**No. 17-1511**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* SCOTT ROSE; MARY AQUINO; MITCHELL NELSON; LUCY STEARNS

*Plaintiffs-Appellees,*

*v.*

STEPHENS INSTITUTE, DBA ACADEMY OF ART UNIVERSITY,

*Defendant-Appellant.*

Appeal from a Decision of the U.S. District Court for the Northern District of California
Case No. 09-cv-05966 (Hamilton, J.)

## BRIEF *AMICUS CURIAE* OF VETERANS EDUCATION SUCCESS IN SUPPORT OF PLAINTIFFS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Veterans Education Success submits the following corporate disclosure statement: Veterans Education Success, Inc., is a 501(c)(3) non-profit, non-stock corporation incorporated in Maryland. It has no parent corporation, and no company owns 10 percent or more of its stock. (Specifically, there is no stock and no ownership interests.)

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## INTEREST OF VETERANS EDUCATION SUCCESS[1]

The False Claims Act is one of the most effective ways Congress has devised to root out fraud, waste, and abuse in federal programs, and higher education is no different. While many proprietary institutions try hard to provide a high-quality education, consumers often have a difficult time discerning the differences in a crowded field and noisy market. Instead of foisting on consumers the difficult, if not impossible, burden of figuring out which institutions are meeting their obligations under the law, a legitimate threat of False Claims Act liability—along with other enforcement mechanisms—helps to ensure that all institutions meet their minimum obligations to students and provides a way for employees with knowledge of fraud, waste, and abuse to report that information to the U.S. Department of Education.

Proprietary colleges are inadvertently incentivized by a loophole in the Higher Education Act to view service members and veterans "as nothing more than dollar signs in uniform, and to use aggressive marketing to draw them in" because the loophole permits the schools to use GI Bill and other military student aid to offset the cap the schools otherwise face on federal funds. Holister K. Petraeus, *For-Profit Colleges, Vulnerable GIs*, N.Y. Times, Sept. 21, 2011,

[1] No counsel for a party authored this brief in whole or in part, and no person made a monetary contribution for the brief's preparation or submission. Veterans Education Success understands from discussions with Relators' counsel that the parties have consented to the filing of amicus curiae briefs by all interested parties.

http://www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html. Specifically, for-profit colleges are subject to a statute and regulation called the "90/10 Rule," which requires them to obtain at least 10% of their revenues from nongovernmental sources. 20 U.S.C. § 1094(a)(24); 24 C.F.R. § 668.14(b)(16). Veterans' education benefits were inadvertently excluded from this rule, however, meaning the schools can exceed the 90% limit on government funding by recruiting more veterans. It is well documented that for-profit schools target veterans for this very reason. *See* S. Comm. on Health, Education, Labor, and Pensions, 112th Cong., For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success (Comm. Print July 30, 2012).

In 2016, the Department of Education published an analysis showing that many proprietary colleges were using the GI Bill to "skirt" the 90/10 Rule's requirements. U.S. Dep't of Education, New Analysis Finds Many For-Profits Skirt Federal Funding Limits (Dec. 21, 2016), https://www.ed.gov/news/press-releases/new-analysis-finds-many-profits-skirt-federal-funding-limits.

Veterans therefore have a particular interest in ensuring that the education and job opportunities promised by the schools—and paid for with their hard-earned education benefits—comply with the law. Robust enforcement at all levels, including through whistleblower suits under the False Claims Act, is necessary to hold accountable those institutions that are defrauding students and government. If whistleblowers are not able to speak up through the False Claims Act to stop

fraud, their colleges will continue to receive billions of dollars in federal funds each year—money that is partly offset by students taking on substantial debt, with the rest covered by taxpayers. Thus, taxpayers and students alike have an interest in making sure that the schools comply with the law.

Veterans Education Success has heard from thousands of veterans and service members who were defrauded or deceived by predatory college recruiters who misled them on key facts about the colleges, from the colleges' tuition, accreditation, transferability of credits, graduation rates, and job prospects for graduates, to the quality of education and materials and how much the GI Bill would cover. Veterans Education Success has also heard from whistleblowers at several major proprietary colleges, who allege their colleges' recruiters engage in profound deception and fraud targeting veterans and service members. These whistleblowers often allege the colleges violate the Incentive Compensation Ban (ICB).

## SUMMARY OF ARGUMENT

Veterans Education Success writes briefly to address two points: (1) the materiality of the ICB under the recent guidance of *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), and (2) to help the Court understand that this case presents a unique legal and factual posture in the context of False Claims Act cases under Title IV of the Higher Education Act, including as compared to such cases as *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166

(9th Cir. 2006). Although Veterans Education Success generally agrees with the positions of the Relators and other amicus curiae parties who have provided briefs in support of the Relators, Veterans Education Success believes the information succinctly set forth in this brief is important legal and factual context for the Court to consider when ruling on an issue that could have lasting effects on tens of thousands of students, many of them veterans.

On the first issue—materiality of the ICB—Appellant has attempted to take *Escobar*'s nonexclusive list of potential evidence of materiality and make each nondispositive factor an absolute requirement. Moreover, Appellant attempts to set the bar of materiality impossibly high, suggesting that unless the government has leveled the most severe administrative penalty for a violation of the law at issue, which Appellant interprets as suspension or termination from the relevant program, the violation is not material under *Escobar*. (Appellant also alleges the government has never "limited" participation in the program after a violation of the ICB, but that is patently false given the numerous settlements with schools and other successful enforcement actions by the Department of Education.) Appellant's proposed interpretation of *Escobar* is without foundation and contrary to how most federal appellate courts have interpreted the decision.

On the materiality issue, it is important for the Court to understand the central and vital role the ICB plays in the broader legal and regulatory scheme. Congress enacted the ICB precisely because it was concerned that paying bonuses

and commissions for recruiting students put the motives of the recruiters at odds with the interests of the government, taxpayers, and, most importantly, the students themselves. While college recruiters should focus on whether a prospective student is a good "match" for the school, recruiters who are incentivized by financial payments to recruit students are unlikely to consider—much less determine—whether the student is a good fit for the school and the program of study. Even worse, monetary incentives for enrolling students can lead recruiters to mislead—or even lie—to prospective students. Documented evidence of these problems, among many others, led Congress to impose the ICB in the first place. For example, one campus president whistleblower who approached Veterans Education Success reported that recruiters at his school would "do anything and say anything" to get veterans to enroll.

The ICB is central to the legal regime Congress has established under Title IV of the Higher Education Act. Schools are constantly reminded of the importance of the ICB. First, the Higher Education Act itself sets forth the ICB and expressly requires continuing compliance with the ICB. Second, the ICB is set forth in the applicable regulations, which also expressly require continuing compliance with the ICB. Third, the ICB is expressly restated in the "Selected Provisions" section of the contract between the schools and the U.S. Department of Education, called a "Program Participation Agreement" (PPA). Fourth, the management of every school under a PPA must annually certify in writing that they are complying with

the ICB, among other specific certifications of compliance required in the audit process. Fifth, and finally, every school must hire an independent, outside auditor to test the schools' compliance with the ICB and other specific legal requirements identified in the audit process.

The importance of the ICB—as explained by the Congress—as well as the numerous ways schools are reminded of the ban, the fact that schools expressly and specifically promise in their contracts to comply with the ICB, and the fact that the schools' management must annually certify compliance with the ICB all demonstrate the ICB's materiality.

Furthermore, the Department of Education routinely pursues enforcement actions for violations of the ICB. Contrary to the claim of the Appellant, there is no requirement in *Escobar* or otherwise that in order for the Department of Education to consider a legal requirement material, the Department must immediately terminate a school's participation in Title IV for a violation and thereby leave thousands or tens of thousands of students potentially stranded and harm an untold number of current students and recent graduates in the process. The Court should affirm the District Court's correct conclusion that regulatory enforcement actions short of complete termination—such as actions to recover penalties or partial repayments—are evidence of materiality.

On the second issue, Veterans Education Success writes to simply educate the Court about the wide variety of falsity theories that the government and

relators have successfully pursued against proprietary colleges under the False Claims Act across the country and to identify the ways that this case is unique among them. Indeed, cases across the country, including in this Circuit, have involved allegations (and proof) of proprietary colleges fraudulently inducing the Department of Education into the PPAs. Some of these cases have involved the Incentive Compensation Ban, while others have involved other promises in the PPAs. But in the present case, the District Court ruled that the Relators could not pursue a fraudulent inducement claim.

In other cases, the government and relators have also alleged (and proven) that schools falsely certified compliance with the ICB and PPAs through their G5 certifications to the Department of Education. Still other cases have pursued claims based on other certifications of compliance with the ICB made by the schools' management, including claims reinstated by this Court on appeal.

While this case focuses on a different theory of falsity, specifically implied certification liability based on the program eligibility certifications in loan documents, it is simply an extension of this Court's prior precedent. Nevertheless, nothing in this case (nor *Escobar*, for that matter) requires the Court to revisit the theories of falsity this Court has upheld and endorsed in other False Claims Act cases involving proprietary colleges. Because this is an evolving field of law, the Court should be careful that its decision in this case does not prematurely foreclose other possible falsity theories in future cases, which may involve different facts.

## STATEMENT OF FACTS

### 1. The ICB is a key component of Congress's efforts to rein in fraud and abuse.

In enacting the ICB, Congress highlighted its importance to the basic integrity of the student financial aid programs. Congress enacted the prohibition against paying commissions, bonuses, or other incentive payments based on success in recruiting students because such payments were associated with high loan default rates, which in turn resulted in a significant drain on program funds. When Congress amended the Higher Education Act in 1992 to prohibit schools from paying these incentives, it did so based on evidence of serious program abuses, including the payment of incentive compensation to motivate admissions personnel to enroll students without regard to the students' ability to benefit from the education. S. Rep. No. 58, 102d Cong., 1st Sess., at 8 (1991) ("Abuses in Federal Student Aid Programs") (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of students for a given period").

### 2. The ICB is specifically highlighted as an important requirement in numerous aspects of the federal student financial aid program.

In order to receive student financial aid funds, Appellant had to first enter into a PPA with Department of Education that "condition[ed] the initial *and continuing eligibility* of" Appellant "to participate in [Title IV] upon compliance with" the ICB, among other requirements. 20 U.S.C. § 1094(a) (emphasis added).

The regulations reiterate that "initial *and continuing eligibility*" to receive Title IV funds is conditioned upon compliance with the ICB as well. 34 C.F.R. § 668.14(a)(1) (emphasis added). The PPA itself provides that "[t]he execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA Program" and that "such participation is subject to the terms and conditions set forth in this Agreement." *Hendow*, 461 F.3d at 1175; Example Program Participation Agreement, attached as Exhibit 1 to USA's Compl.-in-Intervention in *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2:07-cv-00461 (W.D. Pa.), ECF128-2.

Appellant and all other institutions that receive Title IV funding are mandated to comply with the ICB in at least five different ways. *First*, the ICB is expressly stated in the statute. 20 U.S.C. § 1094(a)(20). *Second*, the ICB is expressly stated in the Department of Education's regulations. 34 C.F.R. § 668.14(b)(22). *Third*, the ICB is expressly stated in the contracts (the PPAs) between Appellant and the Department of Education. *Hendow*, 461 F.3d at 1175. *Fourth*, pursuant to the Department of Education's reporting requirements, Appellant's management must annually expressly certify compliance with the ICB in their Required Management Assertions to the Department of Education. 20 U.S.C. § 1094(c)(1)(A); 34 C.F.R. §§ 668.23(a)(2), (a)(4); U.S. Dep't of Education, Audit Guide, attached as Exhibit 4 to USA's Compl.-in-Intervention in *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2:07-cv-00461 (W.D. Pa.), ECF128-5. *Fifth*,

Appellant must annually hire an independent outside auditor to verify its compliance with the ICB, as stated in its Required Management Assertions. *Id.*

While PPAs incorporate numerous legal requirements by reference ("General Terms and Conditions"), PPAs identify and expressly restate just twenty-five "Selected Provisions"[2] from the body of laws incorporated by reference. The "Selected Provisions" section provides that "[b]y entering into this Program Participation Agreement, the Institution agrees" to comply with the specific, select provisions set forth in that section. *See* Example Program Participation Agreement, attached as Exhibit 1 to USA's Compl.-in-Intervention in *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2:07-cv-00461 (W.D. Pa.), ECF128-2. The ICB is specifically identified and expressly restated in the "Selected Provisions" section of the PPA:

> (22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance . . . .

*Id.*

Similarly, the Department of Education's Audit Guide specifically identifies and requires Appellant to report on its compliance with the ICB. Annually,

[2] While the Selected Provisions section actually contains twenty-six numbered paragraphs, the first one simply incorporates by reference other applicable statutory and regulatory provisions.

Appellant's management must certify to the Department of Education that it has "[n]ot paid to any persons or entities any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments, financial aid to students, or student retention." U.S. Dep't of Education, Audit Guide, attached as Exhibit 4 to USA's Compl.-in-Intervention in *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2:07-cv-00461 (W.D. Pa.), ECF128-5 at page II-4. Furthermore, the Department of Education requires Appellant to employ an independent outside auditor each year to audit each one of these certifications, the report from which must be provided to the Department of Education. *See generally id.*; 20 U.S.C. § 1094(c)(1)(A); 34 C.F.R. §§ 668.23(a)(2), (a)(4).

## ARGUMENT

### 1. *Escobar* explained that materiality must be viewed under the totality of circumstances, may be established by a variety of facts, and that no single fact is dispositive.

Contrary to Appellant's mischaracterization of *Escobar*, it did not mandate that a relator offer evidence on each of the materiality factors that it identified and it certainly did not suggest that evidence on each of the factors was necessary to create an issue of fact for the jury. Instead, *Escobar* offered a nonexclusive list of facts that support a finding of materiality and recognized that the materiality test is fact-intensive and context-dependent. 136 S. Ct. at 1989. On remand, the First Circuit determined that *Escobar* "makes clear that courts are to conduct a holistic approach to determining materiality in connection with a payment decision, with

no one factor being necessarily dispositive." *U.S. ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 109 (1st Cir. 2016) ("*Escobar II*").

*Escobar* recognized that the definition of "material" in the False Claims Act—"having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"—derives from "common-law antecedents." 136 S. Ct. at 2002 (citing *Kungys v. U.S.*, 485 U.S. 759 (1988)). Building on this common-law definition, *Escobar* explained that materiality examines the effect that a false representation has on the actual or likely behavior of a reasonable person. 136 S. Ct. at 2003–04 (quoting Restatement (Second) of Torts § 538). In other words, if a reasonable person would likely be influenced by the promise of compliance with a particular legal requirement or its violation, the legal requirement is material.

While *Escobar* held that a misrepresentation is not material "merely because the Government designates compliance with a particular statutory, regulatory, *or* contractual requirement as a condition of payment,"[3] it recognized that such designations are "relevant." 136 S. Ct. at 2003 (emphasis added). The Court also identified three other non-exclusive factors bearing on materiality: whether (1) the violation goes to the "essence of the bargain," *id.* n.5 (quoting *Junius Constr. Co. v. Cohen*, 257 N.Y. 393, 400 (1931)), (2) the violation is significant or "minor or

[3] *Escobar* recognized that conditions of participation are also conditions of payment. 136 S. Ct. at 2002. The Supreme Court used the phrase "conditions of payment" to denote all express legal requirements.

insubstantial," 136 S. Ct. at 2003, and (3) the government has taken action in response to similar, known violations, *id.* at 2003–04.

**1.1 A requirement set forth in a statute, regulation, or contract supports a finding of materiality. Here, Appellant's payments are triple conditioned on compliance with the ICB.**

*Escobar* recognized that when a legal requirement is set forth in a statute, regulation, *or* contract, that is relevant evidence that the requirement is material. 136 S. Ct. at 2003. Here, the ICB is expressly set forth in a statute, regulation, *and* contract, as well as in other legal reporting and certification requirements.

As the Eight Circuit explained in applying *Escobar* in an education case, the government "triple condition[s]" payment on compliance with these requirements: in (1) the PPAs, (2) the regulations, and (3) the statute. *U.S. ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494, 504 (8th Cir. 2016). District courts, including in this Circuit, have correctly denied motions under *Escobar* when the applicable legal requirement was repeated in statutes, regulations, and contracts. *U.S. v. IASIS Healthcare LLC*, No. CV-15-00872-, 2016 WL 6610675, at *13 (D. Ariz. Nov. 9, 2016) (denying motion because the complaint cited "to similar . . . or identical provisions" in "various contractual and regulatory provisions," which the court found "substantiate[d the] claim that these processes are fundamental to" the medical services at issue); *U.S. v. Crumb*, No. CV 15-0655, 2016 WL 4480690, at *24 (S.D. Ala. Aug. 24, 2016) ("Taken as a whole, the allegations . . . raise a compelling inference that the purported misrepresentations in question were material" as the

legal requirements were stated in "applicable rules, regulations, policies and contract terms.").

Moreover, Appellant's management is required to annually certify in writing Appellant's compliance with the ICB and obtain an independent, professional audit of this and other certifications, which is further evidence of the ICB's materiality. U.S. Dep't of Education, Audit Guide, attached as Exhibit 4 to USA's Compl.-in-Intervention in *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2:07-cv-00461 (W.D. Pa.), ECF128-5 at II-4. This is also relevant evidence that the ICB is material. *See U.S. v. Savannah River Nuclear Sols., LLC*, No. 1:16-CV-00825, 2016 WL 7104823, at *23 (D.S.C. Dec. 6, 2016) (fact that the defendant "sent annual certifications" of compliance with specific legal requirements to the government because the defendant "was obligated by [its] contract to provide" them demonstrated the materiality of those legal requirements).

**1.2 The ICB is central to the student financial aid system.**

As set forth above, when Congress enacted the ICB, it made clear that the ICB was critical to the integrity of the student financial aid programs and to their proper functioning. Congress specifically mandated that the ICB be included in the PPAs. To emphasize the importance of the ICB, the Department of Education did not simply incorporate the ICB into the PPAs by reference, as it did for many other legal requirements. Instead, the Department of Education included the ICB among the twenty-five specially selected provisions to be set forth in the PPAs *in haec*

*verba*. That the PPA specifically calls out and highlights the ICB, among the hundreds of laws and regulations referenced in the PPAs, demonstrates how important the ICB is to the integrity of the entire financial aid system.

Consider, by contrast, the Supreme Court's examples in *Escobar* of what would constitute too expansive a view of liability: a regulation forbidding the use of foreign-made staplers and one requiring compliance with the entire U.S. Code. The centrality to Title IV of the ICB—as made clear by its inclusion in five separate stages of Title IV compliance and the triple-conditioning of payments on cooperation with the ICB—prove that finding the ICB material to Title IV is not an "extraordinarily expansive view of liability," such as forbidding the use of foreign staplers or requiring compliance with the entire U.S. Code would be.

### 1.3 Government enforcement actions short of complete termination are still relevant to the materiality analysis.

Contrary to Appellant's claim that only the most extreme government enforcement actions can demonstrate materiality, the District Court was correct in concluding that government enforcement actions short of complete termination are also relevant evidence of materiality. Although Appellant spills much ink assessing an Office of Inspector General report and a Government Accounting Office analysis, the District Court's conclusion on this point was unassailably correct—those reports actually establish that the government has prosecuted and participated in enforcement actions for ICB violations.

Not only is Appellant's all-or-nothing approach unsupported by the text of *Escobar*, Appellant's suggested approach to materiality would make it virtually impossible to establish materiality in a great many cases, contrary to the Supreme Court's guidance in *Escobar*. For example, all important Department of Defense contractors would be virtually immune from False Claims Act suits because, for numerous practical reasons, the DoD cannot simply terminate key suppliers from critical programs or debar them from all federal contracts. Often the government has an interest in bringing contractors and suppliers back into line through less extreme sanctions and has an interest in doing so since re-procurement processes can be slow and expensive.

But just because the government cannot, as a practical matter, terminate a contractor does not mean that the contractor is incapable of committing fraud on the government, nor that the government is incapable of punishing such infractions through fines and controlling their future occurrence through forward-looking restrictions and settlement terms. The truth is that the government must sometimes continue to work with an entity that has committed fraud. Appellate courts have routinely acknowledged that the government must have the leeway "to choose among a variety of remedies, both statutory and administrative, to combat fraud." *U.S. ex rel. Onnen v. Sioux Falls Indep. Sch. Dist.*, 688 F.3d 410, 414-15 (8th Cir. 2012); *see also U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003) (recognizing there may be practical reasons, such as

avoiding costs associated with terminating a contract, for "a government entity [to] choose to continue funding [a] contract despite earlier wrongdoing by the contractor"). This factor, while sometimes important, is not dispositive of the question.

Appellant's all-or-nothing approach also fails to account for the unique circumstances of government programs other than simple procurement contracts—the non-payment example discussed in *Escobar*. In fact, federal student aid funding is the perfect example of a circumstance in which the government must consider collateral consequences to innocent third parties—the students the government has encouraged to go to college through its grants and loans. Terminating a school from Title IV risks jeopardizing years of work by potentially thousands of students (or more) and calling into question the degrees of graduates—both of which combine to make it less likely either group will be able repay student loans, with the resulting loan defaults harming both the U.S. Treasury and taxpayers. Thus, the Department of Education is obligated to students and taxpayers alike to exercise appropriate prosecutorial discretion in such circumstances. Enforcement actions short of complete termination, such as imposing fines and penalties through settlements and administrative actions, are clearly warranted in a great many cases. The exercise of discretion does not suggest the violation is not important to the Department of Education. Instead, the less-severe enforcement actions demonstrate the opposite—that the ICB is important

to the Department of Education since the Department often takes action to recoup funds for violations of the ICB and to prevent future occurrences through such actions.

These fines and settlements are not insignificant. For example, in 2015, the Department settled an ICB case for more than $95 million. U.S. Dep't of Justice, For-Profit College Company to Pay $95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations, Nov. 16, 2015, https://www.justice.gov/ opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and. In 2009, the Department recouped more than $67 million in *Hendow*. U.S. Dep't of Justice, University of Phoenix Settles False Claims Act Lawsuit for $67.5 Million, Dec. 15, 2009, https://www.justice.gov/opa/pr/university-phoenix-settles-false-claims-act-lawsuit-675-million.

The District Court's analysis below on this factor is particularly important, and this Court should endorse it on appeal. The District Court was correct in its conclusion that "[n]othing in *Escobar* suggests that actions short of a complete revocation of funds are irrelevant to the court's materiality analysis." 2016 WL 5076214, at *7. To the contrary, the Department of Education's administrative "corrective actions against schools," which result in fines and "settlement agreements (which function like a fine or partial revocation of funds)," demonstrate that the Department "consider[s] the ICB to be an important part of the Title IV

bargain" and "show that ICB noncompliance was 'capable of influencing' the government's payment decisions." *Id.* at *7–8.

The District Court's approach is identical to that of the Eighth Circuit in *Miller*, which cited to just a couple of administrative actions by the Department of Education for violations similar to those at issue in that case, which resulted in partial repayments of federal funds. 840 F.3d 494, 504 (8th Cir. 2016). As the court noted, the other administrative actions demonstrated that the Department of Education imposes "consequences" on schools that fail to comply with the requirements at issue. The court found that the Department of Education's actions imposing such "consequences" demonstrated that the requirements were important to the Department. The same is true of the administrative actions the Department of Education has pursued for ICB violations—it has acted to impose consequences for violations and recovered funds in the process because the ICB is important to the Department.

### 1.4 There is ample evidence that the ICB is material to create a triable question of fact.

In *Escobar*, the Supreme Court quoted Section 538 of the Restatement (Second) of Tort's standard for materiality as one of the starting points for its analysis. Comment e to Section 538 explains that "the question . . . is a matter for the judgment of the jury" unless it "is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." While

*Escobar* did not rule out the possibility that materiality could be decided by dispositive motion, *id.* at 2004 n.6, it did not suggest that the issue should be routinely so decided. *See U.S. v. Gaudin*, 515 U.S. 506, 512 (1995) (explaining that materiality "is peculiarly one for the trier of fact").

Under the holistic approach mandated by *Escobar*, there is ample evidence of the ICB's materiality to send the question to the jury. The mere fact that the ICB is set forth in the statute, in a regulation, and in the contract between the Appellant and the Department of Education is sufficient evidence to create a question of fact. Add on the general importance of the law to the entire regulatory scheme and the Department of Education's requirement that management expressly certify compliance with the ICB every year, and there should be no serious question that the materiality issues presented in this case are for a jury to resolve.

**2. While this case involves a unique theory of falsity, this Court has recognized that other theories of falsity relating to ICB violations are actionable under the False Claims Act, and nothing in this case or *Escobar* undermines this Court's determinations in these other cases.**

Although Relators are only proceeding on an implied certification claim based on certifications about program eligibility in loan forms, the government and relators in many other cases have alleged (and proven) more direct claims for, among other theories, (1) fraudulent inducement of the PPAs (also known as a promissory fraud theory), and (2) false certifications of compliance, both express and implied.

Many appellate courts, including this one, have recognized that relators and the government can pursue claims "based upon allegations of fraud in the inducement of the original [PPA]." *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006); *U.S. ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005); *Miller*, 784 F.3d at 1204. This case, however, does not involve fraudulent inducement claims under the PPA.[4]

Similarly, numerous courts have sustained false certification claims based on the schools' G5 certifications. The Department of Education makes funds available for schools to electronically draw down from a computerized system known as "G5." All schools must electronically certify in G5 at the point they make a request for funds that "by processing this payment request . . . the funds are being expended within three business days of receipt for the purpose and condition[s] of the [Program Participation] agreement." *See* Example G5 Certification, attached as Exhibit 6 to USA's Compl.-in-Intervention in *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 2:07-cv-00461 (W.D. Pa.), ECF128-7; *see also U.S. ex rel. Mayers v. Lacy Sch. of Cosmetology, LLC*, No. 1:13-CV-00218-JMC, 2015 WL 8665345, at *4 (D.S.C. Dec. 14, 2015) (finding that G5 certifications submitted to receive payments were

[4] It is important to draw a distinction between the PPA as the source of the false statement—as in a fraudulent inducement claim—and the PPA as evidence of materiality. While Relators in this case are not pursuing a fraudulent inducement claim, the fact that the ICB is expressly restated in the PPA is nevertheless relevant evidence of materiality.

"necessary to receive the payment of federal funds" and falsely certified compliance with various requirements); *U.S. ex rel. Washington v. Educ. Mgmt. Corp.*, 871 F. Supp. 2d 433, 451 (W.D. Pa. 2012) (finding complaint adequately alleged false certification claims based on "EDMC's statements in . . . periodic audits regarding its compliance with the Incentive Compensation Ban," as well as each request for payment (i.e., the G5 certifications)); *U.S. v. FastTrain II Corp.*, No. 12-CIV-21431, 2017 WL 606346, at *10 (S.D. Fla. Feb. 15, 2017) (finding that each G5 certification was a false claim).

Still other courts, including this Court, have recognized the validity of false certification claims based on other forms of certifications made in the Title IV process, including the schools' certifications of compliance in the Required Management Assertions and certifications of compliance by third-party auditors. *U.S. ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (reinstating claims based on false certification of compliance with the ICB and false audit reports by third-party auditors); *U.S. ex rel. Irwin v. Significant Educ., Inc.*, No. CV-07-1771-PHX-DGC, 2009 WL 322875, at *3 (D. Ariz. Feb. 10, 2009) (finding allegations about Required Management Assertions adequately pled that "management officials falsely certified to the government that [the college] complied with the incentive compensation ban in order to receive Title IV funding").

Thus, while this case presents yet another theory of falsity based on a different form of certification, the Court should recognize that whatever challenges

this case may face, those challenges are unique to the record in this case and should be careful that its opinion does not prejudge issues that are not before the Court.

Furthermore, this Court's prior rulings in *Hendow* and *Lee* relating to the fraudulent inducement and false certification theories of falsity remain good law. While this case presents a different set of facts from *Hendow* and *Lee* concerning the precise certification of compliance at issue, it is nothing more than a variation on a consistent and correct theme. Nevertheless, nothing in *Escobar* or this case calls into question the theories of falsity endorsed by this Court in *Hendow* and *Lee*, and this Court did not accept an interlocutory appeal to revisit the falsity theories in those cases. Similarly, the Court should not foreclose other possible theories of falsity in this area of the law by writing too broadly in this case, especially since this area of the law is still developing and evolving.

## CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's ruling denying Appellant's summary judgment motion.

DATED this 7th day of August 2017.

Respectfully submitted,

/s/ Brandon J. Mark

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/s/ Brandon J. Mark

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