] institution regarding the nature of its educational program, its financial charges or the employability of its graduates." 34 C.F.R. § 668.71(a). The Complaint purports to allege a regulatory violation with respect to each category: 1) South University allegedly misrepresented that two programs were accredited by CCNE, Compl. ¶ 43 (Count I); 2) Defendants misled students by excluding certain categories of graduates when calculating employability statistics that were used in marketing, *id*. ¶ 50 (Count II); and 3) Defendants provided cost information on a per-credit basis, *id*. ¶ 57 (Count III).

But, Mr. Sobek has failed to allege any example of the purported misrepresentations in practice, and thus cannot meet the particularity requirement of Rule 9(b). For instance, in *Chubb*, the court dismissed claims that the school published false employment placement rates to accrediting agencies because the pleadings did not "identify which statements regarding the placement rates were false (or conversely what the actual placement rates were), to what degree they were inflated or diminished, and upon whose instructions they were falsified." *Chubb I*, 2010 WL 1076228, at *8. Another court dismissed similar claims because "nothing in the Second Amended Complaint sets out what false statements were made to the accrediting bodies, when they were made, or who made them," and relators therefore failed to comply with Rule 9(b). *Diaz*, 2011 WL 3627285, at *7.

The omissions in this case are similarly dispositive. Assuming that the Complaint does describe the *what* of the alleged fraud—that an EDMC school purportedly misrepresented information and was therefore not compliant with DOE regulations—it fails to allege facts meeting the other requirements of Rule 9(b): the *who*, *when*, *where*, and *how*. For example, despite the bald allegation that in 2009, South University misrepresented the CCNE accreditation of two nursing programs, *see* Compl. ¶ 43, the Complaint does not describe any actual statement made, who made it, or the person to whom it was made. The heightened pleading standard of Rule 9(b) exists in part to ensure that Defendants will have adequate notice of the allegedly wrongful acts. *Staniszewski*, 2008 WL 2987213, at *2. Given that Mr. Sobek has not mustered a single, specific instance of this alleged misconduct, his claim is impossible to answer (let alone defend), and Rule 9(b) requires dismissal.[12]

The Complaint also lacks other facts that are essential under Rule 9(b). For instance, Mr. Sobek fails to:

- Make any accreditation allegations with respect to Argosy Education Group, Inc. and The Art Institutes International, LLC, and Count I should be dismissed at least as to those Defendants;
- provide any example of a statement that contained the allegedly misleading cost and placement information;
- allege either what cost and placement information EDMC's schools supposedly provided, or what information the schools *should* have provided instead;
- identify a single manager who instructed recruiters to misrepresent cost and accreditation information to students or prospective students;
- identify a single recruiter who misrepresented that information; or

[12] The failure is particularly critical because CCNE has indisputably accredited nursing programs at South University since at least 2005. *See* Def. Ex. 4 (accreditation letters from CCNE); *see also Daghlian v. DeVry Univ., Inc.*, 461 F. Supp. 2d 1121, 1145 (C.D. Cal. 2006) (judicially noticing accreditation status as a matter of public record). Without considering its actual content and the other surrounding circumstances, a statement cannot plausibly be considered false or misleading. *See Diaz*, 2011 WL 3627285, at *7.

- identify how any student suffered detriment from having purportedly relied on EDMC's alleged misrepresentations.

Without knowing what actual statements Mr. Sobek asserts were false or misleading, he has failed to provide sufficient notice of the claims against EDMC. *See Chubb I*, 2010 WL 1076228, at *8-9; *Gatsiopoulos*, 2011 WL 3489443, at *5. EDMC and the Court are left to guess at the *who*, *when*, *where*, and *how* with which Defendants supposedly violated the law, providing no assurance that Counts I, II, and III are not "frivolous suits brought solely to extract settlements." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997). Rule 9(b) thus requires dismissal.

C. The SAP Allegations In Count IV Are Also Insufficiently Pled.

Mr. Sobek's claims based on alleged violations of DOE's SAP regulations fail for the same reason. DOE regulations "establish[] standards that an institution must meet in order to participate in any Title IV, HEA program," including having the "administrative capability" to process HEA funds. 34 C.F.R. § 668.11(a); *see also id.* § 668.16. A school is presumptively deemed to be administratively capable if it meets sixteen different criteria, one of which is to apply "reasonable standards for measuring whether an otherwise eligible student is maintaining satisfactory academic progress in his or her educational program." *Id.* § 668.16(e). In turn, DOE will automatically consider SAP standards to be "reasonable" if they meet certain enumerated conditions, such as: 1) providing procedures by which students may appeal a SAP determination or re-establish their compliance with SAP requirements in the event of an adverse determination; 2) applying consistently among all students within certain categories; and 3) comprising both a qualitative measurement that considers each student's grades, as well as a quantitative component that considers progress toward program completion. *Id.* § 668.16(e)(1)-(6).

Here, Mr. Sobek alleges that SUO violated DOE regulations by not timely calculating SAP for "several hundred of its students each year," Compl. ¶ 65; by applying SAP procedures that were not identical to those applied at the other institutions that comprise EDMC, *id*. ¶ 67; and by violating internal policies regarding how student appeals and transfers are handled, *id*. ¶ 68-69. Mr. Sobek fails, however, to provide the factual allegations necessary to support his bald conclusions. The Complaint does not:

- Allege a single instance when an EDMC institution failed to timely measure a student's academic progress;
- describe any way in which SUO's standards for measuring SAP fell short of the guidelines set forth in DOE regulations;
- provide one example of a student who improperly received "repeated appeals" or transferred programs, or who avoided SAP milestones as a result;
- allege any *facts* about SAP procedures at Argosy Education Group, Inc. and The Art Institutes International, LLC, or explain how any Defendant besides SUO is relevant to Count IV.[13]

Without "examples of the alleged misconduct" to substantiate the Complaint's conclusions, Mr. Sobek's claims should be dismissed. *See, e.g.*, *Chubb I*, 2010 WL 1076228, at *9 (dismissing SAP claims because "[r]elators provide no examples of this alleged misconduct"). *See also Diaz*, 2011 WL 3627285, at *4 (dismissing SAP claims that failed to allege facts "as to any specific student or students who were not attending class, not doing their work, or otherwise not

[13] Mr. Sobek, who spent his entire EDMC career at SUO, *see* Compl. ¶ 9, does claim that he "believes" the SAP policies at Argosy Education Group, Inc. and The Art Institutes International, LLC violated federal law. *Id*. ¶ 66. But, he alleges no facts to support this conclusory allegation. FCA relators may not lump multiple defendants into the same general allegations. When a complaint names more than one defendant, "a plaintiff must, at a minimum identify the role of each defendant in the alleged fraudulent scheme." *United States ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011) (marks and citation omitted). In addition, Mr. Sobek's "belief" cannot be squared with his allegation that each institution affiliated with EDMC did not implement the same SAP policies. Compl. ¶ 67.

adequately performing but whom Defendants certified were performing in order to receive student loans").

III. MR. SOBEK FAILS TO ALLEGE ESSENTIAL ELEMENTS UNDER THE FCA.

In addition to an overall lack of the necessary particularity, Mr. Sobek's claims fail under any pleading standard because he does not allege each essential element of his FCA claims. He cannot rely on lawful conduct to state a claim; the Complaint does not plead any violation of the regulations underlying Counts II, III, and IV; Mr. Sobek does not attempt to plead scienter with respect to any Count; and he has not alleged the violation of a condition of payment.

A. Lawful Conduct Cannot Support FCA Liability.

At the outset, courts "cannot impose FCA liability" if the regulations with which defendant certified compliance did not prohibit the alleged misconduct. *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004). *See also Lee*, 655 F.3d at 992-93 (precluding liability on incentive compensation ban claims that were based on personnel decisions instead of compensation). Courts dismiss at the pleading stage FCA allegations about "enrolling unqualified students [and] the extreme pressure of admissions representatives to perform." *Diaz*, 2011 WL 3627285, at *7.

Nothing in DOE's regulations prohibits the use of third-party contractors, lead generators, or automatic dialing programs, and whether or not EDMC did so is therefore immaterial. Mr. Sobek cannot state a claim based on the recruiting culture at EDMC or the alleged "pressure to sell at all costs." Compl. ¶ 38; *see also id*. ¶ 21-40. As in *Diaz*, "[w]hile many of these allegations are quite detailed, there are no allegations in the Second Amended Complaint that demonstrate that these allegations, if true, would constitute a violation of any statute or regulation." *Diaz*, 2011 WL 3627285, at *7.

B. Counts II, III, And IV Do Not Allege Any Regulatory Violation.

To satisfy the falsity element in a false certification claim requires pleading the actual violation of the underlying government regulation. *See Washington*, 2012 WL 1658482, at *8-10 (dismissing FCA claims predicated on conduct that complied with applicable regulations); *Chubb I*, 2010 WL 1076228, at *9-10 (dismissing FCA claims based on the incentive compensation ban where the allegations demonstrated compliance with DOE regulations); *Diaz*, 2011 WL 3627285, at *4 (dismissing where relators could not plead how the alleged misconduct "violates any rules or regulations").

The SAP allegations in Count IV fail for this reason. Mr. Sobek does not claim that any Defendant is administratively incapable of processing HEA funds or that any SAP procedure is unreasonable. Instead, he complains that SUO contradicted its own "public pronouncements and internal policies"—not federal law and not Section 668.16(e). Compl. ¶ 65. According to the Complaint, SUO permitted too many appeals, *id*. ¶ 68, had an overly permissive transfer policy, *id*. ¶ 69, and did not have a class attendance policy, *id*. ¶ 70. SAP regulations, however, do not limit the number of appeals or restrict transfers. Nor has DOE ever required Defendants to take attendance. Mr. Sobek may feel that SUO "should have used" different policies to assess student progress, *id*. ¶ 68, but his mere disagreement with those policies does not state a violation of either DOE regulations or the FCA.

In the one instance where he tries to allege a violation of Section 668.16, Mr. Sobek claims only that "EDMC decentralized authority over the SAP evaluation procedures among its" various institutions. *Id*. ¶ 67. But, whether SAP standards differed among those institutions is immaterial. DOE regulations only state that SAP standards should "[p]rovide for consistent application of standards to all students within *categories of students*, e.g., full-time, part-time, undergraduate, and graduate students, and *educational programs* established by the *institution*."

34 C.F.R. § 668.16(e)(3) (emphases added). Consistent with that, each institution within EDMC may apply its own SAP procedures, and the Complaint does not allege that those procedures differed within any particular institution. Nor does it allege that SAP standards ever differed within the same category of students or educational program.[14] Mr. Sobek's inability to allege any violation of Section 668.16 is dispositive of Count IV.

The placement-misrepresentation claim in Count II fails for this reason as well. The Complaint alleges generally that "Defendants kept two sets of job placement statistics: one set was kept for accrediting agencies, the other set was kept for prospective students, employers, and the 'investment community,'" Compl. ¶ 50, and that, for the latter, Defendants purportedly hid the fact that they were excluding certain categories of graduates. *Id*. at ¶ 50-53. But even if true, DOE never required that marketing statistics be calculated one particular way. The agency only decided recently to regulate how certain schools should calculate placement statistics, but that regulation did not take effect until 2011 and cannot be applied retroactively. *See* 34 C.F.R. 668.6(b)(1)(iv) (effective July 1, 2011). No plausible inference of wrongdoing can be drawn from the bald allegation that unknown state regulators and accrediting agencies purportedly required EDMC to calculate placement statistics differently. *See* Compl. ¶ 50. The use of distinct calculation methods among the institutions that comprise EDMC did not infringe DOE regulations.[15]

[14] Contrary to the Complaint's suggestion, DOE also does not require institutions to measure SAP within any calendar timeframe. *See* Compl. ¶ 65. Instead, SAP regulations are keyed to *academic* years. *See* 34 C.F.R. § 668.16(e)(2)(ii)(B). For part-time or other non-traditional students, the relevant increment for measuring academic progress could necessarily—and permissibly—exceed a twelve-month period.

[15] For instance, the HEA and DOE regulations do prescribe required methods for calculating job placement statistics in two particular instances, neither of which is otherwise relevant here. *See* 20 U.S.C. § 1085(a)(5)(A)(iii)(III) (relating to petitions for regulatory relief from a DOE

Moreover, contrary to misleading its students and investors, *see* Compl. ¶ 50, EDMC schools disclose that their placement statistics do not account for certain types of graduates, including those who "choos[e] to stay at home full-time due to parental obligations" or "continue employment in an unrelated field."[16] As EDMC's public filing with the Securities Exchange Commission also states, these calculations

> exclude students who are pursuing further education, who are deceased, who are in active military service, who have medical conditions that prevent them from working, who are continuing in a career unrelated to their program of study because they currently earn salaries which exceed those paid to entry-level employees in their field of study, who choose to stay at home full-time or who are international students no longer residing in the country in which their school is located.

See Def. Ex. 5, Education Management Corp., Prospectus at 83 (Oct. 1, 2009).[17] EDMC was never required to do anything differently, and to permit Mr. Sobek to state a claim under Count II would be to create judicially new regulatory obligations that DOE itself did not find appropriate at the time.

(continued…)

order suspending HEA eligibility); 34 C.F.R. § 668.8(g)(1) (addressing how to prove eligibility for short-term vocational programs). And notably, the two methods are different.

[16] *See* The Art Institute of Pittsburgh, Graduate Employment Statistics, *available at* http://www.artinstitutes.edu/CareerServices/Employers/career_stats/aip.pdf (last visited May 29, 2012). South University's website makes similar disclosures. *See* South University, Gainful Employment for Online MBA Program, *available at* http://www.southuniversity.edu/online/business-administration-degree-mba-154812.aspx ("Certain graduates are excluded from cohort such as … stay at home parent[s] … and graduates who work[] in [an] unrelated established career.") (follow second "More Info" link under "Success" heading; last visited May 29, 2012).

[17] Because Mr. Sobek put the placement-statistic disclosures at issue in the Complaint, the full extent of these documents may be incorporated into the pleadings and considered under Rule 12(b)(6). *See Angstadt*, 377 F.3d at 342. In addition, the Court may judicially notice the content of securities filings and websites. *See Yusupov v. AG of the United States*, 650 F.3d 968, 985 n.23 (3d Cir. 2011) (website); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (SEC filings).

With respect to Count III, Mr. Sobek's own pleadings undercut his cost-misrepresentation claims: He admits that program costs were provided in writing and that recruiters were trained to "explain[] a program and its costs before walking prospects through the online application and financial paperwork necessary for enrollment." Compl. ¶ 59. *See also id.* ¶ 57. The Complaint does not allege that any school provided inaccurate cost information or refused to disclose such information when required to do so. Rather, Mr. Sobek's claim is premised on the allegation that for prospective students seeking post-graduate degrees, using a calculator was "a difficult task"—hardly a plausible theory of fraud against the government.[18]

Even assuming the truth of the allegations in Counts II, III, and IV, Mr. Sobek has failed to identify the violation of any underlying regulation and, therefore, failed to state a false certification claim under the FCA. *See Washington*, 2012 WL 1658482, at *8-10; *Diaz*, 2011 WL 3627285, at *4.

C. The Complaint Does Not Adequately Allege Scienter.

FCA claims must also be dismissed if they do not demonstrate that the defendant had "actual knowledge of the information" that is allegedly false, "act[ed] in deliberate ignorance of the truth or falsity of the information," or "act[ed] in reckless disregard of the truth or falsity of the information." *Chubb II*, 443 F. App'x at 759 (quoting 31 U.S.C. § 3729(b)(1)). While scienter is exempted from Rule 9(b)'s particularity requirement and may be pled generally under Rule 8, *see Washington*, 2012 WL 1658482, at *16, the plausibility standard of that Rule—as well as Third Circuit precedent—both require plaintiffs to "allege facts that show the court their

[18] In addition, the cost information provided to students at EDMC schools—which may be considered for purposes of the instant motion, *see supra* n. 17—provide detailed cost information, including application and enrollment fees, miscellaneous other fees, and total program costs. *See, e.g.*, Enrollment Agreement, Argosy University Online Programs, *available at* http://online.argosy.edu/documents/EnrollmentAgreement.pdf (last visited May 29, 2012).

basis for inferring that the defendants acted with 'scienter.'" *Burlington*, 114 F.3d at 1418. *See also Chubb I*, 2010 WL 1076228, at *7. Courts require "strict enforcement" of this element as a means of weeding out relators who rely solely on allegations of regulatory non-compliance. *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1270 (D.C. Cir. 2010).

No such facts are alleged here. Indeed, with respect to the accreditation- and cost-misrepresentation claims (Counts I and III, respectively), the allegations *negate* any inference of the scienter that is necessary to state an FCA claim:

- The Complaint alleges that recruiters were instructed *not* to misrepresent accreditation status to inquiring prospective students. *See* Compl. ¶ 43 ("'[I]f they do ask, you have to tell them that we are in the process.'"); *id*. at ¶ 44 ("'It is vitally important that we **do not** in any way indicate that our program will allow them to take advance practice nursing exams.'").

- Recruiters were also trained to discuss costs with potential enrollees, and EDMC schools provided that information in writing. *Id*. ¶ 57, 59.

A "plaintiff can plead himself out of court by alleging facts which show that he has no claim." *See Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997); *see also Gagliardi v. Clark*, No. 06-20, 2006 WL 2847409, at *4 (W.D. Pa. Sept. 28, 2006).

More generally, Mr. Sobek cannot state an FCA claim by baldly alleging "that [defendant] had notice that its submissions contained erroneous data … [and] intended to use erroneous data for the purpose of defrauding the Government." *Chubb I*, 2010 WL 1076228, at *8. He makes no relevant allegations regarding Argosy Education Group, Inc. or The Art Institutes International, LLC. And with respect to SUO, even if a student had been misinformed about a program's accreditation status, costs, or placement success, that fact alone would not establish a knowingly false certification of compliance with DOE regulations; "[t]he mere failure of a system to catch an error does not establish recklessness." *United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 110 (3d Cir. 2007). Consistent with Rule 8, Mr.

Sobek must allege facts that give rise to a plausible inference that a Defendant knowingly or recklessly defrauded the government by misleading its students. Yet there is no allegation in the Complaint concerning who directed the alleged misrepresentations, who devised the relevant policies, or who signed the PPAs or authorized any other alleged claim for payment. Nor are there factual allegations demonstrating what any of these people might have known about DOE compliance requirements or the truth or falsity of a school's certifications to the government.

The Complaint's general allegation that "Defendants … fail[ed] to adequately track students' progress" also cannot support a *fraud* claim regarding the SAP allegations in Count IV. Compl. ¶ 22. As with the misrepresentation claims, the Complaint does not identify any executive or other authorized employee—either at SUO or at any other Defendant—who devised the alleged SAP policies, who failed to properly execute those policies, who instructed others to disregard them, or who signed a PPA or authorized a claim for payment despite knowledge of non-compliance. The Complaint does not allege a single fact showing that any Defendant knowingly perpetrated a fraud on the federal government through the manner in which it designed and implemented SAP procedures. Mr. Sobek's failure to plead relevant facts demonstrating scienter is thus fatal to Counts I, II, III, and IV.

D. Mr. Sobek Does Not Allege The Violation Of A Condition Of Payment.

Courts recognize that false certification claims like Mr. Sobek's are "prone to abuse by the government and *qui tam* relators who, seeking to take advantage of the FCA's generous remedial scheme, may attempt to turn the violation of minor contractual provisions into an FCA action." *Sci. Applications*, 626 F.3d at 1270. The Third Circuit, therefore, holds that relators may not state a claim by merely alleging that a defendant participated in a federal funding program while violating applicable regulations. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 304 (3d Cir. 2008), *overruled on other grounds, United States ex rel. Eisenstein v.*

City of New York, 556 U.S. 928 (2009). FCA claimants must plead and prove "that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government," not a mere condition of participation. *Wilkins*, 659 F.3d at 309.

The court in *Washington* distinguished *Wilkins* because the incentive compensation ban was dissimilar to the Medicare regulations that the Third Circuit has considered, and because two other courts of appeals had permitted FCA claims based on the incentive compensation ban. *See Washington*, 2012 WL 1658482, at *19-20. But the claims in this case over which the Court may assert jurisdiction do not pertain to incentive compensation. The regulations relevant to Counts I through IV are far different than the narrow issue in *Washington*, closely analogous to the provisions that could not support an FCA claim in *Wilkins*, and compel dismissal.[19]

1. Mr. Sobek Cannot Rely On Catch-All Certifications of Compliance.

Initially, unlike in *Washington*, the PPA does not expressly reference either the misrepresentation regulations in 34 C.F.R. § 668 Subpart F, or the SAP provisions on which the Complaint relies, 34 C.F.R. § 668.16(e).[20] That agreement does not affirmatively prohibit any of

[19] There can be no doubt that the principles behind the condition-of-payment requirement are not limited to the healthcare context. *See, e.g., United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799-800 (8th Cir. 2011) (affirming dismissal where "[a]lthough Nelnet's alleged violation of [DOE] regulations may have jeopardized its continued participation in the various loan programs, it is implausible to believe, and the Complaint does not even allege, that these past violations would have affected decisions by [DOE] … to pay"); *United States ex rel. Lobel v. Express Scripts, Inc.*, 351 F. App'x 778, 780 (3d Cir. 2009) (non-precedential) (affirming dismissal of FCA claims because the relevant FDA labeling requirements are not conditions of payment); *United States ex rel. Bauchwitz v. Holloman*, 671 F. Supp. 2d 674, 691 (E.D. Pa. 2009) (holding that regulations governing federal research grants are not conditions of payment); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 502 (S.D. Tex. 2003) (holding that the incentive compensation ban is not a condition of payment).

[20] Defendants strongly disagree with the conclusion in *Washington* that the incentive compensation provision could be a condition of payment, and believe that the Third Circuit would find that *Wilkins* forecloses the claims in that case as well. Because there is no jurisdiction over Count V pursuant to 31 U.S.C. § 3730(b)(5) and 3730(e)(3), however, the

the misconduct that Mr. Sobek has alleged, and the Complaint relies instead on blanket certifications of compliance. *See, e.g.*, Compl. ¶ 47 (alleging in support of Count I that "Defendants' PPAs required that they certify that they complied with all federal regulations governing Title IV, HEA programs"); *see also id*. at ¶ 20, 27.

Courts reject FCA claims based on such sweeping, generalized certifications. *See, e.g.*, *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1218-19 (10th Cir. 2008) (precluding FCA liability where a medical provider merely certified that it would comply with "the laws and regulations regarding the provision of health care services"); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996) (rejecting FCA claim based on agreement to "meet all applicable requirements of state and federal law and regulations").

Moreover, in *Wilkins*, the Third Circuit reasoned that false certification claims may not be used to supplant the discretion that Congress vests in administrative agencies, which have the expertise and authority to address regulatory non-compliance:

> Federal agencies are unquestionably better suited than federal courts to ensure compliance with [administrative] regulations…. [B]y permitting *qui tam* plaintiffs to file suit based on the violation of regulations which may be corrected through an administrative process and which are not related directly to the Government's payment of a claim, courts unwisely would shift the burden of enforcing the … regulations to themselves even though the administration of the vast and complicated [administrative] program is best left to the administrators.

Wilkins, 659 F.3d at 310-11.

(continued…)

matter need not be addressed here. For present purposes, what is significant is that the provisions in the PPA and DOE regulations on which Mr. Sobek relies are materially different than what is at issue in *Washington*.

If any instance of alleged regulatory noncompliance were enough to state a claim, every entity that does business with the government and promises not to violate the law could face litigation seeking to compel the return—in trebled form, not including penalties—of all federal monies it received based on the slightest allegation of illegality. Remedial anti-discrimination legislation that is broadly incorporated into the PPA would become grounds for non-protected relators to try and disgorge years' worth of HEA funds from a school that allegedly suspended an employee for improper reasons. In other words, the FCA would become exactly the kind of "'blunt instrument to enforce compliance with all … regulations'" that the Third Circuit and other courts of appeals prohibit. *Rodriguez*, 552 F.3d at 304 (quoting *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001)). As a matter of law and a matter of policy, Mr. Sobek cannot state a claim based on generalized certifications of compliance.

2. Rule 12(b)(6) Requires Dismissing Claims That, Like Mr. Sobek's, Are Not Based On Conditions Of Payment

The language of the regulations themselves also precludes Sobek from plausibly alleging the violation of a condition of payment. Only violations that, if known, could lead to "immediate termination" of federal funding can give rise to liability. *Wilkins*, 659 F.3d at 309. If a regulatory violation is "correctable and, if corrected, will allow the [defendant] to continue as a … program participant," the regulation is not a condition of payment. *Id*. at 309. Thus, under Rule 12(b)(6), plaintiffs "must show that if the Government had been aware of the defendant's violations … it would not have paid the defendant's claims," *id*. at 307, and must cite examples or other evidence demonstrating how the underlying regulation is a condition of payment, *id*. at 310. In other words, federal regulations that do not "require perfect compliance as an absolute condition for receiving" payment, but rely on an "administrative mechanism for managing and

correcting [regulatory] violations which includes remedies for violations other than the withholding of payment otherwise due" cannot give rise to FCA claims. *Id*.

Mr. Sobek has failed to allege—and could not plausibly claim—that the misrepresentation and administrative capability regulations on which the Complaint relies are conditions of payment. With respect to Counts I, II, and III, DOE regulations reserve for the agency the discretion to determine in the first instance whether a given statement constitutes a misrepresentation regarding accreditation, financial charges, and graduate employability. *See* 34 C.F.R. § 668, Subpart F. Upon receiving a complaint, DOE must first "review[] the allegation or complaint to determine its factual base and seriousness," and determine whether the alleged misrepresentation was minor or substantial. *Id*. § 668.75(a). This is a question exclusively within DOE's purview; there is no private right of action to enforce the misrepresentation provisions. *See L'ggrke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992).

Moreover, DOE may only take action on certain kinds of misrepresentations. In the event that a minor misrepresentation is found, the regulations require DOE to provide the school with an opportunity to take voluntary corrective steps. *See* 34 C.F.R. § 668.75(b). Where a misrepresentation is thought to be substantial, the agency may—but need not—levy a fine or initiate suspension of eligibility hearings; and, at its discretion, DOE might prefer some "other appropriate action." *Id*. § 668.75(c)(2). As the agency confirmed when it recently revised these provisions, "[d]epending on the facts presented, an appropriate response could run the gamut from no action at all to termination" of eligibility. 75 Fed. Reg. 66914.

Mr. Sobek cites to nothing in the PPA, any statute or regulation, any administrative material, or anything else demonstrating that DOE expressly conditions HEA payments on compliance with 34 C.F.R. Subpart F. By itself, the lack of any allegation or evidence that a

misrepresentation will lead to the immediate termination of federal funding compels dismissal for failure to state a claim. *Wilkins*, 659 F.3d at 309. But in addition, as in *Wilkins*, there is an "administrative mechanism for managing and correcting" alleged misrepresentations that includes requests for voluntary corrections. 34 C.F.R. § 668.75(b). By no means do the regulations "require perfect compliance as an absolute condition for receiving" payments. *Wilkins*, 659 F.3d at 310.

The same is true for the questions of administrative capability that underlie Count IV. Mr. Sobek points to nothing indicating that perfect compliance with any specific SAP policy is a necessary prerequisite for HEA payments. Nor could he. Administrative discretion is again central to the operation of these regulations, which only describe what will be presumptively deemed to constitute administrative capability and reasonable SAP standards; the regulations are otherwise silent as to the precise contours of schools' requirements and do not affirmatively prohibit specific conduct. *See* 34 C.F.R. § 668.16. This is consistent with the regulatory intent of the SAP provisions, which were meant to "provid[e] parameters for institutions to use … while preserving essential institutional discretion in setting their own specific standards." 48 Fed. Reg. 45670.[21] Thus, in practice, SAP concerns do not automatically terminate federal funding, but instead "*may* lead" DOE to initiate administrative proceedings, and Mr. Sobek cannot premise FCA liability on the allegations in Count IV. 34 C.F.R. § 668.11(b) (emphasis added).

The Complaint does not point to any authority that would suggest FCA claims may proceed on the basis of alleged violations of the misrepresentation and SAP regulations, the operation of which relies on the same species of administrative discretion that was dispositive of

[21] As with the misrepresentation provisions, there is also no private cause of action to enforce Section 668.16(e). *See Robinett v. Delgado Cmty. College*, No. 99-2545, 2000 WL 798407, at *7 n.5 (E.D. La. June 19, 2000).

the claims in *Wilkins*. Were he able to state an FCA claim, Mr. Sobek would effectively convert federal courts into super-agencies with first-line responsibility for interpreting, enforcing, and sometimes creating new administrative obligations. The Complaint purports to state claims predicated on the *reasonableness* of Defendants' SAP policies and the allegedly *misleading* nature of certain—unidentified—statements. DOE officials, not federal courts, are the arbiters of what those phrases mean in any given instance. To delegate that responsibility to the judicial process instead will leave educators with no guidance as to the propriety of their conduct and no choice but to accept the burdens and expenses of regulation through private litigation, which are particularly draconian in the context of the FCA.

The principles that compelled dismissal in *Wilkins* are not specific to claims based on Medicare or Medicaid regulations; they operate as a limitation on the *FCA*—and, specifically, on false certification claims like Mr. Sobek's. Courts should not "'read the FCA, a statute intended to protect the government's fiscal interests, to undermine the government's own regulatory procedures,'" no matter where in the C.F.R. those procedures are found. *Wilkins*, 659 F.3d at 310 (citation omitted). Here, DOE's regulatory flexibility is intentional and a critical predicate to any finding of non-compliance with the regulations on which Mr. Sobek has based his claims.[22] The Complaint makes no attempt to establish how compliance with the misrepresentation and SAP provisions is related to DOE's decision to distribute HEA funds, and

[22] In contrast to the discretion and flexibility built into the administrative capability and misrepresentation provisions, Congress knew how to specify the type of misconduct that would definitively result in the termination of HEA funding. *See* 20 U.S.C. § 1094(d)(2) (schools that do not derive at least ten percent of their revenue from non-HEA sources "shall be ineligible to participate in [HEA] programs … for a period of not less than two" years); 20 U.S.C. § 1085(a)(2)(A) ("An institution whose cohort default rate is equal to or greater than the threshold percentage specified in subparagraph (B) for each of the three most recent fiscal years … shall not be eligible to participate in a program….").

Mr. Sobek thus may not supplant Congress' and DOE's deliberate administrative scheme with FCA litigation. The Court should dismiss Counts I through IV.

IV. OTHER JURISDICTIONAL FLAWS UNDERMINE THE COMPLAINT.

A. The Job Placement Misrepresentation Claim Is Barred By The FCA's Public Disclosure Bar, 31 U.S.C. § 3730(e)(4)(A).

The FCA also removes jurisdiction over claims that, like the employability misrepresentation claims of Count II, are premised on publicly available information:

> No court shall have jurisdiction over an action … based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless … the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (amended Mar. 23, 2010).[23] "[O]pportunistic plaintiffs who have no significant information to contribute of their own" may not bring *qui tam* actions. *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1406 (2010) (marks and citation omitted).

Section 3730(e) is not limited to instances where every facet of the fraud has been made public; it is enough that the allegations are "'supported by'" or "'substantially similar to'" the prior disclosure. *Atkinson*, 473 F.3d at 519 (citation omitted). "[A] disclosure need not specifically show fraud, but must merely be 'sufficient to put the government on notice of the likelihood of related fraudulent activity.'" *Lopez*, 698 F. Supp. 2d at 641 (citation omitted).

[23] Congress amended 31 U.S.C. § 3730(e)(4) on March 23, 2010, months after Relator filed his Complaint. *See* Pub. L. No. 111-148, 124 Stat. 119, 901-02 (2010). The amended statute does not, therefore, apply in this case. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.1 (2011).

As set forth above, Count II alleges that EDMC schools omitted certain categories of graduates when calculating the placement statistics that they marketed to prospective students. Compl. ¶ 50. But that supposedly hidden information has been publicly disseminated for years to students, employers, and investors, both through schools' websites and EDMC's publicly available securities filings. *See supra*, Argument Part III.B. *See also United States v. Collegiate Funding Servs.*, No. 11-1103, 2012 WL 835747, at *10 (4th Cir. Mar. 14, 2012) (unpublished) (holding that because a registration prospectus is "produced at the request of and … made public by the SEC in the course of carrying out its activities as a federal agency," it qualifies as an administrative report). The method by which EDMC calculated its marketing statistics was publicly known well before Mr. Sobek filed his Complaint, and he cannot proceed with FCA claims based on that information. *See Atkinson*, 473 F.3d at 519.

In addition, Mr. Sobek has failed to allege that the exception to the public disclosure bar applies. The FCA permits duplicative claims *if* the relator has direct and independent knowledge of the facts alleged *and* voluntarily provided the information to the government before filing his *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). However, jurisdictional allegations cannot be conclusory, and to qualify as an "original source" under this Section, relators must plead facts demonstrating the investigative efforts they undertook to develop the allegations, and how they disclosed the information before filing suit. *See United States v. Sodexho, Inc.*, No. 03-6003, 2009 WL 579380, at *14 (E.D. Pa. Mar. 6, 2009), *aff'd*, 364 F. App'x 787 (3d Cir. 2010). Sobek has done neither; the Complaint does not even allege in conclusory fashion any element of the original source doctrine. Count II should, therefore, be dismissed.

B. Primary Jurisdiction Requires Deferring To DOE With Respect To Counts I, II, III, And IV.

The administrative discretion built into DOE's misrepresentation and SAP regulations prevent Mr. Sobek from pursuing Counts I, II, III, and IV for another reason besides the condition-of-payment requirement. Where "enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body," *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956), deference to that agency under the doctrine of primary jurisdiction promotes "proper relationships between the courts and administrative agencies charged with particular regulatory duties." *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 253 (3d Cir. 2007) (quoting *W. Pac. R.R. Co.*, 352 U.S. at 63); *see also Laveson v. Trans World Airlines*, 471 F.2d 76, 79-84 (3d Cir. 1972); *Aronson v. IDT Corp.*, No. 02-1706, 2003 WL 1790970, at *4-5 (W.D. Pa. Apr. 3, 2003). The doctrine of primary jurisdiction should independently counsel this Court to refrain from deciding Counts I, II and III in the first instance.

Here, the Complaint cannot plausibly claim non-compliance with DOE regulations absent a predicate agency finding that some violation has occurred. And, with respect to both his misrepresentation and SAP allegations, DOE has the exclusive authority to make such a finding. The HEA and DOE regulations both leave to the Secretary of Education the determination whether a school has committed a sanctionable "substantial misrepresentation," 34 C.F.R. § 668.75, or whether a school should be deemed "administratively incapable" of processing HEA funds. *Id*. § 668.16. At the very least, the Court should, therefore, stay Counts I through IV to permit agency review. *See Ellis v. Tribune TV Co.*, 443 F.3d 71, 73 (2d Cir. 2006) (applying primary jurisdiction doctrine where question of legality of defendant's action was an "issue squarely within the agency's expertise and discretion").

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR REVERSE FALSE CERTIFICATION.

Count VI alleges that "Defendants … failed to report students who should have been dropped … due to attendance violations and/or enrollment into programs falsely certified by Defendants in order to 'conceal, avoid, or decrease' an obligation by Defendants to return federal funding….." Compl. ¶ 135. This type of "reverse" claim implicates a unique set of elements and requirements that Mr. Sobek cannot properly allege.

Unlike other FCA claims, which typically allege the use of false statements to coerce payment from the government, "reverse" FCA claims under 31 U.S.C. § 3729(a)(7) are "centered around an alleged fraudulent effort to reduce a liability owed to the government." *Atkinson*, 473 F.3d at 513 n.12. Such claims may not be redundant of FCA claims asserted under other provisions of Section 3729. *United States ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d 505, 514-15 (E.D. Pa. 2010). Instead, relators must make unique factual allegations to establish both that a clear obligation to pay arose, and that Defendants subsequently used a misrepresentation to avoid that obligation. *Quinn*, 382 F.3d at 446. The mere potential for future liability at the time a false claim is made does not give rise to a cause of action under Section 3729(a)(7); "a plaintiff may not state a reverse false claim unless the pertinent obligation attached *before* the defendant made or used the false record or statement." *Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 734 (6th Cir. 1999).

The allegations preclude any reverse FCA claim. To the extent it relies on the purported enrollment of students "into programs falsely certified by Defendants," Compl. ¶ 135, Count VI is redundant of the other claims and fails for that reason alone. Moreover, Count VI seeks recovery based on every "federal student aid *application*" for loans and grants. Compl. ¶ 47, 54, 60, 93 (emphasis added); *see also id*. ¶ 97 (premising liability on the "requests for federal grants or guaranteed student loan money"). Those requests necessarily *preceded* any obligation to

repay federal aid money that was allegedly retained improperly. Because relator does not allege a single statement, false or otherwise, that any EDMC school purportedly made in order to avoid a concrete and pre-existing obligation to pay the government, Count VI also fails. *See Am. Textile Mfrs. Inst.*, 190 F.3d at 734.

In addition, the reverse FCA claim is factually deficient. The Complaint does not identify any "improperly enrolled students." Nor does it allege a single instance when any institution affiliated with EDMC was obligated to return funds, did not return funds despite that obligation, and made a subsequent claim to avoid its liability to the government with the requisite knowledge that the statement was false. Because Count VI has nothing but speculative legal conclusions masquerading as facts, it fails to meet the basic plausibility and particularity requirements of the federal rules.

CONCLUSION

Many of the flaws in Mr. Sobek's Complaint are common to multiple claims. Others are unique to particular Counts. Whether the flaws that undermine this case overlap or complement one another, however, a count-by-count summary demonstrates that, in each instance, the Complaint has failed to state a claim for multiple reasons:

Count I:
- The Complaint does not allege with any particularity what statements were purportedly misleading, and it provides no other context as Rule 9(b) requires.
- The Complaint does not allege that a misrepresentation was made knowingly, any person who signed a PPA was aware of the alleged misrepresentation, or any other facts that could suggest scienter.
- DOE regulations have a built-in mandate that allows for the voluntary correction of misstatements, the Complaint has not alleged the violation of a condition of payment, and primary jurisdiction would compel deferring to DOE.

Count II:
- The Complaint does not satisfy the requirements of Rule 9(b), and Mr. Sobek fails to allege the violation of the underlying regulation.
- The Complaint does not allege scienter.
- The misrepresentation provisions are not conditions of payment, and primary jurisdiction would compel deferring to DOE.
- The Court lacks jurisdiction under 31 U.S.C. § 3730(e).

Count III:
- The Complaint does not satisfy the requirements of Rule 9(b) and also does not identify any underlying regulatory violation.
- The Complaint does not allege scienter.
- The misrepresentation provisions are not conditions of payment, and primary jurisdiction would compel deferring to DOE.

Count IV:
- The Complaint fails to satisfy Rule 9(b)'s particularity requirements.
- The Complaint does not allege any underlying regulatory violation.
- The Complaint does not allege scienter.
- Only DOE can find that EDMC was not administratively capable of receiving HEA funds or that EDMC did not apply reasonable SAP procedures, the Complaint does not allege the violation of a condition of payment, and primary jurisdiction would compel deferring to DOE.

Count V:
- The Court lacks jurisdiction under 31 U.S.C. § 3730(b) and (e).

Count VI:
- Mr. Sobek cannot repackage his other claims as reverse FCA claims.
- The Complaint does not identify any false statement that EDMC purportedly made in order to avoid a reimbursement obligation to the government.

Accordingly, EDMC respectfully requests that the Court dismiss this case with prejudice.

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Respectfully submitted,

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