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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SCOTT ROSE, et al.,
Plaintiff-relators,
v.
STEPHENS INSTITUTE,
Defendant.

Case No. 09-cv-5966-PJH

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

United States District Court
Northern District of California

On March 9, 2016, defendant's motion for summary judgment came on for hearing before this court. Plaintiff-relators Scott Rose, Mary Aquino, Mitchell Nelson, and Lucy Stearns ("relators") appeared through their counsel, Stephen Jaffe and Kenneth Nabity. Defendant Stephens Institute, doing business as Academy of Art University ("defendant" or "AAU"), appeared through its counsel, Steven Gombos and Gerald Ritzert. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

This case arises under the False Claims Act. Relators generally allege that AAU fraudulently obtained funds from the U.S. Department of Education by falsely alleging compliance with Title IV of the Higher Education Act ("HEA").

The HEA requires colleges and universities that receive federal funds to enter into a Program Participation Agreement ("PPA") with the Department of Education. The PPA requires schools to comply with certain regulations, including one prohibiting the payment

1 of “any commission, bonus, or other incentive payment based directly or indirectly on
2 success in securing enrollments or financial aid to any persons or entities engaged in any
3 student recruiting or admissions activities.” 20 U.S.C. § 1094. This is referred to as the
4 “incentive compensation ban,” and is designed to prevent schools from incentivizing its
5 recruiters to enroll poorly-qualified students who will not benefit from the subsidy and may
6 be unable or unwilling to repay federal student loans.

7 The regulations did contain a “safe harbor” to the incentive compensation ban,
8 allowing schools to provide “payment of fixed compensation, such as a fixed annual
9 salary or a fixed hourly wage, as long as that compensation is not adjusted up or down
10 more than twice during any twelve month period and any adjustment is not based solely
11 on the number of students recruited, admitted, enrolled, or awarded financial aid.” 34
12 C.F.R. § 668.14(b)(22)(ii)(A). However, relators allege that AAU’s actions fall outside of
13 the safe harbor, because it did award compensation based solely on enrollment success.

14 On December 21, 2009, relators filed suit, asserting two related causes of action
15 under the False Claims Act: (1) knowingly presenting, or causing to be presented, a false
16 or fraudulent claim for payment or approval under 31 U.S.C. § 3729(a)(1)(A), and (2)
17 knowingly making, using, or causing to be made or used, a false record or statement
18 material to a false or fraudulent claim under 31 U.S.C. § 3729(a)(1)(B). After the
19 government declined to intervene, relators filed the operative second amended complaint
20 (“SAC”), asserting the same two causes of action. AAU now moves for summary
21 judgment.

22 **DISCUSSION**

23 A. Legal Standard

24 A party may move for summary judgment on a “claim or defense” or “part of . . . a
25 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there
26 is no genuine dispute as to any material fact and the moving party is entitled to judgment
27 as a matter of law. Id.

28 A party seeking summary judgment bears the initial burden of informing the court

1 of the basis for its motion, and of identifying those portions of the pleadings and discovery
2 responses that demonstrate the absence of a genuine issue of material fact. Celotex
3 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the
4 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
5 dispute as to a material fact is “genuine” if there is sufficient evidence for a reasonable
6 jury to return a verdict for the nonmoving party. Id.

7 Where the moving party will have the burden of proof at trial, it must affirmatively
8 demonstrate that no reasonable trier of fact could find other than for the moving party.
9 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue
10 where the nonmoving party will bear the burden of proof at trial, the moving party may
11 carry its initial burden of production by submitting admissible “evidence negating an
12 essential element of the nonmoving party’s case,” or by showing, “after suitable
13 discovery,” that the “nonmoving party does not have enough evidence of an essential
14 element of its claim or defense to carry its ultimate burden of persuasion at trial.” Nissan
15 Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105-06 (9th Cir. 2000);
16 see also Celotex, 477 U.S. at 324-25 (moving party can prevail merely by pointing out to
17 the district court that there is an absence of evidence to support the nonmoving party’s
18 case).

19 When the moving party has carried its burden, the nonmoving party must respond
20 with specific facts, supported by admissible evidence, showing a genuine issue for trial.
21 Fed. R. Civ. P. 56(c), (e). But allegedly disputed facts must be material – the existence
22 of only “some alleged factual dispute between the parties will not defeat an otherwise
23 properly supported motion for summary judgment.” Anderson, 477 U.S. at 247-48.

24 When deciding a summary judgment motion, a court must view the evidence in the
25 light most favorable to the nonmoving party and draw all justifiable inferences in its favor.
26 Id. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011).

27 B. Legal Analysis

28 Before addressing the merits of AAU’s motion, the court will address a threshold

1 jurisdictional issue that was raised by AAU – for the first time – at the summary judgment
2 hearing. AAU's counsel argued that the “public disclosure bar” deprives this court of
3 subject matter jurisdiction, and when asked why this issue was not included in its
4 summary judgment brief, counsel responded that “it came to light as we were doing the
5 brief – the reply brief and comparing the allegations to public disclosures.” Dkt. 178 at
6 40. Following the hearing, the court directed AAU to file a supplemental brief on the
7 “public disclosure” issue, and relators were given an opportunity to file a response.

8 AAU's supplemental brief starts by setting forth the statutory “public disclosure”
9 bar: “No court shall have jurisdiction over an action under this section based upon the
10 public disclosure of allegations or transactions in a criminal, civil, or administrative
11 hearing, in a congressional, administrative, or Government Accounting Office report,
12 hearing, audit, or investigation, or from the news media, unless the action is brought by
13 the Attorney General or the person bringing the action is an original source of the
14 information.” 31 U.S.C. § 3730(e)(4)(A)¹.

15 The Ninth Circuit has set forth the relevant test as follows: “The public disclosure
16 bar is triggered if three things are true: (1) the disclosure at issue occurred through one
17 of the channels specified in the statute, (2) the disclosure was ‘public,’ and (3) the
18 relator's action is ‘based upon’ the allegations or transactions publicly disclosed. U.S. ex
19 rel. Mateski v. Raytheon Co., 816 F.3d 565, 570 (9th Cir. 2016) (internal citations
20 omitted).

21 Applying that three-part test to this case, there appears to be no dispute that (1)
22 AAU has identified disclosures made through the channels specified in the statute, and
23 (2) those disclosures were public. Specifically, AAU points to “congressional hearings
24 and Department of Education reports” that “identified widespread fraud among
25 proprietary schools,” and “numerous” False Claims Act suits that “advanced the same
26 allegations raised in relators' complaint.”

27 _____
28 ¹ AAU cites the 2009 version of the public disclosure bar, which has since been
amended.

1 AAU admits that “those public disclosures do not specifically identify AAU,” but
2 nevertheless argues that a public disclosure “need not name a defendant specifically,”
3 and instead, need only “contain enough information to place the government on notice of
4 the fraud.” However, while AAU cites a number of cases acknowledging the general
5 principle that a defendant need not be specifically named, nearly all of those cases
6 actually do involve disclosures about the same defendant named in the suit.

7 For instance, U.S. ex rel. Hoggett v. University of Phoenix was a case alleging
8 violations of the incentive compensation ban, just as this suit does. 2014 WL 3689764
9 (E.D. Cal. July 24, 2014). While the court ultimately dismissed the case based on the
10 public disclosure bar, its discussion of the specific public disclosures is instructive. The
11 court started by citing a news report about the state of New York blocking the University
12 of Phoenix’s attempt to open a Manhattan campus, based in part on “concerns” about
13 how the school “compensates recruiters.” Id. at *6. The court went on to discuss a
14 segment on PBS’s “Frontline,” which reported “continuing abuses in incentive
15 compensation among for-profit colleges.” Id. However, rather than referring to “for-profit
16 colleges” generally, the “Frontline” program specifically discussed the University of
17 Phoenix “at length,” and even referred to it as “the ‘granddaddy’ of for-profit schools.” Id.
18 The court then cited a Reuters news article specifically mentioning the University of
19 Phoenix as a subject of a congressional investigation. Id. Only after citing those multiple
20 specific references to the University of Phoenix and its compensation practices did the
21 court dismiss the suit under the public disclosure bar.

22 Similarly, in U.S. ex rel. Lee v. Corinthian Colleges, the court dismissed a FCA suit
23 after considering previous “securities class action litigation brought against Corinthian”
24 that made “nearly identical” allegations regarding Corinthian’s incentive compensation
25 practices. Case no. 07-1984, Dkt. 224 at 6, 8 (C.D. Cal. Mar. 15, 2013). The court then
26 discussed, at length, a subsequent congressional hearing that “echoe[d] the allegations
27 in the securities litigation” regarding Corinthian’s alleged violations of the “spirit and
28 intent” of the incentive compensation ban. Id. at 8. Testimony at the hearing frequently

1 focused on Corinthian Colleges specifically (rather than for-profit schools generally) – in
2 fact, a former Corinthian Colleges employee “testified as to Corinthian’s allegedly
3 complete focus on hitting enrollment targets.” Id. Again, only after citing these
4 disclosures specific to Corinthian Colleges did the court dismiss the FCA suit.

5 In another case, a suit was dismissed under the public disclosure bar after the
6 court considered two news articles that named the defendant specifically, and further
7 discussed a previous lawsuit that involved allegations about the defendant’s use of
8 enrollment numbers in evaluating recruiters. U.S. ex rel. Lopez v. Strayer Education,
9 Inc., 698 F.Supp.2d 633, 643 (E.D. Va. 2010).

10 While the University of Phoenix, Corinthian, and Strayer courts also cited other
11 disclosures that discussed for-profit schools more generally, the fact that each case
12 involved multiple disclosures about each specific defendant serves to distinguish those
13 cases from the present one, which involves no disclosures about AAU’s own practices.

14 AAU cites only one case in which a suit was dismissed based only on public
15 disclosures about non-parties. Schultz v. DeVry Inc., 2009 WL 562286 (N.D. Ill. Mar. 4,
16 2009). However, as relators point out in their brief, Schultz has since been discredited by
17 the Seventh Circuit. See U.S. ex rel. Baltazar v. Warden, 635 F.3d 866, 868 (7th Cir.
18 2009) (“no court of appeals supports the view that a report documenting widespread false
19 claims, but not attributing them to anyone in particular, blocks qui tam litigation against
20 every member of the entire industry”).

21 Moreover, even more importantly, the Ninth Circuit has recently addressed the
22 issue, and endorsed the view currently taken by the Seventh Circuit. See Mateski, 816
23 F.3d 565. Mateski was a False Claims Act suit filed by an engineer working for a
24 government defense contractor. The engineer alleged that his employer (Raytheon)
25 failed to comply with the government’s contractual requirements and improperly billed the
26 government for erroneous and incomplete work. Id. at 568. The defendant sought
27 dismissal of the suit under the public disclosure bar, citing government reports of
28 “inadequate project management” and “inadequate oversight,” as well as news articles

1 reporting “cost overruns and schedule delays.” Id. at 567-68.

2 In applying the public disclosure bar, the Mateski court first explained that, “for a
3 relator’s allegations to be ‘based upon’ a prior public disclosure, ‘the publicly disclosed
4 facts need not be identical with, but only substantially similar to, the relator’s allegations.’”
5 816 F.3d at 573 (internal citations omitted). However, the court recognized the elasticity
6 of the “substantially similar” test, noting that “whether [the] complaint is substantially
7 similar to prior public reports depends on the level of generality at which the comparison
8 is made.” Id. at 575. If considered at a high level, then the complaint and the public
9 reports did indeed both describe problems with Raytheon’s performance of the
10 government contract. But if “considered at a more granular level, the allegations in
11 Mateski’s complaint discuss specific issues found nowhere in the publicly disclosed
12 information.” Id. at 574. The court noted that the case required it to “address for the first
13 time whether we should approach the substantial similarity question at a high or low level
14 of generality, and accordingly whether a complaint that is similar only at a high level of
15 generality triggers the public disclosure bar.” Id. at 575.

16 The Mateski court then observed that the Seventh Circuit “appears to be the only
17 circuit to have focused on this level-of-generality question,” and cited three of its cases
18 addressing the issue. 816 F.3d at 575. Of particular relevance is Leveski v. ITT
19 Educational Services, Inc., which, like the present case, arose out of allegations that a
20 for-profit college was violating the incentive compensation ban. See Leveski, 719 F.3d
21 818 (7th Cir. 2013). The public disclosures at issue in Leveski were more than
22 generalized reports regarding for-profit schools as a whole – instead, the defendant
23 argued that the suit (brought by a former employee) was “substantially similar” to a
24 previous suit filed by another former employee, who even had the same job title as the
25 plaintiff-relator in Leveski. Both suits alleged that ITT violated the incentive
26 compensation ban, but the Seventh Circuit found that, in the second-filed case, the
27 “details of how ITT allegedly violated” the False Claims Act were “quite different” than
28 those alleged in the first-filed case. While the first suit alleged a “rudimentary scheme” to

1 violate the incentive compensation ban, the Leveski suit alleged a “more sophisticated,
2 second-generation method of violating” the Act, and thus, the public disclosure bar did
3 not apply.

4 The Ninth Circuit in Mateski found the Seventh Circuit’s approach to be
5 persuasive, and articulated its own approach to the public disclosure bar as follows:

6 Allowing a public document describing ‘problems’ – or even some
7 generalized fraud in a massive project or across a swath of an industry – to
8 bar all FCA suits identifying specific instances of fraud in that project or
9 industry would deprive the Government of information that could lead to
recovery of misspent Government funds and prevention of further fraud.

10 816 F.3d at 577.

11 Based on the guidance provided by the Mateski court, the court finds that the
12 public disclosure bar does not apply to the present suit. If the Mateski disclosures –
13 which were made not only about the same defendant, but about the same project – were
14 not enough to trigger the bar, then the disclosures in this case do not come close to doing
15 so. As mentioned above, AAU relies on reports of generalized fraud among for-profit
16 schools, including with regard to the incentive compensation ban. The relators’
17 complaint² not only ties the alleged conduct to AAU, but also provides specific allegations
18 regarding AAU’s conduct. For instance, in addition to alleging that their compensation
19 was “directly based upon and proportional to their success in securing student
20 enrollments,” relators also allege that “AAU formally evaluated its admissions
21 representatives and adjusted their salaries twice a year in March and October,” with each
22 recruiter given a goal of student enrollments and a promise that “if they met this ‘goal’ (in
23 reality, a quota) their annual salary would be increased \$30,000 at the time of their next
24 evaluation.” Dkt. 1, ¶¶ 22, 42. Relators further allege that their “salary histories illustrate
25 and substantiate the unlawful compensation scheme,” and that “[i]n addition to salary,
26

27 ² Because subject matter jurisdiction is determined at the time of the original complaint’s
28 filing, the court will consider the original complaint, rather than the operative second
amended complaint, for purposes of the public disclosure bar.

1 AAU also illegally compensates enrollment counselors based upon enrollments through
2 trips and gifts,” including a promised “trip to Hawaii if their team enrolled a minimum
3 number of students.” Id., ¶¶ 43-44.

4 Although the above allegations are already sufficient to avoid the public disclosure
5 bar, as relators provided specific details that were not disclosed through public sources,
6 the complaint provides even more detail. Specifically, relators allege that “AAU did not
7 and does not allow its admissions representatives to retain any written documentation of
8 its incentive compensation scheme,” and instead “conveyed the enrollment goals and
9 accompanying financial incentives only through information sheets that were shown to
10 admissions representatives at their semiannual evaluations but were retained by AAU.”
11 See Dkt. 1, ¶¶ 22-25.

12 The court finds that the complaint’s allegations are not “substantially similar” to the
13 prior public disclosures when viewed at the appropriate level of generality, and thus, the
14 public disclosure bar does not apply.

15 The court now turns to the merits of AAU’s motion for summary judgment. The
16 first issue for the court to resolve is the specific theory under which relators are
17 proceeding. Because relators do not allege that AAU’s claims for payment were facially
18 false (in other words, relators do not allege that AAU submitted claims on behalf of
19 fictitious students, or submitted claims for inflated amounts), any viable FCA cause of
20 action must arise out of one of the “two doctrines that attach potential False Claims Act
21 liability to claims for payment that are not explicitly and/or independently false: (1) false
22 certification (either express or implied), [or] (2) promissory fraud.” U.S. ex rel. Hendow v.
23 University of Phoenix, 461 F.3d 1166, 1171 (9th Cir. 2006) (citing Harrison v.
24 Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999)).

25 As explained by the Ninth Circuit, the “false certification” doctrine “could just as
26 easily be called the ‘false statement of compliance with a government regulation that is a
27 precursor to government funding’ theory, but that is not as succinct.” Hendow, 461 F.3d
28 at 1172. It applies when a party “falsely certifies compliance with a statute or regulation

1 as a condition to government payment.” Id. at 1171.

2 While the Hendow court did not explain the difference between the two types of
3 “false certifications” – express or implied – the Ninth Circuit did so in a later case. See
4 Ebeid ex rel. U.S. v. Lungwitz, 616 F.3d 993 (9th Cir. 2010). Express false certification
5 “simply means that the entity seeking payment certifies compliance with a law, rule, or
6 regulation as part of the process through which the claim for payment is submitted.” Id.
7 at 998. In contrast, implied false certification “occurs when an entity has previously
8 undertaken to expressly comply with a law, rule, or regulation, and that obligation is
9 implicated by submitting a claim for payment even though a certification of compliance is
10 not required in the process of submitting a claim.” Id. The court then explained that
11 “[u]nder both theories, it is the false certification of compliance which creates liability
12 when certification is a prerequisite to obtaining a government benefit.” Id. (emphasis in
13 original) (internal citation and quotation omitted).

14 Aside from the “false certification” theories, the Ninth Circuit has also recognized a
15 “promissory fraud” theory of liability, which does not require a “false statement of
16 compliance with government regulations.” Hendow, 461 F.3d at 1173. Instead, liability
17 attaches to “each claim submitted to the government under a contract, when the contract
18 or extension of government benefit was originally obtained through false statements or
19 fraudulent conduct.” Id. (internal citations omitted). “In other words, subsequent claims
20 are false because of an original fraud,” even though those subsequent claims do not
21 require a false certification. Id. (emphasis in original). As applied to this case, the
22 alleged “original fraud” occurred when AAU entered into a PPA with the federal
23 government, thereby promising to comply with the incentive compensation ban.

24 This distinction between the “original fraud” and “subsequent claims” is particularly
25 relevant in this case, because AAU contends that relators must show not only a false
26 promise to comply with a PPA, but also proof that the promise was false when made.
27 See U.S. ex rel. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996) (“although
28 promissory fraud may be actionable in rare circumstances under the FCA, the promise

1 must be false when made”). AAU points out that it entered into a PPA on March 30,
2 2006, which was in effect until the next PPA was executed on April 10, 2012. See Dkt.
3 150, Ex. 2 (2006 PPA); Ex. 3 (2012 PPA). And while entering into the PPAs did require
4 AAU to promise that it would comply with the incentive compensation ban, AAU argues
5 that relators have not provided evidence that either promise was false when made. In
6 fact, even relators’ own opposition brief appears to concede that all of the evidence that
7 “AAU was violating the incentive compensation ban” is temporally limited “from the fall
8 semester in 2006 through the fall semester of 2010.” Dkt. 159 at 22.

9 Relators do provide some evidence from before March 2006, but it is not directly
10 relevant to the incentive compensation ban. Specifically, relators point to a December
11 2005 email from AAU’s executive vice president of marketing, who proposed solutions to
12 “take recruitment to the next level” by finding leaders who are “goal-driven,” “results-
13 oriented,” and “experienced in the fields of sales and business,” and by finding recruiters
14 “able to close the sales off site” and who “understand sales and know the basic 101
15 Sales technique.”³ Dkt. 159-1, Ex. 1. While the December 2005 email certainly
16 demonstrates an emphasis on recruiting, it is entirely unrelated to the incentive
17 compensation ban, and thus does not serve as evidence that AAU made a false promise
18 when entering into the 2006 PPA. Nor do relators provide any evidence that AAU was
19 violating the incentive compensation ban at the time that the 2012 PPA was signed.
20 Accordingly, the court finds that relators cannot proceed under a “promissory fraud”
21 theory.

22 Relators’ “express false certification” theory suffers from the same flaw. In their
23 opposition brief, relators concede that “each request for Title IV loan and grant funds that
24 AAU made did not contain an express certification of compliance with the incentive ban.”
25 In fact, relators’ only reference to an express “certification” is their assertion that “AAU

26 _____
27 ³ At the hearing, the court specifically asked relators’ counsel to identify the evidence
28 supporting the argument that AAU entered into the 2006 PPA with the intent to violate the
incentive compensation ban, and counsel pointed to this same email. See Dkt. 178 at
17:4-19:13.

1 President Stephens certified through PPAs that AAU will comply with the incentive
2 compensation ban.” Dkt. 159 at 22. Because relators have not provided evidence
3 showing that AAU intended to violate the ban when it certified compliance through either
4 the 2006 PPA or the 2012 PPA, they cannot show that either express certification was
5 false, and thus, their “express certification” theory is not viable.

6 At the hearing, the court noted the lack of evidence from early 2006 regarding the
7 alleged incentive compensation ban violation, and sought to clarify whether relators truly
8 intended to proceed under all three theories. Relators’ counsel indicated that they did
9 indeed seek to proceed under all three theories in the alternative. However, in
10 supplemental briefing, relators started by stating that they “are proceeding under the false
11 certification claim” (apparently abandoning promissory fraud), and then appeared to
12 further narrow their theory, explaining that “the evidence establishes each element [of a
13 FCA claim] including that AAU’s claims for money were false based on an implied false
14 certification that AAU was in compliance with the incentive compensation ban when, in
15 fact, AAU was not.” See Dkt. 173 at 1-2 (emphasis added). The court’s own finding that
16 only the implied false certification theory remains viable is bolstered by (but not
17 dependent on) this apparent concession from relators.

18 The court also sought to clarify another issue at the hearing. As mentioned above,
19 the operative SAC asserts two causes of action – the first under 31 U.S.C. §
20 3729(a)(1)(A), which applies to anyone who “knowingly presents, or causes to be
21 presented, a false or fraudulent claim for payment or approval,” and the second under 31
22 U.S.C. § 3729(a)(1)(B), which applies to anyone who “knowingly makes, uses, or causes
23 to be made or used, a false record or statement material to a false or fraudulent claim.”
24 In other words, subsection (A) applies in cases of a “false or fraudulent claim,” whereas
25 subsection (B) applies in cases of a “false record or statement material to a false or
26 fraudulent claim.”

27 At the hearing, the court asked relators’ counsel to explain the difference between
28 the two asserted causes of action. After noting that neither party’s briefs addressed the

1 distinction between the two claims, the court directed relators to file a supplemental brief
2 explaining the meaningful difference (if any) between the two asserted claims, and
3 permitted AAU to file a response.

4 In their supplemental brief, relators first explain that, at the time of the complaint's
5 filing, "the case law was unclear" as to whether their claim should be pled under
6 subsection (A) or (B), and as a result, relators pled both claims "out of an abundance of
7 caution." Dkt. 173 at 2-3. Since then, the Tenth Circuit has become the first circuit court
8 to address the distinction, holding that "implied certification" claims can arise under
9 subsection (A) but not under subsection (B).⁴ U.S. ex rel. Lemmon v. Envirocare of Utah,
10 Inc., 614 F.3d 1163, 1168 (10th Cir. 2010). In light of Lemmon, relators explain that they
11 have "no objection to the court dismissing the second cause of action as duplicative."
12 Dkt. 173 at 3. The court similarly finds that there is no reason to present two duplicative
13 causes of action to a jury, and dismisses the second cause of action based on relators'
14 representation. Thus, the only claim that remains is a single cause of action under 31
15 U.S.C. § 3729(a)(1)(A) for knowingly presenting, or causing to be presented, a false or
16 fraudulent claim for payment or approval. And as discussed above, the court will analyze
17 this claim under an "implied false certification" theory.

18 The elements of a cause of action under the False Claims Act are as follows: (1) a
19 false statement or fraudulent course of action, (2) made with scienter, (3) that was
20 material, and (4) that caused the government to pay out money. Hendow, 461 F.3d at
21 1174; see also 31 U.S.C. § 3729(a).⁵

22 Starting with the first element, relators contend that each of AAU's requests for
23 Title IV funds contained an "implied certification of continued compliance with the
24 incentive ban" which was, in fact, false. For support, relators point to evidence that
25 AAU's admissions director (Joan Bergholt) told recruiters that they would be paid an

26 _____
27 ⁴ The Tenth Circuit's opinion cites to a previous version of the False Claims Act, and thus
28 refers to the two relevant sections as (a)(1) and (a)(2), rather than (a)(1)(A) and (a)(1)(B).
⁵ AAU asserts that relators must meet a "clear and convincing" burden of proof, but its
cited authority does not actually support its assertion.

1 additional \$30,000 if they hit their enrollment goal. See Dkt. 159-1, Ex. 78 at 45:2-18, Ex.
2 80 at 147:14-17, Ex. 87 at 24:18-25, Ex. 77 at 33:10-22 (deposition testimony from
3 recruiters regarding \$30,000 payment for hitting enrollment goal); see also Dkt. 159-1,
4 Ex. 16 (email to Bergholt discussing a \$20,000 raise and stating “that’s 2/3 of what was
5 promised to someone who made their goal”).

6 AAU responds by arguing that the salary adjustments were made in compliance
7 with a HEA “safe harbor” provision, which allowed⁶ schools to compensate recruiters for
8 enrollments, “as long as that compensation is not adjusted up or down more than twice
9 during any twelve month period, and any adjustment is not based solely on the number of
10 students recruited, admitted, enrolled, or awarded financial aid.” 34 C.F.R. §
11 668.14(b)(22)(ii)(A) (July 1, 2010). AAU maintains that any compensation adjustments
12 were made only after considering “a totality of factors and not solely or exclusively
13 success in enrolling students,” and cites to extensive deposition testimony purporting to
14 state as such. Dkt. 150 at 3. However, relators provide two declarations – one from a
15 former admissions representative (Julie Bell) and one from a former admissions director
16 (Joan Stiverson-Smith) – stating that AAU’s qualitative criteria were “cosmetic and
17 superficial in nature and designed by AAU to circumvent the prohibition against incentive
18 or commission pay by giving AAU the appearance of compliance with the law.” See Dkt.
19 159-1, Ex. 43 (Stiverson-Smith decl.), Ex. 44 (Bell decl.). The declarants further attest
20 that the “‘qualitative criteria results’ were adjusted and ‘backed into’ the compensation
21 calculations so that the final compensation of each admissions representative – while
22 appearing on paper to include the ‘qualitative’ factors – in fact reflected only his or her
23 enrollment statistics – positive or negative.” Id.

24 AAU attempts to undermine the Stiverson-Smith and Bell declarations by casting
25 doubt on whether the declarants had personal knowledge of the ultimate compensation

26
27 ⁶ The safe harbor has since been eliminated, such that schools are not permitted to
28 compensate recruiters “based in any part, directly or indirectly, upon success in securing
enrollments or the award of financial aid.” 34 C.F.R. § 668.14(b)(22)(ii)(A) (effective July
1, 2011).

1 decisions, but there are two problems with this argument. First, personal knowledge
2 “includes opinions and inferences grounded in observations and experience.” Great
3 American Assurance Co. v. Liberty Surplus Insurance Co., 669 F.Supp.2d 1084 (N.D.
4 Cal. 1084, 1089 (N.D. Cal. 2009) (internal citation omitted). Second, the substance of the
5 declarations is corroborated by documentary evidence. In particular, relators submit a
6 December 12, 2007 email from Joan Bergholt with the subject line “performance
7 reviews,” in which she instructs two employees that “we need to bring these ratings up,
8 especially for the people who are getting good raises.” Dkt. 159-1, Ex. 23. While the
9 email, by itself, indicates that the raises were already decided and that the performance
10 ratings needed to be reverse-engineered to reflect the pre-determined raises, that
11 conclusion is further bolstered by a spreadsheet showing the salary increases as “OK per
12 Elisa Stephens” (AAU’s sole shareholder, who is responsible for all compensation
13 decisions) on December 11, 2007 – one day before Ms. Bergholt issued her instructions
14 “bring these ratings up, especially for the people who are getting good raises.” Dkt. 159-
15 1, Ex. 40.

16 Similarly, relators submit another email from Joan Bergholt with the subject line
17 “performance appraisal checklists for spring 07,” in which she directs four employees to
18 fill out performance reviews for recruiters, and tells them to “[r]emember that the totality
19 rating needs to be consistent with the salary increases or decreases.” Dkt. 159-1, Ex. 18.
20 While not as explicit as the previously-cited email in stating that the salary adjustments
21 had already been determined, the implication is the same, because there would be no
22 need for a “reminder” to keep ratings consistent with salary increases/decreases if those
23 increases/decreases had not been determined yet. And while AAU presents its own
24 evidence showing that draft versions of the performance reviews had already been
25 started, the fact remains that Ms. Bergholt is instructing her employees to “fill out”
26 performance reviews in a certain way, because “the totality rating needs to be consistent
27 with the salary increases or decreases.” Whether or not the reviews had already been
28 started, the email supports relators’ argument that the final performance ratings were

1 ultimately reverse-engineered to fit the salary increases, as claimed by Ms. Stiverson-
2 Smith and Ms. Bell.

3 At her deposition, Ms. Bergholt insisted that the totality ratings were determined
4 first, and that the salary adjustments were based on those ratings. See Dkt. 159-1, Ex.
5 82 at 158:24-161:14. However, at best, this testimony creates a disputed issue of fact as
6 to whether the salary adjustments were determined before or after the performance
7 ratings. And when viewed with the rest of the above-mentioned evidence, in a light most
8 favorable to the non-moving parties, relators have raised a triable issue of fact as to
9 whether AAU paid compensation solely on the basis of enrollment success, and in doing
10 so, made an impliedly false certification to the Department of Education. Thus, for
11 purposes of this motion, the first element of a FCA claim is met.

12 The second element of the False Claims Act asks whether AAU acted with
13 scienter in making the allegedly false certifications, and there appears to be some
14 uncertainty regarding the applicable standard for this element. AAU cites Ninth Circuit
15 authority holding that “for a certified statement to be ‘false’ under the [False Claims] Act, it
16 must be an intentional, palpable lie” that is “known to be a lie when it is made.” Hendow,
17 461 F.3d at 1172. However, relators cite more recent Ninth Circuit authority holding that
18 the scienter requirement may be met if the defendant either “knew, or acted with reckless
19 disregard of the fact that its compensation program did not fall within the DOE safe
20 harbor provision.” U.S. v. Corinthian Colleges, 655 F.3d 984, 997 (9th Cir. 2011)
21 (emphasis added). Interestingly, the Corinthian court actually cited Hendow in its
22 discussion of scienter, even though it did not adopt the “intentional, palpable lie”
23 language.

24 The apparent tension between Hendow and Corinthian can be resolved by looking
25 to the words of the False Claims Act itself. The Act requires a “knowing” presentation of
26 a false claim, and then defines “knowing” (or “knowingly”) as meaning that a person
27 either “has actual knowledge of the information[,] acts in deliberate ignorance of the truth
28 or falsity of the information[,] or acts in reckless disregard of the truth or falsity of the

1 information.” 31 U.S.C. § 3729(b)(1) (emphasis added). The statute also specifically
2 states that it “require[s] no proof of specific intent to defraud.” Id. Thus, the Corinthian
3 court’s version of the scienter requirement more closely tracks the statute, and the court
4 finds that “reckless disregard” is sufficient to establish scienter under the False Claims
5 Act. However, as applied to this case, relators have adequately shown scienter under
6 either standard.

7 Much of the same evidence cited in support of the “falsity” prong is equally
8 relevant to the “scienter” prong. The declarations from Ms. Stiverson-Smith and Ms. Bell
9 that AAU’s qualitative criteria were “cosmetic and superficial in nature and designed by
10 AAU to circumvent the prohibition against incentive or commission pay by giving AAU the
11 appearance of compliance with the law,” if true, certainly serve as evidence that AAU
12 made an “intentional, palpable lie” in impliedly certifying compliance with the HEA.
13 Moreover, the email from Ms. Bergholt instructing employees to “bring these ratings up,
14 especially for the people who are getting good raises,” when read in a light most
15 favorable to the non-moving parties, also supports an inference that AAU knew that it
16 was not complying with the safe harbor.

17 In addition to the above-mentioned evidence, relators also provide evidence of the
18 lengths taken by AAU to hide their compensation practices. For instance, one of the
19 relators asked an admissions manager whether she could have a “copy of the goal sheet
20 with the \$ increase information included based on the number of student[s] we register,”
21 and the manager responded that she was “unable to hand that out” because it was “for
22 management use only.” Dkt. 159-1, Ex. 57.

23 In another email exchange, AAU’s chief operating officer asked the admissions
24 director whether she had information on the “summer and fall team goal,” but the
25 admissions director responded that she “deleted all those docs” because she “[s]aw REP
26 GOALS and was trying to protect us.” Dkt. 159-1, Ex. 70.

27 Another AAU employee testified at his deposition that there “was an instruction not
28 to share that document” (referring to the “score value card” used for performance

1 reviews) and to “make everything verbal.” Dkt. 159-1, Ex. 85 at 188:7-13. When asked
2 why the document was not to be shared, the witness answered that his supervisor “was
3 concerned with that information,” and that “compliance was concerned.” Id. at 188:15-17.

4 This evidence provides further support for the allegation that AAU knew that it was
5 actively circumventing the law by attempting to create the appearance of compliance with
6 the safe harbor provision, and took efforts to avoid leaving a paper trail. While it will
7 ultimately be up to a jury to decide whether to credit this evidence and find that AAU
8 acted with scienter, relators have raised a triable issue of fact sufficient to defeat
9 summary judgment.

10 AAU does not meaningfully challenge the remaining two elements – that the
11 allegedly false certifications were material, or that they caused the government to pay out
12 money – and the court finds both elements to be met.

13 Accordingly, the court finds that relators have raised a triable issue of fact as to
14 whether AAU failed to comply with the incentive compensation ban, and thus violated the
15 False Claims Act.

16 **CONCLUSION**

17 For the foregoing reasons, AAU's motion for summary judgment is DENIED. The
18 court will conduct a case management conference on **June 2, 2016 at 2:00 p.m.** to set a
19 pretrial schedule.

20 Finally, both parties have filed motions to seal, seeking to redact certain non-party
21 financial information contained in exhibits filed in connection with the summary judgment
22 motion. Because the parties have shown that the salary information is entitled to
23 protection, and because the proposed redactions are narrowly tailored to cover only the
24 sealable information, the motions to seal are GRANTED.

25 **IT IS SO ORDERED.**

26 Dated: May 4, 2016

27 

28 _____
PHYLLIS J. HAMILTON
United States District Judge