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False Claims Act Liability for Higher Education Institutions: Analyzing Claim Against Charlotte School of Law and Infilaw Systems

Brian Munsie

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I. Introduction

In mid-August, prior to the beginning of the 2017 fall semester, the Charlotte School of Law (CSOL) announced that it would be closing.[1] The announcement came in the wake of public disclosure of shortcomings in the school's ability to operate effectively.[2] The American Bar Association (ABA) Section of Legal Education and Admission to the Bar published notice that it was placing CSOL on probationary status for failing to comply with several ABA standards, including standards for bar passage and admissions.[3] The school subsequently lost its ability to receive federal funding for student tuition, and also lost its license to operate in the state, thereby forcing CSOL to close.[4] The school is now facing a plethora of lawsuits filed by students and faculty.[5]

One lawsuit the school is facing is a False Claims Act (FCA) suit filed by a former teacher, Professor Barbara Bernier, alleging that the school violated the FCA for allowing students to submit claims for federal funds under Title IV of the Higher Education Act (HEA) while failing

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[1] Stephanie Francis Ward, *Feds Started Criminal Investigation of Charlotte School of Law, According to Civil Filing*, ABA J. (Aug. 29, 2017, 5:44 PM), http://www.abajournal.com/news/article/feds_started_criminal_investigation_of_charlotte_school_of_law_according_to/.

[2] Ann Doss Helms, *Charlotte School of Law Put on Probation by American Bar Association*, CHARLOTTE OBSERVER (Nov. 17, 2016, 8:51 AM), http://www.charlotteobserver.com/news/local/education/article115339503.html.

[3] *Id.*

[4] Ward, *supra* note 1.

[5] *See, e.g.*, Stephanie Francis Ward, *Student Lawsuits Against Charlotte School of Law Consolidated*, ABA J. (Oct. 17, 2017, 12:54 PM), http://www.abajournal.com/news/article/student_lawsuits_against_charlotte_school_of_law_consolidated.

to comply with certain requirements.[6] Professor Bernier filed the *qui tam*[7] action under seal in the United States District Court for the Middle District of Florida in June 2016, a few months prior to her voluntarily leaving the school.[8] The complaint was unsealed in August 2017 after the United States Attorney's Office filed a notice that it would not intervene.[9] The United States Attorney's motion to unseal the lawsuit gave no indication whether the decision to not intervene was based on lack of evidence against the school, but it stated that the investigation "will continue."[10] It is unclear whether the government's investigation into the school is ongoing, but Professor Bernier as the relator and whistleblower will presumably continue pursuing the action.[11] Her complaint alleges that the school manipulated bar exam and employment statistics by offering students who were unlikely to pass the exam a monetary stipend to forego taking the exam.[12] Additionally, Professor Bernier alleges that CSOL dramatically transformed the nature of the school in terms of faculty and resources after obtaining full accreditation,[13] and downwardly adjusted minimum GPA requirements in order to retain failing students who otherwise should have been academically dismissed.[14]

This Comment will discuss the current FCA lawsuit filed against CSOL and Infilaw, its parent corporation, and address whether non-compliance with accreditation standards following entry into a Program Participation Agreement (PPA) should be a basis for a valid claim under the

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[6] Elizabeth Olson, *Federal Inquiry of Charlotte Law School Is Disclosed by Suit*, N.Y. TIMES (Sep. 13, 2017) https://www.nytimes.com/2017/09/13/business/dealbook/charlotte-law-school-federal-inquiry.html.
[7] A qui tam action is a lawsuit brought by a private citizen (popularly called a "whistleblower") against a person or company who is believed to have violated the law in performance of a contract with the government or in violation of a government regulation. *Qui tam action*, LAW.COM, https://dictionary.law.com/Default.aspx?selected=1709 (last visited Apr. 19, 2018). Qui tam suits are brought "for the government as well as for the plaintiff." *Id.*
[8] Olson, *supra* note 6.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Ward, *supra* note 1.
[13] Complaint at ¶ 53, United States ex rel. Bernier v. Infilaw Corp., 2016 WL 9526145 (M.D. Fla. June 6, 2016) (No. 16-970), http://www.abajournal.com/files/bernier_v._Infilaw_2016.pdf.
[14] *Id.* at ¶ 69.

FCA. Part II will discuss the history of CSOL and Infilaw, the background of the FCA, and the requirements of both Title IV of the HEA and PPAs that schools must enter into with the Department of Education in order to be able to receive federal funding. Part III will address the current state of FCA liability for higher education institutions based on theories of non-compliance with statutes, regulations, and promises made under the PPA. It will focus on the current circuit split as to the viability of the false-certification theory of liability under the FCA. Recently, the Supreme Court imposed liability based on the false-certification theory in the medical context,[15] but the effect of that holding on educational institutions is unclear. Part IV will analyze the facts of the lawsuit filed by Professor Bernier against CSOL and Infilaw, and will analyze whether the complaint states a valid claim of FCA liability. This Comment posits that, while the complaint may not have pled with specificity the alleged "bad faith" that is normally required under a pre-formation false certification theory of liability, Professor Bernier should be held to the more lenient standard of Federal Rule of Civil Procedure 9(b) pleading some courts have applied. But even if the complaint fails to allege facts sufficient to prove bad faith entry into the PPA, she should be allowed to continue based on the theory of post-formation false certification. Part V briefly concludes.

II. Background

A. The Infilaw System and CSOL

The Infilaw System is a consortium of private, independently-operated for-profit law schools in the United States.[16] Infilaw is owned primarily by Sterling Partners, a Chicago-based private equity firm, and is headquartered in Naples, Florida.[17] It was founded by Sterling Partners

[15] *See* Universal Health Services, Inc. v. United States *ex rel.* Escobar, 136 S.Ct. 1989 (2016).
[16] THE INFILAW SYSTEM, www.infilaw.com (last visited Feb. 16, 2018).
[17] *Id.*

in 2004, shortly after Sterling's purchase of the Florida Coastal School of Law.[18] Infilaw then established two other for-profit law schools—Arizona Summit Law School, located in Phoenix Arizona, in 2004, and CSOL in 2006.[19] The company's approach has been to mostly target students who do not qualify for admission to top law schools,[20] including many minorities,[21] because of low grade-point averages and LSAT scores.[22] The schools supposedly emphasize providing more feedback than other law schools, and focus on "hands on" learning.[23] With the closing of CSOL, the consortium currently consists of two ABA-accredited law schools, Arizona Summit Law School in Phoenix, Arizona, and Florida Coastal School of Law in Jacksonville, Florida.[24]

Arizona Summit Law School has recently experienced operating troubles of its own, however, being placed on probation by the ABA and ranking second-to-last out of all ABA approved schools in "ultimate" bar passage rates.[25] Ultimate bar passage rates show the percentage of graduates who passed the bar within two years of graduation.[26] Just sixty percent of the 2015

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[18] Zach Warren, *For-profit Law Schools on the Rise*, CORP. COUNS. (Oct. 21, 2013), https: //www.law.com/insidecounsel/2013/10/21/for-profit-law-schools-on-the-rise/.

[19] Ashby Jones, *Private-Equity Group's for-Profit Law School Plan Draws Critics*, WALL ST. J. (Oct. 20, 2013), https://www.wsj.com/articles/privateequity-group8217s-forprofit-law-school-plan-draws-critics-1382312687?mg= prod/accounts-wsj.

[20] U.S. News & World Report ranks 197 fully accredited law schools based on a weighted average of several factors including quality assessment, selectivity, placement success, and faculty resources. Robert Morse & Kenneth Hines, *Methodology: 2018 Best Law Schools Rankings*, U.S. NEWS WORLD REP. (Mar. 13, 2017, 9:30 PM), https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology. U.S. News assigns a numerical rank to the top three-fourths of law schools, while the bottom quarter are listed as Rank Not Published. *Id.* CSOL was unranked due to its probationary status. *Id.* Arizona Summit Law School and Florida Coastal School of Law were both listed as Rank Not Published. *Best Law Schools*, U.S. NEWS WORLD REP., https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings/page+7 (last visited Apr. 19, 2018).

[21] For example, Professor Bernier alleges that CSOL recruited heavily from Livingstone College in Salisbury, North Carolina, a historically black college, admitting approximately forty Livingstone students in 2013 and fifty in 2014. *See* Complaint, *supra* note 13, at ¶ 60. Both sets of students allegedly failed at extremely high rates with most not making it through a second semester. *Id.*

[22] Jones, *supra* note 19.

[23] According to Peter Goplerud, the president of Infilaw's consulting arm, one "informal goal" of the school's is for students to obtain at least 400 hours of work experience prior to graduation. *Id.*

[24] *Our Schools*, THE INFILAW SYSTEM, http://www.infilaw.com/our-schools-2/ (last visited Feb. 16, 2018).

[25] Anne Ryman, *Arizona Summit Law School Has Nation's Second-lowest Bar Passage Rate*, ARIZ. REPUBLIC (Mar. 23, 2018), https://www.azcentral.com/story/news/local/arizona-education/2018/03/23/arizona-summit-law-school-second-lowest-bar-passage-rates-country/450085002/.

[26] *Id.*

Arizona Summit graduates had passed the bar, while the average of all other schools was eighty-eight percent.[27] Additionally, a FCA suit brought against the school by two former professors, making similar allegations to those in the Bernier complaint, was recently unsealed in March 2018.[28] While the suit was voluntarily dismissed by the plaintiffs in February, a lawyer representing the former professors said his clients stand by their allegations against the school despite their decision to not move forward with the suit.[29] Florida Coastal School of Law has also faced recent troubles, ranking among the lowest in bar passage rates in the state and failing federal gainful-employment ratings—which signals graduates' inability to manage student loan debt based on their post-graduation earnings.[30] The ABA sent the school a letter notifying its administrators that the school was out of compliance with accreditation standards, but the school has not yet been placed on probation or sanctioned.[31]

CSOL obtained provisional accreditation[32] from the ABA in 2008 and full accreditation in 2011.[33] The ABA performed a full site inspection of the school in 2014.[34] Since obtaining full accreditation in 2011, students of CSOL have been eligible to apply for and obtain federal financing for their legal education.[35] Within three months of becoming fully accredited and site

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[27] *Id.*

[28] Karen Sloan, *Second Law Prof Whistleblower Suit Against InfiLaw Unsealed*, DAILY BUS. REV. (Apr. 4, 2018), https://www.law.com/dailybusinessreview/2018/04/04/second-law-prof-whistleblower-suit-against-infilaw-unsealed/.

[29] *Id.*

[30] Andrew Kreighbaum, *Accreditors' Scrutiny of Florida Law School Renews Concerns Over Oversight*, INSIDE HIGHER ED (Nov. 15, 2017), https://www.insidehighered.com/news/2017/11/15/accreditors-scrutiny-florida-law-school-renews-concerns-over-oversight.

[31] *Id.*

[32] The ABA grants provisional approval to applying schools who establish that they are "in substantial compliance with each of the Standards" and present "a reliable plan for bringing the school into full compliance within three years after receiving provisional approval." *The Law School Accreditation Process*, ABA SEC. LEGAL EDUC. ADMISSIONS B., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2016_the_law_school_accreditation_process.authcheckdam.pdf.

[33] Complaint, *supra* note 13, at ¶ 51.

[34] *Id.* The ABA conducts regular site visits of fully approved law schools every seventh year. *Law School Site Visits*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/accreditation/law_school_site_visits.html (last visited Feb. 16, 2018).

[35] Complaint, *supra* note 13, at ¶ 52.

certified, the Bernier complaint alleges that the school began instituting buy-outs of faculty and staff in order to cut costs, which dramatically altered the nature of the school as compared to when it obtained accreditation.[36] Following the 2014 site visit, the ABA made several findings of concern about the school's operation in a report to the school.[37] The report stated the school was out of compliance with several ABA standards for law schools, including "its ability to provide a rigorous program that prepares students for admission to the bar and its application of reasonably high standards for admission."[38] Further reports showed the school was troubled with exceedingly high drop-out rates and low bar-passage rates among first-time takers.[39] But despite the school's failure to come in to compliance, the ABA did not place the school on probation until November 2016, two and a half years after issues of noncompliance were first discovered.[40] Subsequently, the Department of Education removed the school's Title IV eligibility, and CSOL students were no longer able to receive Title IV funds for their education.[41] Ultimately the school's license to operate in the state of North Carolina expired, and CSOL was forced to close in August 2017, just weeks prior to the start of the fall semester.[42]

B. The FCA

The FCA, often called the Lincoln Law, was signed in 1863 by President Abraham Lincoln in response to deception and fraud practiced on the government in its purchasing of horses, weapons, ammunition, and other goods needed for the Civil War.[43] The FCA imposes liability on

[36] *Id.* at ¶ 53.
[37] Clare McCann, *A Play-By-Play of Charlotte School of Law's Closure*, NEW AMERICA (Aug. 23, 2017), https://www.newamerica.org/education-policy/edcentral/csl-part-one/.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Elizabeth Olson, *For-Profit Charlotte School of Law Closes*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/business/dealbook/for-profit-charlotte-school-of-law-closes.html.
[43] Harry Litman, *'Lincoln's law': The Most Important Supreme Court Case Under the Radar*, PITTSBURGH POST-GAZETTE (Jun. 13, 2016), http://www.post-gazette.com/opinion/Op-Ed/2016/06/13/Lincoln-s-law-The-Supreme-

any person or entity that knowingly makes, or causes another to make, any false or fraudulent claim for payment to the government.[44] "Knowingly" is defined in the statute as "actual knowledge," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information," and requires "no proof of specific intent to defraud."[45] The statute has been amended several times since its enactment to make it more effective.[46] Violators of the FCA are subject to a fine between $5000–10,000 per violation, treble damages, and attorney's fees and costs to successful whistleblowers who bring claims on behalf of the government.[47]

The statute contains a *qui tam* provision which allows private individuals, known as "relators," to bring a lawsuit on behalf of the government against a party who has defrauded the government by a false claim.[48] The provision allows any person or entity with evidence of fraud against federal programs or contracts which induced the government to wrongly pay out a claim to sue the wrongdoer in the name of the United States.[49] A *qui tam* action must be filed under seal in a district court with jurisdiction over the matter, and the complaint and its contents are kept confidential until the seal is lifted.[50] Additionally, a copy of the complaint and a written disclosure containing all of the material evidence of fraud the relator possesses must be served on the United States Attorney General and the United States Attorney for the district where the action is filed.[51]

Court-will-decide-whether-to-leave-in-place-a-robust-defense-against-fraud-passed-during-the-CivilWar/stories/201606130010.

[44] 31 U.S.C. § 3729 (2016).

[45] *Id.* § 3729(b).

[46] *See infra* notes 55–59 and accompanying text.

[47] *Id.* § 3729(a)(1), (3).

[48] 31 U.S.C. § 3730(b).

[49] False Claims Act/Qui Tam FAQ, NATIONAL WHISTLEBLOWER CENTER, http://www.whistleblowers.org/resources/faq-page/false-claims-actqui-tam-faq#what%20is%20false (last visited Nov. 2, 2017).

[50] *Id.*

[51] *Id.*

The government may choose to intervene in the lawsuit and take over the action, but if the government does not intervene the relator is permitted to proceed with the suit.[52]

The FCA has become the government's "primary litigation tool" in combatting fraud against it.[53] Both the judicial decisions and legislative history of the Act show a preference to extend liability broadly. In 1968, the Supreme Court extended the reach of the FCA to "all fraudulent attempts to cause the Government to pay out sums of money."[54] Then in 1986 Congress amended the Act to broaden the ability for relators to bring a claim and increase the financial incentives available to successful relators.[55] The amendment allowed relators to bring FCA actions even if the government was already aware of the fraud if the relator was the original source of the information.[56] Congress further amended the Act in 2009 through the Fraud Enforcement and Recovery Act (FERA), which was enacted to enhance the government's ability to combat financial fraud following the 2008 financial crisis, establishment of the Troubled Asset Relief Program, and increased economic stimulus spending.[57] But FERA also added a materiality element to the FCA by requiring that a false record or statement be "material to a false or fraudulent claim."[58] The FCA defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[59]

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[52] *Id.*
[53] United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010).
[54] United States v. Neifert-White Co., 390 U.S. 228, 233 (1968). The question before the Court was whether the FCA applied to a loan application submitted to a federal agency which contained false information. *Id.* at 229. The Court found that the congressional debates at the time the act was passed suggested the Act was "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Id.* at 232.
[55] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (current version codified at 31 U.S.C. § 3729 (2016)).
[56] *Id.*
[57] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 386, 123 Stat. 1617 (codified at 31 U.S.C. § 3729 (2016). *See also* 155 CONG REC. E1090-03 (daily ed. May 7, 2009) (statement of Rep. Dingell).
[58] 31 U.S.C. § 3729(a)(1)(B).
[59] *Id.* § 3729(b)(4).

Since 2009, the Department of Justice has recovered over $31 billion in settlements and judgements from FCA cases, recovering over $4.7 billion in fiscal year 2016 alone.[60] Of the $4.7 billion recovered in 2016, $2.9 billion related to actions originally brought by relators under *qui tam* provisions, and the government paid out $519 million to such private individuals.[61] The majority of those actions involved claims against the healthcare industry, including drug companies, hospitals, nursing homes, and physicians.[62] The Department also secured a significant amount of recoveries involving the financial industry from cases of housing and mortgage fraud in connection with federally insured residential mortgages.[63] In recent years, however, there has been an increase in FCA litigation against for-profit schools that allegedly participated in fraudulent schemes to secure federal education funds.[64] The increase in claims against for-profit schools follows the increased awareness of the predatory nature and educational shortcomings of these schools.

There are two categories of false claims recognized by courts under the FCA: (1) factually false claims and (2) legally false claims.[65] A factually false claim occurs when a claimant makes misrepresentations as to the goods or services it actually provides to the government.[66] A legally false claim, also called false certification, occurs when a claimant falsely certifies compliance with a statute or regulation where compliance is a condition of government payment.[67] Legally false

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[60] *See* Dep't of Justice Office of Pub. Affairs, *Justice Department over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016*, JUSTICE.GOV (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] "For example, the second largest for-profit education company in the country, Education Management Corp., paid the United States $52.6 million to resolve allegations that it unlawfully recruited students, engaged in deceptive and misleading recruiting practices, and falsely certified compliance with Title IV of the Higher Education Act . . . ." *Id.*
[65] United States *ex rel.* Wilkins v. United Health Group, Inc., 659 F.3d 295, 305 (3d Cir. 2011).
[66] *Id.*
[67] *Id.* ("[A] legally false claim is based on a 'false certification' theory of liability.") (citing Rodriguez v. Our Lady of Lourdes Med. Ctr., 552 F.3d 297, 303 (3d Cir. 2008)).

claims can be based on either express or implied false certifications.[68] Under the "express false certification theory," a claimant is liable for falsely certifying compliance with a statute or regulation which is a prerequisite to receiving government payment.[69] The "implied false certification theory," however, finds a claimant liable for submitting claims for government payment without disclosing non-compliance with statutes or regulations that would affect eligibility to receive payment.[70] Implied false certification is based on the common-law definition of fraud encompassing misrepresentations by omission.[71]

C. The Higher Education Act and Program Participation Agreements

Under Title IV of the HEA, the federal government operates several programs that provide educational funds to students to enable them to meet the financial burdens of higher education.[72] Programs providing assistance include the Federal Pell Grant, the Federal Family Education Loan Program, the William D. Ford Federal Direct Loan Program, the Federal Perkins Loan, and the Graduate Plus Loan.[73] Students are eligible to obtain funds through federal programs only if they attend a qualifying school.[74] To qualify, Title IV of the HEA requires schools to enter into PPAs with the Secretary of the Department of Education.[75] In a PPA, the school agrees to comply with all statutory requirements of Title IV, any regulatory provisions promulgated thereunder, and any other arrangements, agreements, and limitations entered into under the authority of Title IV.[76] The

[68] *Id.*
[69] *Id.*
[70] *Id.* (noting that the "implied false certification theory of liability is premised 'on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment'") (quoting Mikes v. Strauss, 274 F.3d 687, 699 (2d Cir. 2001).
[71] *See* Universal Health Services, Inc. v. United States *ex rel.* Escobar, 136 S.Ct. 1989, 1999 (2016).
[72] 20 U.S.C. §§ 1070–1099d (2016).
[73] *Id.*
[74] *Id.*
[75] 20 U.S.C. § 1094(a).
[76] *Id.*; 34 C.F.R. § 668.14(b)(1) (2017).

institution must also be accredited by the applicable accrediting agency.[77] The Department of Education does not accredit schools directly, but the Secretary of Education approves accrediting agencies for different educational programs, who in turn set independent accreditation standards.[78] Once a school is qualified to receive federal funds, its students are eligible to apply to receive full financing for their education through federal programs.[79]

III. Applying the FCA to Educational Institutions

Due to the predatory recruitment tactics and fraudulent schemes that have plagued the for-profit educational industry in recent years, there has been an increase in FCA suits brought against for-profit higher educational institutions.[80] But because a claim under the FCA involves allegations of "fraud," pleadings under the FCA must meet the heightened pleading requirements of Civil Procedure Rule 9(b).[81] Courts have consistently applied Rule 9(b) to complaints filed under the scope of the FCA.[82] Courts have differed, however, on the theories of FCA liability that can be extended to educational institutions.

A. Heightened Pleading Requirements

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[83] This standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[84] The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[85] A claim cannot survive a

[77] 34 C.F.R. § 600.4(a)(5)(i) (2017).
[78] Thomas M. Cooley Law School v. American Bar Ass'n, 459 F.3d 705, 707 (6th Cir. 2006).
[79] *See supra* note 73 and accompanying text.
[80] *See* DOJ, *supra* note 60.
[81] FED. R. CIV. P. 9(b).
[82] *See* United State *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1309 (11th Cir. 2002).
[83] FED. R. CIV. P. 8(a)(2).
[84] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
[85] *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570 (2007)).

motion to dismiss where allegations are merely "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."[86] The plausibility standard requires a plaintiff to allege facts sufficient to allow a court to reasonably infer that the defendant's alleged misconduct was unlawful.[87]

Because they involve fraud, actions arising under the FCA are additionally subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b).[88] The heightened pleading standards under Rule 9(b) are a supplement, not a replacement, to the Rule 8(a) standards that apply to all pleadings.[89] Rule 9(b) applies to actions where a plaintiff alleges fraud or mistake, and requires a plaintiff alleging fraud to "state with particularity the circumstances constituting fraud," but allows scienter to be alleged generally.[90] The purposes of heightened pleading are: (1) to ensure "that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of;" (2) "to protect defendants from frivolous suits;" (3) "to eliminate fraud actions in which all facts are learned after discovery;" and (4) to protect "defendants from harm to their goodwill and reputation."[91] Rule 9(b) is generally satisfied if the complaint establishes:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.[92]

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[86] *Twombly*, 550 U.S. at 555.
[87] *Id.* at 556; *Iqbal*, 556 U.S. at 678.
[88] *See* United State ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1309 (11th Cir. 2002).
[89] *Id.*
[90] Fed. R. Civ. P. 9(b).
[91] Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc. 755 F. Supp. 1055, 1056–57 (S.D. Ga 1990)).
[92] *Clausen*, 290 F.3d at 1310 (11th Cir. 2002) (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)).

To serve the purposes of heightened pleading, the relator must provide "some indicia of reliability" to support the allegations that the defendant submitted a false claim.[93]

In applying this standard to the FCA cases brought against educational institutions, there is little difficulty with providing particularity that a claim was submitted to the government because the claims submitted were requests from students for federal loans. Instead, the facts that must be alleged with particularity are those showing the defendant's false statements, which ultimately led the government to pay amounts it did not owe.[94] For example, in *Urquilla-Diaz v. Kaplan University*, the Eleventh Circuit found the relator met the requirements of Rule 9(b) for an FCA claim based on a violation of the Department of Education's regulation banning incentive compensation for admissions employees where the relator pled specific instances of salaries being adjusted based on numbers of enrollments.[95] The court, however, affirmed the dismissal of the claim that the school falsely certified that students were making satisfactory progress as a result of a grade inflation scheme because the relator failed to provide specific instances of students who would not have been making satisfactory progress but for the scheme.[96]

B. False Certification Theory

As noted previously, legally false claims under the FCA based on a theory of false certification can be either express or implied.[97] The relevant certification of compliance must be both a "prerequisite to obtaining a government benefit" and the "*sine qua non* of receipt of government funding."[98] In *United States ex rel. Hendow v. University of Phoenix*, the Ninth Circuit recognized the viability of a FCA claim against the University of Phoenix, a for-profit entity,

[93] *Id.* at 1311.
[94] Uquilla-Diaz v. Kaplan University, 780 F.3d 1039, 1045 (11th Cir. 2015).
[95] *Id.*
[96] *Id.* at 1055.
[97] *See supra* note 68 and accompanying text.
[98] *Urquilla-Diaz*, 780 F.3d at 1053.

predicated on an express false certification theory.[99] Relators, former enrollment counselors at the school, alleged that the University knowingly made false promises that it would comply with the incentive compensation ban required by the PPA.[100] They further alleged that the University falsely certified compliance with the ban each year while knowingly violating the requirement; that, coupled with later claims for payment of Title IV funds, constituted false claims under the FCA.[101]

In reversing the district court's dismissal of the case for failure to state a claim, the Ninth Circuit accepted false certification as a viable theory of FCA liability and stated four essential elements: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.[102] The court found that all of the essential elements were met and allowed the case to proceed.[103] In articulating the necessity of alleging an actual false claim rather than a mere regulatory violation, the court stressed that it is the false certification of compliance that creates liability when certification is required prior to obtaining the government benefit.[104]

The court found that the falsity element was met due to the University's alleged violation of the incentive compensation ban because it had expressly agreed to comply with the ban (as well as all other statutory and regulatory requirements) in the PPA.[105] As for the scienter element, the court found the element satisfied based on the allegations that University staff openly bragged about perpetrating a fraud and established procedures to deceive the government.[106] The court

[99] United States ex rel. Hendow v. Univ. of Phx., 461 F.3d 1166, 1171–73 (9th Cir. 2006).
[100] *Id.* at 1169.
[101] *Id.*
[102] *Id.* at 1174.
[103] *Id.* at 1177.
[104] *Id.* at 1171.
[105] *Hendow*, 461 F.3d at 1174–75.
[106] *Id.* at 1175.

found the materiality element was satisfied because eligibility to receive funds under Title IV is explicitly conditioned on compliance with all requirements contained in the PPA, including the incentive compensation ban.[107] Notably, the court found that, in the context of Title IV and the HEA, any distinction between conditions of participation and conditions of payment was irrelevant, and all promises to comply with a PPA are conditions of payment.[108] Finally, the court found that the relators properly alleged submission of claims to the government through a variety of requests for student funding.[109]

The Ninth Circuit's holding in *Hendow* is significant because the court extended FCA liability to the University based on allegedly fraudulent conduct that was committed after entry into the PPA. While the court stated both that "mere regulatory violations do not give rise to a viable FCA action,"[110] and that "false claims must in fact be false when made,"[111] the court based its finding on the University's later failure to honor its agreement to comply with the ban when it entered into the PPA.[112] The court stated that the claim was an express false certification because the signed, written PPA was an "express statement of compliance."[113] But the court did not look to whether the statement of compliance was false at the time the school entered into the PPA.[114] Thus, it appears that the claimant's state of mind and intention at the time it enters into the PPA are irrelevant to the court's analysis.

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[107] *Id.* at 1175–77.
[108] *Id.* at 1176 (stating "[t]hese conditions are also 'prerequisites,' and 'the sine qua non' of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid.").
[109] *Id.* at 1177.
[110] *Id.* at 1171 (quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996)).
[111] *Hendow*, 461 F.3d at 1172.
[112] *Id.* at 1175. The court noted that to receive federal funding under Title IV, the University was required to agree to comply with applicable regulations in the future, not merely have a history of compliance. *Id.* at 1176.
[113] *Id.* at 1172, n.1 (noting that "[s]ome courts . . . have adopted a false certification theory whereby the certification need only be implied, rather than express. In those cases, if a party submits a claim for payment under a government program with requirements for participation, that claim is taken as an implied certification that the party was in compliance with those program requirements.").
[114] *See Id.*

In *Urquilla-Diaz v. Kaplan University*, the Eleventh Circuit expressly adopted the Ninth Circuit's false certification theory.[115] This case involved a consolidated *qui tam* action brought by three relators against a for-profit educational institution alleging the school falsely certified compliance with federal statutes and regulations in order to receive financial aid funds.[116] The court noted that the mere disregard of regulations or improper internal practices cannot be a basis for FCA liability under section 3729(a)(1)(A) "unless, as a result of such acts, the [defendant] knowingly ask[ed] the Government to pay amounts it does not owe."[117] But the court stated that under section 3729(a)(1)(B), a defendant may be liable where a relator shows that (1) "the defendant made a false record or statement for the purpose of getting a false claim paid or approved by the government," and (2) "the defendant's false record or statement caused the government to actually pay a false claim, either to the defendant itself, or to a third party."[118] Therefore, to meet the heightened pleading standard of Rule 9(b), a relator must allege, with particularity, that false statements or a fraudulent course of conduct actually led the government to pay out money it did not owe.[119]

The Eleventh Circuit went on to reverse the district court's dismissal of the relator's claim based on the school's violation of the incentive compensation ban, but the court affirmed the dismissal of claims based on other violations, including allegedly using a grade inflation scheme to falsely certify students as making satisfactory progress and violating the accreditation requirement under 34 C.F.R. § 600.5(a)(6).[120] The relators alleged that the school was improperly paying incentive-based compensation to recruiters, while falsely certifying in a yearly letter to the

[115] 780 F.3d 1039, 1045 (11th Cir. 2015).
[116] *Id.* at 1043.
[117] *Id.* at 1051–52.
[118] *Id.* at 1052.
[119] *Id.*
[120] *Id.* at 1064.

Department of Education that it was in compliance with the ban.[121] The court found that the relators met the heightened pleading standard for showing a violation of the incentive compensation ban by including specific facts about four former employees whose salaries were adjusted based on the number of enrollments secured.[122]

The relators further alleged that the school engaged in a practice of inflating students' grades in order to certify that they were making satisfactory progress, and used falsified documents to obtain accreditation.[123] Under 34 C.F.R. § 668.34, "an institution must establish a reasonable satisfactory academic progress policy for determining whether an otherwise eligible student is making satisfactory academic progress in his or her educational program and may receive assistance under [T]itle IV, HEA programs."[124] The relator alleged Kaplan violated the Department of Education's "satisfactory progress" regulation by engaging in a grade inflation scheme to falsely certify students as making satisfactory progress who otherwise would have been failing.[125] The court noted that grade inflation could lead to a FCA violation where a school certified that a student was making satisfactory progress when he or she was not.[126] The court found, however, that the relator had failed to plead specific instances of students who would not have been making satisfactory progress without the scheme, and affirmed the dismissal.[127]

In evaluating the claim based on accreditation, the court stated that false statements made to an accreditation agency could lead to FCA liability because whether a school is accredited is material to the government's decision to pay Title IV funds.[128] The relator alleged that Kaplan

[121] *Urquilla-Diaz*, 780 F.3d at 1046.
[122] *Id.* at 1054.
[123] *Id.* at 1046.
[124] 34 C.F.R. § 668.34(a) (2017).
[125] *Urquilla-Diaz*, 780 F.3d at 1055.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 1056.

submitted backdated studies and budgets "as well as other 'forged' or 'false' documents" to its accrediting agency.[129] The court affirmed the dismissal, however, because it found that the relator had failed to plead particular facts sufficient to infer a plausible connection between the school's allegedly false statements and the accreditation agency's decision to accredit the school.[130] The court was willing to adopt a theory of FCA liability based on falsely obtaining accreditation, but required more in terms of pleading than what the relator had provided. Specifically, the court required the relator to include specific facts or statements made in the pleadings that were essential to the school receiving or maintaining accreditation.[131]

In *United States v. Sanford-Brown, Ltd.*,[132] the Seventh Circuit declined to follow the Ninth Circuit's approach to FCA liability in the context of Title IV funds.[133] *Sanford-Brown* involved a claim brought by a relator, the former Director of Education at the for-profit college, alleging that staff, professors, administration, and ownership of the school had engaged in fraudulent conduct regarding admission and retention of students in order to maintain Title IV funding.[134] The relator alleged violations of several federal regulations, including provisions that banned paying incentive compensation, required maintenance of accreditation, prohibited harassing students to attend class, and requiring students receiving Title IV funds to maintain a minimum GPA.[135] The district court found "no clear manifestation of congressional or regulatory intent to condition payment of Title IV federal subsidies on compliance with the disputed Title IV [r]estrictions," and granted summary judgement in favor of the defendant.[136]

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] 788 F.3d 696 (7th Cir. 2015), *reinstated in part, superseded in part*, 840 F.3d 445 (7th Cir. 2016).
[133] *Id.*
[134] *Id.* at 701.
[135] *Id.* at 702.
[136] *Id.* at 708.

The Seventh Circuit analyzed the relator's claim based on two different theories of liability. First, the court addressed the false record theory under section 3729(a)(1)(B) of the FCA, which imposes liability when any party "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[137] The court stated that to establish liability under this section, a relator must prove: (1) defendant made a statement or record in order to receive money from the government; (2) the statement or record was false; and (3) the defendant knew it was false.[138] The court held that to establish that a defendant knowingly used a false record, the relator was required to establish the defendant's mindset at the time of entry into the PPA.[139] The court further explained that promises of future performance do not become false due to subsequent non-compliance, and to prove liability based on the false record theory a relator must prove bad faith entry into the PPA.[140]

The court then looked at the relators claim based on a false presentment theory under section 3729(a)(1)(A), which imposes liability on a party who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[141] The court articulated the requirements under section 3729(a)(1)(A) as: (1) a false or fraudulent claim; (2) which defendant presented, or caused to be presented, for payment; (3) with knowledge the claim was false.[142] The court rejected the relator's argument, along with the government as amicus curiae, that certification of compliance with Title IV restrictions upon entry into the PPA caused the presentment of false or fraudulent claims for payment when the school subsequently violated conditions of the PPA.[143] The court stated that according to the relator's theory, a PPA "serves as a trigger poised to impose

[137] *Id.*; 31 U.S.C. § 3729(a)(1)(B) (2016).
[138] *Sanford-Brown*, 788 F.3d at 708.
[139] *Id.* at 709.
[140] *Id.*
[141] *Id.*; 31 U.S.C. § 3729(a)(1)(A).
[142] *Sanford-Brown*, 788 F.3d at 709.
[143] *Id.* at 709–710.

FCA liability at some indefinite point in the future, because continued lawful receipt of the federal subsidies depends on continued compliance with the PPA."[144] The court held that FCA liability does not result from non-compliance with Title IV restrictions following entry into a PPA unless the relator proves fraudulent entry into the PPA.[145] Because the relator failed to prove bad faith entry into the initial PPA, the Seventh Circuit affirmed the district court's grant of summary judgement in favor of the defendant.[146]

The Supreme Court granted a petition for writ of certiorari and vacated the Seventh Circuit's judgement in *Sanford-Brown*.[147] The Court remanded the case to the Seventh Circuit for further consideration in light of the Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*.[148] In *Universal Health,* the Court held that the implied false certification theory can be a basis for FCA liability "when a defendant submitting a claim makes specific representations about the goods or services provided, but fails to disclose noncompliance with material statutory, regulatory, or contractual requirements that make those representations misleading with respect to those goods or services."[149]

On remand, the Seventh Circuit interpreted the Court's *Universal Health* holding to require two conditions to be met for implied false certification: first, "the claim does not merely request payment, but also makes specific representations about the goods or services provided,"[150] and second, "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[151] The court noted

[144] *Id.* at 710. The court stated, "When entered in good faith, a PPA memorializes conditions of participation (not conditions of payment) in connection with the U.S. Department of Education's subsidies program." *Id.* at 712.
[145] *Id.*
[146] *Id.* at 714.
[147] United States *ex rel.* Nelson v. Sanford-Brown, Ltd., 136 S.Ct. 2506 (2016).
[148] *Id.*; 136 S.Ct. 1989 (2016).
[149] 136 S.Ct. 1989, 1993–94 (2016).
[150] *Sanford-Brown*, 840 F.3d 445, 447 (7th Cir. 2016).
[151] *Id.*

that the only part of its prior decision that was affected by *Universal Health* was that which addressed the false presentment claim under section 3729(a)(1)(A), which was based on a theory of implied false certification.[152] In reinstating its original decision granting summary judgement, the Seventh Circuit found that neither condition was met in this case.[153] The court stated that the relator offered no evidence showing that the defendant Sanford-Brown College made any representations in connection with its claim for payment.[154] Further, the court found that the relator failed to establish the independent element of materiality because he offered no evidence that the government's decision to pay money to the college would have been different if the college's noncompliance with Title IV restrictions was disclosed.[155]

It appears that the Seventh Circuit's interpretation of the *Universal Health* holding's effect on *Sanford-Brown* is flawed for two reasons. First, in allowing students' financial aid claims to be submitted to the government, a college inherently represents that it is in compliance with the initial requirements that made it eligible to receive government funding in the first place. As the Supreme Court stated in *Universal Health*, "[a]nyone informed that a social worker at a . . . mental health clinic provided a teenage patient with individual counseling services would probably—but wrongly—conclude that the clinic had complied with core . . . Medicaid requirements."[156] Similarly, anyone informed that a college was providing higher educational programs to students who receive funding through federal programs would likely conclude that the school had complied with HEA requirements. The Seventh Circuit focused on the fact that the claims submitted for payment in *Universal Health* contained payment codes and provider identification numbers which

[152] *Id.*
[153] *Id.* at 447.
[154] *Id.*
[155] *Id.*
[156] *Universal Health*, 136 S.Ct. at 2000.

corresponded to specific counseling services.[157] The court stated that the college had not made any representations in connection with its claim for payment.[158] The court's narrow interpretation of what constitutes a "specific representation" is not warranted. The standard articulated by the Supreme Court does not require representations made in addition to a claim for payment, but only that specific representations are made through a claim requesting payment.[159] Simply by allowing students to submit claims for payment to the government, a college is representing that it is in compliance with the requirements of Title IV and the PPA. The claim for payment is itself a representation of compliance. Failing to disclose its noncompliance makes the representations "misleading half-truths."[160]

The second error in the Seventh Circuit's interpretation was in finding that the independent materiality element had not been met. The court correctly stated that the materiality requirement is "rigorous" and "demanding," and requires more than showing that "the Government would have the option to decline to pay if it knew of the defendant's noncompliance."[161] But the court erred in finding that the government's decision to pay would not "likely or actually have been different" if the government knew that the college was not in compliance with Title IV requirements.[162] Compliance with all statutory, regulatory, and contractual obligations contained in a PPA is a prerequisite to obtaining federal funds under Title IV.[163] Thus, had it been disclosed that the college was violating certain requirements, the school would have likely lost its eligibility to receive federal funding and the government would have denied payment.

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[157] *Id.*
[158] *Sanford-Brown*, 840 F.3d at 447.
[159] *Universal Health*, 136 S.Ct. at 2000.
[160] *Id.* at 2001.
[161] *Sanford-Brown*, 840 F.3d at 447.
[162] *Id.*
[163] 20 U.S.C. § 1094(a) (2016); 34 C.F.R. § 668.14(b)(1) (2017).

Despite these criticisms, the Seventh Circuit's approach remains in tension with the Ninth and Eleventh Circuit's interpretations. Thus, it is unclear what theories are viable, and what standards must be met, for bringing a valid cause of action against an educational institution under the FCA. What is clear, however, is that the judicial decisions and legislative history show a preference for extending FCA liability broadly. The predatory nature of some for-profit schools and the current student loan crisis make higher educational institutions prime suspects for committing fraudulent acts to secure federal funding. The current FCA lawsuit brought against CSOL presents an interesting case involving false claims based on failure to maintain accreditation standards. The case provides a good basis for extending FCA liability to educational institutions.

IV. Applying FCA Liability to CSOL

Professor Bernier's FCA lawsuit alleges that CSOL and Infilaw entered into the initial PPA in bad faith and intended to defraud the federal government to falsely obtain Title IV funds.[164] She alleges that CSOL and Infilaw "knowingly violated Title IV of the HEA, its implementing regulations . . ., and the PPA by making . . . fraudulent claims."[165] She alleges that CSOL and Infilaw are liable under the FCA under sections 3729(a)(1)(A), (B), and (C).[166] Specifically, the complaint alleges that CSOL and Infilaw violated ABA Rules by, among other things, admitting academically underqualified students, failed to maintain accreditation standards set by the ABA (in violation of Title IV), recertified students as having made satisfactory progress when they had not, and, in advertising job placement rates, engaged in misleading practices by failing to disclose that graduates were "employed" by the law school to study for the bar exam.[167]

[164] Complaint, *supra* note 13, at ¶¶ 96–106.
[165] *Id.* at ¶ 100.
[166] *Id.* at ¶¶ 95–118.
[167] *Id.* at ¶ 100.

Under the express false certification theory as applied by the Ninth Circuit and expressly adopted by the Eleventh Circuit, it appears that the complaint states a valid cause of action under the FCA because the relator has adequately alleged facts showing a fraudulent course of conduct causing the government to pay out money it did not owe.[168] But even if it is found that the complaint does not meet the heightened pleading standard because it only generally alleges bad faith entry into the PPA without sufficient particularity under that theory, the court should extend the Supreme Court's articulation of the implied false certification theory in *Universal Health* to allow the case to proceed.

A. Express False Certification

The Eleventh Circuit expressly adopted the false certification theory of FCA liability for educational institutions in *Urquilla-Diaz*.[169] To meet the heightened pleading requirements of Rule 9(b), a relator must allege specific facts about the time, place, and substance of the fraud, particularly, "the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them."[170] While the Seventh Circuit requires a showing of fraudulent entry into a PPA for express false certification,[171] the Eleventh Circuit has applied false certification to claims based on fraudulent conduct committed after entering the PPA.[172]

In the complaint filed against CSOL and Infilaw, Professor Bernier alleges that the defendants entered into the initial PPA in bad faith with the intent to defraud the government.[173] But the complaint fails to include any factual allegations concerning the circumstances around the

[168] *See* United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166 (9th Cir. 2006); Urquilla-Diaz v. Kaplan University, 780 F.3d 1039 (11th Cir. 2015); Complaint, *supra* note 13.
[169] *Urquilla-Diaz*, 780 F.3d at 1045. Under that theory, a relator must prove: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. *Id.* (citing United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1174 (9th Cir. 2006)).
[170] *Id.* at 1051 (quoting United State *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1309 (11th Cir. 2002)).
[171] *See supra* note 145 and accompanying text.
[172] *See supra* note 122 and accompanying text.
[173] Complaint, *supra* note 13, at ¶ 98.

party's entry into the PPA.[174] Professor Bernier did not begin teaching at CSOL until 2013,[175] and thus was not present at the school when the PPA was signed. She failed to provide any information that would provide an indicia of reliability concerning the formation of the PPA.[176] Therefore, it seems that the complaint would fail to meet the heightened standard of Rule 9(b) particularity. In the Eleventh Circuit's view,[177] however, it seems the court will either "imply" fraudulent entry into the PPA based on fraudulent conduct committed after formation, or not require it at all. While the Eleventh Circuit's view directly conflicts with the Seventh Circuit's bad faith entry requirement,[178] the Eleventh Circuit's view is more consistent with the FCA's purposes in combatting fraud against the government. In the Seventh Circuit's view, a school could conceivably initially enter a PPA in good faith, then later decide to perpetuate a fraudulent scheme to obtain federal funds, and escape liability under the FCA. This idea conflicts with the legislative and judicial preference to extend liability broadly. In entering the PPA, a school expressly certifies it will comply with all requirements, and subsequent knowledge or purposeful noncompliance is sufficient to find a defendant liable under the express false certification theory.[179]

The complaint does allege specific factual allegations pertaining to fraudulent conduct committed after entering the PPA, specifically relating to student admissions and certifications of satisfactory progress.[180] ABA Rule 501(b) mandates that a school must not admit applicants who do not appear capable of satisfactorily completing the program of study and being admitted to the

[174] *See Id.*
[175] *Id.* at ¶ 2.
[176] *See Id.*
[177] *See* Urquilla-Diaz v. Kaplan University, 780 F.3d 1039 (11th Cir. 2015).
[178] *See* United States v. Sanford-Brown, Ltd., 788 F.3d 696 (7th Cir. 2015), *reinstated in part, superseded in part*, 840 F.3d 445 (7th Cir. 2016).
[179] *See* United States ex rel. Hendow v. University of Phoenix, 461 F.3d 1166, 1172, n.1(9th Cir. 2006) (noting that express false certification applied because "the University signed the written Program Participation Agreement, thus making an express statement of compliance," while evaluating the sufficiency of the complaint based on allegations occurring after entry into the PPA.).
[180] Complaint, *supra* note 13, at ¶¶ 55–70.

bar.[181] Additionally, ABA Rule 205(b) requires academically underqualified students to be admitted only if approved by the dean and faculty of the law school.[182] Under ABA rules, the number of underqualified students admitted through conditional admission or an alternate admission program must not exceed ten percent of the class.[183] The Bernier complaint alleges generally that academically underqualified students were admitted and states the school's low LSAT scores compared to other schools.[184] The complaint further alleges specific facts suggesting that the school knew the students were unqualified and would have a low probability of success in law school. For instance, the relator alleges that during a faculty meeting in the spring of 2015, the CSOL Director of Bar Preparation stated that students being admitted to the school would have only a twenty-five percent chance of passing the bar exam.[185]

Additionally, the relator alleges that the school made re-certifications of academically underqualified students as having made satisfactory progress as a condition for the continued receipt of federal financial aid.[186] In order to remain eligible under Title IV and continue receiving educational funding, a student must be making "satisfactory progress."[187] The complaint states that CSOL President Chidi Ogene summarily adjusted the minimum passing GPA requirement down to 1.50 in order to retain students who otherwise should have failed.[188] The complaint contains specific facts that the GPA adjustment allowed the school to retain sixty-five students who should have been dismissed.[189] Further, the relator alleges that during a February 2016 faculty

[181] *Id.* at ¶ 100.
[182] *Id.*
[183] *Id.* at ¶ 64.
[184] *Id.* at ¶ 62.
[185] *Id.* at ¶ 65.
[186] Complaint, *supra* note 13, at ¶ 100.
[187] 34 C.F.R. § 668.34 (2017).
[188] Complaint, *supra* note 13, at ¶ 69.
[189] *Id.*

meeting, Dean Conison stated that President Ogene took these actions because "the company [Infilaw] could not tolerate the financial loss or harm to its reputation."[190]

These specific factual allegations of fraudulent conduct showing the school knowingly violated requirements in order to receive Title IV funds sufficiently meet the heightened pleading requirements to state a claim under the FCA as applied by the Eleventh Circuit. The standard for showing an FCA violation based on false certification requires: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.[191] The factual allegations contained in the complaint establish a fraudulent course of conduct to meet the first requirement. Additionally, the complaint contains sufficient particularity in providing specific dates, numbers of students, and conversations with administrators for which Bernier was present to establish the indicia of reliability that Rule 9(b) requires.[192] Scienter may be alleged generally,[193] and Bernier alleges that CSOL engaged in the fraudulent conduct in order to obtain federal funds.[194] Further, the fraudulent conduct is material because if CSOL disclosed its noncompliance with Title IV requirements, it likely would have lost its eligibility to receive federal funds. Finally, the conduct caused the government to pay out money it otherwise would not have in the form of student financial aid. Therefore, the allegations in Professor Bernier's complaint sufficiently state a claim of FCA violations against CSOL.

B. Implied False Certification

Even if the complaint fails to plead a viable claim under an express false certification theory, the court should extend liability under the implied false certification theory as articulated

[190] *Id.* at ¶ 70.
[191] *See supra* note 102 and accompanying text.
[192] Complaint, *supra* note 13, at ¶¶ 67–70.
[193] *See supra* note 90 and accompanying text.
[194] Complaint, *supra* note 13, at ¶ 101.

by the Supreme Court in *Universal Health*.[195] Under that standard two conditions must be met: (1) the claim makes specific representations about the goods or services provided, and (2) failure to disclose noncompliance with material statutory, regulatory, or contractual requirements make those representations misleading half-truths.[196] Both conditions are met under the facts of this case. By continuing to participate in Title IV programs and in reaffirming its duties, obligations, and promises under the PPA annually, the school made specific representations that it was complying with all requirements. Additionally, by failing to disclose noncompliance the school made material misrepresentations for the purpose of receiving funds the government would not otherwise be required to pay. The failure to disclose is material because compliance with all requirements of the PPA is a prerequisite to obtaining funding. While the Supreme Court's holding was limited to the healthcare context, the court should extend implied false certification liability to educational institutions in this context. CSOL should be found liable for submitting claims for payment after knowingly breaking its promises and obligations under the PPA.

V. Conclusion

Assuming the truth of the allegations in the complaint, FCA liability should be extended to CSOL for failing to maintain proper procedures, knowingly or intentionally, and causing millions of dollars to be paid out in student loans. The predatory nature of some for-profit educational institutions is drastically adding to the current student loan crisis faced by students in the United States. Policy concerns demand holding the responsible parties liable. The extended period that CSOL was able to continue operating and benefitting from student loan payments it otherwise should not have received shows that accreditation agencies are not well equipped to combat against this sort of activity. The FCA should be utilized against educational institutions that knowingly

[195] *See supra* note 149 and accompanying text.
[196] *Id.*

fail to maintain accreditation and other standards in order to deter the predatory practices of for-profit universities.