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13 Attorneys for Defendant,  
UNIVERSITY OF PHOENIX  
14

15 UNITED STATES DISTRICT COURT  
16 FOR THE EASTERN DISTRICT OF CALIFORNIA  
17

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

20 Plaintiff,

21 v.

22 UNIVERSITY OF PHOENIX,

23 Defendant.  
24

**FILED**

JAN 13 2009

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BY \_\_\_\_\_  
DEPUTY CLERK

CASE NO. CV-03-0457 GEB DAD

**DECLARATION OF JESSICA A.  
TAGGART IN SUPPORT OF  
DEFENDANT'S OPPOSITION TO  
RELATORS' MOTION TO COMPEL**

**REDACTED  
ORIGINAL LODGED UNDER SEAL**

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26  
27  
28

1 I, Jessica A. Taggart, declare that:

2 1. I have personal knowledge of the facts set forth herein and, if called as a witness, I  
3 could and would competently testify thereto.

4 2. I am an attorney licensed in the State of California and admitted to practice before the  
5 United States District Court for the Eastern District of California. I am an associate at the law firm of  
6 Gibson, Dunn & Crutcher LLP and I am one of the attorneys of record for Defendant University of  
7 Phoenix ("University").

8 3. In this action, University has already produced to Relators over 414,893 pages of  
9 documents responsive to Relators' requests.

10 4. Prior to this action, University collected, reviewed and produced documents in a  
11 securities action that was pending in the District of Arizona against University's parent, Apollo  
12 Group, Inc ("Apollo"). Discovery in that matter concerned some similar topics as discovery in this  
13 action. Because of the similarities, the discovery burden in the securities action is instructive when  
14 estimating the potential burden to University in this action. In the securities action, Apollo produced  
15 over 900,000 pages. To produce those pages in the securities action, Apollo had to review millions  
16 more pages of documents.

17 5. University produced to Relators the documents produced by Apollo in the securities  
18 action. In addition, University collected and reviewed additional documents for production to  
19 Relators. To date, in order to respond to Relators' requests for documents regarding enrollment  
20 counselor compensation, the University's attorneys have already spent well over 5,432 hours  
21 reviewing 463,369 documents or approximately 2,316,845 pages for relevance and privilege. The  
22 University has incurred costs of more than \$1.3 million relating just to the collection, review, and  
23 processing of those documents. This is on top of the thousands of hours Apollo already expended  
24 and the millions of dollars that Apollo already spent in reviewing and producing documents in the  
25 securities case, which documents Relators have also received.

26 6. Specifically, in this action, University has already agreed to search electronic data  
27 from 38 principal custodians and select data from hundreds of additional custodians from Northern  
28

1 California and Online. In reviewing this electronic data, Relators proposed and University agreed to  
2 employ over 120 search terms.

3 7. Attached as Exhibit A are true and correct excerpts from the March 7, 2003 Disclosure  
4 Statement of Mary Hendow and Julie Albertson, Relators, Pursuant to the False Claims Act. The  
5 Department of Education produced this document to University's parent, Apollo, on May 3, 2005 in  
6 response to a request by Apollo pursuant to the Freedom of Information Act.

7 8. Attached as Exhibit B are true and correct excerpts from Relators' November 29, 2004  
8 Opening Brief to the United States Court of Appeals for the Ninth Circuit.

9 9. Attached as Exhibit C are true and correct excerpts from the September 19, 2006  
10 deposition of Julie Albertson.

11 10. Attached as Exhibit D are true and correct excerpts from the September 20, 2006  
12 deposition of Mary Hendow.

13 11. Attached as Exhibit E are true and correct excerpts from the November 12, 2008  
14 deposition of Mary Hendow.

15 12. Attached as Exhibit F are true and correct excerpts from the November 14, 2008  
16 deposition of Julie Albertson.

17 13. Attached as Exhibit G is a true and correct copy of a June 28, 1995 letter to Charles  
18 Siegel from Carney M. McCullough of the Department of Education.

19 14. Attached as Exhibit H is a true and correct copy of a July 13, 2001 Chronicle of  
20 Higher Education Article entitled "U.S. Officials Pledge to Clarify Rules on Recruiting Students."

21 15. Attached as Exhibit I are true and correct copies of demonstrative exhibits marked at  
22 depositions in this action containing comparative analyses of the number of enrollments and salaries  
23 of various enrollment counselors. The names of the enrollment counselors have been redacted for  
24 privacy purposes.

25 16. Attached as Exhibit J is a true and correct copy of the Slip Opinion from the case  
26 entitled *United States ex rel. Bott v. Silicon Valley Colleges*, No. 06-15423 (9th Cir. Jan. 4, 2008).

27 17. Attached as Exhibit K are true and correct excerpts from the 2005 Form 10-K for the  
28 period ending August 31, 2005, filed by Apollo Group, Inc on November 14, 2005.

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18. Attached as Exhibit L is a true and correct copy of the September 26, 2008

Declaration of Diane Thompson.

I declare under penalty of perjury that the foregoing is true and correct. Executed on  
December 30, 2008, in Irvine, California.

s/Jessica A. Taggart *Jessica Taggart* / by PEI  
Jessica A. Taggart *by permission*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2008, the attached document was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send notification of such filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Cliff Palesfsky	<u>uroy@aol.com</u>
Daniel R. Bartley	<u>DanielBartleyLaw@aol.com</u>
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Kendall J. Newman	<u>Kendall.newman@usdoj.gov</u>

I further certify that copies of the foregoing were sent on December 30, 2008, via U.S. Mail to the following parties not registered on the CM/ECF:

Jay D. Majors	Leeland O. White
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Civil Division	El Paso, TX 79902
601 D. Street, N.W., Room 9550	
Washington, DC 20004	
E-Mail: <u>Jay.Majors@usdoj.gov</u>	

\_\_\_\_\_  
/s/ Jessica A. Taggart

**Exhibit A**  
**REDACTED**  
**LODGED UNDER SEAL**

**EXHIBIT B**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

No. 04 16247

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

**Plaintiffs/Appellants,**

**v.**

**UNIVERSITY OF PHOENIX,**

**Defendants/Appellees.**

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

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**APPELLANTS' OPENING BRIEF**

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**NANCY G. KROP (SBN 133723)  
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1534 Plaza Lane, No. 322  
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Tel. 650/344-5306 Fax 650/344-5307  
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**ATTORNEYS FOR APPELLANTS**

In the certification, UOP requests the Title IV amounts — the "claim" for the funds. **In the certification, UOP falsely certifies that the student "is an eligible borrower in accordance with the Higher Education Act of 1965."**

The student is not eligible because the student attends an institution ineligible for Title IV funds due to its incentive compensation ban violations (ER 52, ¶ 35; ER 98-99).

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT C

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF ARIZONA

3 \_\_\_\_\_  
4 )  
5 In Re APOLLO GROUP, INC. )  
6 SECURITIES LITIGATION, )

7 )  
8 \_\_\_\_\_)Case No. CV 04-2147-PHX-JAT

9 )  
10 This Document Relates to )

11 )  
12 ALL ACTIONS. )

13 )  
14 CONFIDENTIAL DEPOSITION OF JULIE J. ALBERTSON

15 SAN FRANCISCO, CALIFORNIA

16 Volume I (Pages 1-215)

17 September 19, 2006

18 Reported by Susan F. Magee, RPR, CLR, CSR No. 11661

19 PRS Job No. 96-341274

1 workplace.

2 When did you first start working for University  
3 of Phoenix, which as you know is the subsidiary or a  
4 subsidiary of University -- pardon me. Let me rephrase  
5 the question.

6 When did you first start working for University  
7 of Phoenix which, as you know, is one of Apollo Group's  
8 subsidiaries?

9 A. I started April 2000.

10 Q. And at the time you started the work, had you  
11 interviewed for the position?

12 A. Yes.

13 Q. And when you interviewed for the position, who  
14 did you interview with?

15 A. I interviewed with Jennifer Rezucha.

16 Q. And did Ms. Rezucha say anything at all about  
17 how your salary would be based?

18 A. Yes.

19 Q. What did she say?

20 A. She told me that if I enrolled students, I  
21 would be paid lucratively.

22 Q. Did she indicate to you anything with regard to  
23 whether there was a certain quota or goal that you had  
24 to meet with respect to enrollment of students in order  
25 to attain salary increases?

1 A. Yes. She didn't define specifically what the  
2 goals were. But she told me if I hit certain aspects  
3 and certain numbers, it would determine my salary.

4 Q. And this was in the interview before you  
5 actually started working?

6 A. Yes.

7 Q. When you started working, at what campus did  
8 you work?

9 A. I started at San Jose, California campus.

10 Q. And what was your title or position at that  
11 time?

12 A. From what I can remember, I believe it was  
13 enrollment counselor.

14 Q. Was there any period of training that you had  
15 to undergo in connection with your commencement of  
16 employment?

17 A. Yes.

18 Q. And how long was your training period?

19 A. Originally I had trained with counselors for  
20 the first couple of weeks. I would say a couple weeks.

21 Q. Did you have to go off site somewhere in order  
22 to train, or were you trained right on the campus site?

23 A. I did go off-site to train.

24 Q. And where did you go?

25 A. I trained in Pleasanton, California; and I

1 Q. Well, let's back up. Thank you. What was your  
2 salary when you originally started at San Jose?

3 A. My original salary was 32,000.

4 Q. And did you receive an increase thereafter?

5 A. Yes.

6 Q. When did you receive that increase?

7 A. In January 2001.

8 Q. Did you undergo any kind of evaluation prior to  
9 receiving that increase?

10 A. Yes.

11 Q. And who participated in your evaluation?

12 A. My manager.

13 Q. Who was that?

14 A. Marci Miller.

15 Q. Was Marci Miller an enrollment manager at the  
16 San Jose campus?

17 A. Yes.

18 Q. Were there others that you considered to be in  
19 a managerial position at the San Jose campus other than  
20 Marci Miller at that time?

21 A. My manager? Others than my manager?

22 Q. Yes.

23 A. No.

24 Q. Did you and Marci Miller have any discussion  
25 about your evaluation prior to your receipt of the

**EXHIBIT D**

1 0001

2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF ARIZONA

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8 In Re APOLLO GROUP, INC. )

9 SECURITIES LITIGATION, )

10 )

11 )

12 ) No. CV 04-2147-PHX-JAT

13 )

14 This Document Relates to: )

15 ALL ACTIONS. )

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22 CONFIDENTIAL DEPOSITION OF MARY HENDOW

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VOLUME I, Pages 1 - 186

24

SEPTEMBER 20, 2006

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SAN FRANCISCO, CALIFORNIA

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Reported by Cynthia Manning, CSR No. 7645

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PRS Job No. 96-231273

32

1 provide us with your best recollection and testimony?

2 A. I do not.

3 Q. Then, with your permission, we'll proceed.

4 A. Okay.

5 Q. Okay. Thank you.

6 When you first commenced employment with the  
7 University of Phoenix, what was your position at that  
8 time?

9 A. Associate Enrollment Counselor.

10 Q. And do you recall what your starting salary  
11 was?

12 A. \$24,000 annual.

13 Q. On an annual basis?

14 A. It was.

15 Q. Did you receive any kind of performance review  
16 subsequent to your commencing employment?

17 A. Many.

18 (Mr. Bartley joins the proceedings)

19 BY MR. BASSER:

20 Q. When was the first performance review that you  
21 received subsequent to commencing your employment in  
22 April of '97?

23 A. It would have been six months after that, so  
24 October-November timeframe.

25 Q. Of 1997?

1 time. So the review was performed by Kris Plachy and  
2 Vince Grell jointly.

3 Q. And what was your pay after that particular  
4 increase? You went from 36 to what?

5 A. 50, maybe 48, something in that neighborhood.

6 Q. Other than the numbers of students that you  
7 enrolled in your evaluation, were you told that there  
8 was anything else that was the bases for your receiving  
9 your salary increase?

10 A. I was told that my numbers would determine my  
11 salary increase and that was it.

12 Q. And who told you that?

13 A. Both managers: Vince Grell and Kris Plachy.

14 Q. And that was during your evaluation?

15 A. Correct.

16 Q. Were there other times when you were also told  
17 that you had to achieve these numbers in order to get  
18 your salary increase?

19 A. Many.

20 Q. Between the time that you first became an  
21 enrollment counselor until this November 1998  
22 evaluation, were there instances outside of the formal  
23 evaluation itself when you were either told or reminded  
24 that you had to hit a certain number of enrollments in  
25 order to get a salary increase?

EXHIBIT E

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF CALIFORNIA

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4  
5 UNITED STATES OF AMERICA, )  
ex rel., MARY HENDOW and )  
6 JULIE ALBERTSON, )

7 )  
Plaintiff(s), )

)Case No.

8 vs. )

)CV-03-0457 GEB DAD

9 UNIVERSITY OF PHOENIX, )

10 )  
Defendant(s). )  

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15 \*\*\* CONFIDENTIAL \*\*\*

16 VIDEOTAPED DEPOSITION OF MARY HENDOW

17 Held at Leiff, Cabraser

18 275 Battery Street, 29th Floor

19 San Francisco, California

20 Wednesday, November 12, 2008

21 9:06 a.m. - 6:30 p.m.  
22  
23  
24

25 REPORTED BY: James Beasley, CSR No. 12807

1 (Discussion off the record.)

2 BY MR. TOFFER:

3 Q. So I take it, then, in these various  
4 positions that you've had, you understand the  
5 difference between being paid a salary and being  
6 paid on commission, correct?

7 A. Yes.

8 Q. Okay. And is it true that as an  
9 enrollment counselor at the University of Phoenix,  
10 you were paid a salary?

11 MR. NELSON: Objection. Vague.

12 THE WITNESS: Well, it was a compensation  
13 plan, but, you know, it went up drastically and  
14 went down drastically. So it was called a salary,  
15 but I would say that it was much more like a  
16 commission plan than a salary.

17 BY MR. TOFFER:

18 Q. Is that consistent with your prior  
19 testimony in the securities case?

20 A. I don't recall.

21 Was I asked that in the securities case?

22 Q. Well, I'm asking if you recall.

23 A. So I would say I don't recall.

24 Q. Is that a new theory that you've recently  
25 created?

**EXHIBIT F**

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF CALIFORNIA

3  
4 UNITED STATES OF AMERICA, )  
ex rel., MARY HENDOW and )  
5 JULIE ALBERTSON, )  
 )  
6 Plaintiff(s), )  
 ) Case No.  
7 vs. )  
 ) CV-03-0457 GEB DAD  
8 UNIVERSITY OF PHOENIX, )  
 )  
9 Defendant(s). )  

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11  
12 \*\*\* CONFIDENTIAL \*\*\*

13 VOLUME I

14 VIDEOTAPED DEPOSITION OF JULIE BEHN

15 Held at Leiff, Cabraser

16 275 Battery Street, 29th Floor

17 San Francisco, California

18 Friday, November 14, 2008

19 9:06 a.m. - 2:59 p.m.

20 -----

21 3:16 p.m. - 6:17 p.m.

22  
23  
24 REPORTED BY: James Beasley, CSR No. 12807

and

25 Balinda Dunlap, CSR NO. 10710, RPR, CRR, RMR

1 as it is now?

2 BY MR. DIULIO:

3 Q. The word -- do you understand "salary"

4 as -- itself is a word?

5 A. Yes.

6 Q. Okay. What does that word mean?

7 A. It is an income that cannot go up or down.

8 It can go up, but not down. And it's a set salary.

9 Q. And what do you mean by "a set salary"?

10 A. It's an income that is set.

11 Q. Set over a period of months?

12 A. Sure.

13 Q. Is that correct?

14 A. Correct.

15 Q. Is that your understanding of it?

16 A. Correct.

17 Q. Okay. I'm going to ask you a series of  
18 questions, and they will contain the word "salary."

19 And I'm going to ask you based on your

20 understanding and definition of the word "salary";

21 is that fair?

22 A. Well, if it's in reference to the

23 University of Phoenix, it's not fair.

24 Q. Your understanding of the word "salary"

25 changes as it applies to the University of Phoenix?

1 A. Yes. The word that -- they used "salary"  
2 as I was -- when I worked there is different than  
3 "salary" as it is today for me.

4 Q. I'm not -- I'm not asking about the word  
5 they used. I'm asking you about your word. You've  
6 used the word "salary" before, haven't you?

7 A. Yes, but --

8 Q. Okay. And I see you've read the word  
9 "salary" before, right?

10 A. Correct. In different contexts, though.

11 Q. And you have an -- you have an  
12 understanding of what the word "salary" means,  
13 don't you?

14 A. Correct. But you asked me if it was fair  
15 that you asked me questions and used the word  
16 "salary," and I said if it's in regards to  
17 University of Phoenix, "salary" for me has a  
18 different meaning than it does today.

19 Q. When did you develop this different  
20 meaning?

21 A. When I left University of Phoenix.

22 Q. See, that's strange to me, because when  
23 you gave a deposition in the securities case, you  
24 used the word "salary," didn't you?

25 A. As it meant towards University of Phoenix.

1 I was using their language, the language I was  
2 taught while I was at the university. It has a  
3 different meaning to me today.

4 Q. You never claimed during your deposition  
5 in the securities case that you did not understand  
6 what the word "salary" means.

7 A. I was never asked.

8 Q. How has your understanding of what the  
9 word "salary" means changed since you left the  
10 University of Phoenix?

11 A. Because when I was at the University of  
12 Phoenix, I was compensated based on enrollment. I  
13 had a set enrollment goal, based on quantitative  
14 enrollment numbers, that would determine my salary,  
15 in which it would go up or it could go down. It  
16 wasn't cost of living, it was directly related to  
17 my enrollment.

18 Today, when I work in enrollment, it's  
19 cost of living. It's an annualized adjustment, and  
20 it doesn't go down unless I'm demoted or  
21 terminated.

22 Q. When you were an employee at the  
23 University of Phoenix, did your salary ever go  
24 down?

25 MR. NELSON: Objection. Calls for a legal

**EXHIBIT G**



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

JUN 28 1985

Charles M. Seigel  
Vice President  
Apollo Education Corporation  
4615 Eltwood  
Phoenix, AZ 85040

Dear Mr. Seigel:

I am writing in response to our earlier conversations and your letter of March 10. In light of the prohibition listed in Sec. 487(a)(20) of the Higher Education Act of 1965, as amended (HEA), you asked for a written ruling concerning the legality of the compensation packages some of your clients offer institutional representatives. I apologize for the delay in my response.

In part, the answer will depend on the exact responsibilities of these representatives. Any representative whose responsibilities do not include recruitment or enrollment of students, or the processing of applications for financial aid, is not affected by the prohibition. However, for those representatives whose responsibilities do include any such activities, Section 487(a)(20) of the HEA states that for institutions participating in title IV, HEA programs:

"The institution will not provide 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 admissions activities or in making decisions regarding the award of student financial assistance..."

As you can see, the statute is quite blunt in prohibiting completely an entire set of compensation plans. Thus any compensation plan for persons engaged in the recruiting or admission of students, or in the awarding of student aid, must meet a very high standard. In practice, this standard is that persons involved in recruiting, admissions, or financial aid administration cannot be paid any type of incentive, commission, or bonus payment that can be related in any way to the recruiting or enrolling students, or the awarding of financial aid. The Department believes only this interpretation embodies the aim of the statute to preclude incentives for representatives to recruit or admit students solely to increase the amount of title IV, HEA funds an institution receives, or to award such aid without due regard for an applicant's qualifications.

From the information you provided me concerning the terms of the compensation plan you propose, two important points stand out that are germane to this standard:

Mr. Seigel, page 2

1) The representatives subject to your proposed plan would be paid according to an annual plan in which success in meeting goals and standards increases their immediate compensation, and this compensation is understood to be, and termed, "incentive pay", or at least "incentive-based" pay.

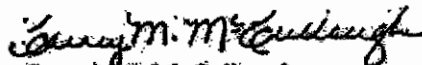
2) The goals and incentives linked with increases in pay are based in part on the factor "meeting revenue targets". While, as you note, the total revenues for these institutions are not entirely made up of title IV funds, those funds do make up a part of those revenues, so that these targets, and thus the goals and incentives, cannot be separated from successfully enrolling students who receive title IV aid.

It therefore appears that this compensation plan is prohibited by the statute, because incentive pay would be awarded that is based on the successful enrollment of students.

Please note that this determination is not meant to prohibit these institutions from making future salary decisions based on present performance. Such awards, however, must truly involve straight salary plans, in which employees are paid neither more nor less than a fixed amount each pay period, regardless of any performance measures related to recruitment, enrollment, or the award of financial aid within the salary period.

I trust this response answers your question fully. If you have further questions, please feel free to contact me.

Sincerely,



Carney M. McCullough

Chief, General Provisions Branch

Policy Development Division

Policy, Training, and Analysis Services

EXHIBIT H

75 of 85 DOCUMENTS

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The Chronicle of Higher Education

July 13, 2001

**SECTION:** GOVERNMENT & POLITICS; Pg. 21

**LENGTH:** 504 words

**HEADLINE:** U.S. Officials Pledge to Clarify Rules on Recruiting Students

**BYLINE:** ANNE MARIE BORREGO

**BODY:**

Education Department officials told leaders of for-profit colleges last month that the department would soon issue more detailed guidance on what forms of payment for student recruitment are legal.

The comments were made by William D. Hansen, deputy education secretary, and Jeff Baker, director of program development for student financial-assistance programs, in speeches here at the Career College Association's annual meeting.

When it reauthorized the Higher Education Act in 1992, Congress included a provision that prohibits colleges from providing incentive payments to recruiters. The intent of the measure was to prevent recruiters, motivated by a commission they would receive, from signing up students for programs that might not be appropriate for them.

College officials at both nonprofit and for-profit institutions have criticized the law and the Education Department's interpretation of it. The critics do not disagree with the law's intended purpose but with what they consider to be conflicting guidance from the department on how to comply with the law and its regulations.

A series of high-profile findings from the department's inspector general has focused renewed attention on the law. Last year, the department asked Computer Learning Centers, which is now defunct, to repay \$187-million in federal financial aid, after finding that the company had compensated its admissions officers based on how many students each recruiter enrolled. In May, the inspector general recommended that the department order William Penn University and Olivet Nazarene University to repay a combined \$8.1-million in federal financial aid for compensating a contractor under a revenue-sharing agreement based on the number of students enrolled in their programs.

Mr. Hansen told the proprietary-school officials here that the Education Department's previous guidance on the rule, which has historically consisted of informal letters sent to individual institutions, was ambiguous and "not acceptable." Mr. Hansen added that no one wanted to return to the days when "bounty hunters" brought in unqualified students.

Mr. Baker, who took part in a separate panel discussion on incentive compensation, told the audience that he could not provide official guidance until the Education Department had issued a "Dear Colleague" letter to financial-aid officials nationwide. Several of the conference attendees said a draft of such a letter was being evaluated by Education Secretary Roderick R. Paige.

Lawyers on the panel who represent career and traditional four-year colleges included a copy of an unsigned letter from Secretary Paige in a packet that was given to conference attendees. In the letter, Mr. Paige says that the department will soon offer guidance on various aspects of the law, including compensation for those who have direct contact with students, and payment for employees or contractors involved in Web-based marketing. The letter was unofficial, the panelists stressed.

**LOAD-DATE:** August 13, 2001

**EXHIBIT I**



Demonstrative Exhibit

Redacted

Counselor Name	Payroll New Salary	Effective Date	System Period	Number of Months in Service	Number of Interim Salary Changes	Percent Salary Change	Max. Payroll	Job Title
Redacted	12,300	10-24	10-24	17	5	5%	12,300	Administrative Counselor II
	12,300	10-24	10-24	17	5	5%	12,300	Administrative Counselor II



Administrative Board

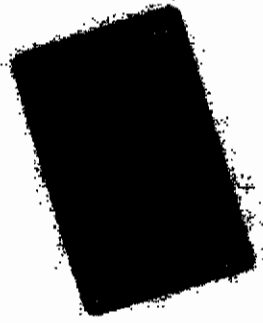
Redacted

Counselor Name	Previous Salary	New Salary	Effective Date	Contract Period	Number of Months in Contract	Number of Months Since Salary Change	Percent Salary Change	Gross Salary Change	Message	Review	Job Title
Redacted	\$33,000	\$45,310	Jan-02	Sept 11, 2001 - Sept 11, 2002	12	91	37%	\$ 2,310	per the Personnel Commission	Merit Increase	Commissioner / Advisor / Commissioner
Redacted	\$99,600	\$132,000	Jan-02	January 1, 2001 - January 1, 2002	12	110.5	33%	\$ 32,400	Merit / Casual	Merit Increase	Commissioner / Advisor



Confidential Exhibit

Counselor Name	Previous Hire Status	Effective Date	Review Period	Number of Months in Review	Number of Employees Supervised	Percent Salary Increase	Manager	Job Title
Redacted	RECENT HIRE	12/15/2011	12/15/2011 - 12/15/2012	12	5	10%	Mark Miller	Employment Counselor



Person 74

12.5.03

Demonstrative Exhibit  
Redacted

Counselor Name	Campus	Position	Previous Salary	New Salary	Eff. Date of New Salary	Review Period	Number of Months in Review	Number of Enrollments	Percent Salary Change	Gross Salary Change
Person K	N. California / San Jose	Freshman EC	\$36,000	\$36,000	16-Mar-03	December 2002 - March 2003	3	7	0%	\$ -
Person L	N. California / San Jose	Freshman EC	\$36,000	\$36,000	2-Mar-03	December 2002 - March 2003	3	9	0%	\$ -
Person M	N. California / San Jose	Freshman EC	\$36,000	\$40,000	4-Feb-03	November 2002 - February 2003	3	7	11%	\$ 4,000

**EXHIBIT J**

**FILED**

JAN 04 2008

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

**UNITED STATES of America ex rel.  
MOUNTHASONE BOTT; UNITED  
STATES of America ex rel. SUSAN  
NEWMAN,**

**Plaintiffs - Appellants,**

**v.**

**SILICON VALLEY COLLEGES;  
WESTERN CAREER COLLEGES;  
GREG NATHANSON; ELLIS C.  
GEDNEY; DARRYL LINDSEY;  
STEVE GALLAGHER; BARBARA  
BICKETT; JANETTE C. MARQUEZ;  
PATRICK SUTHERLAND; U.S.  
EDUCATION CORPORATION;  
GEORGE MONTGOMERY; LESLIE  
E. PRITCHARD; ALMICH &  
ASSOCIATES,**

**Defendants - Appellees.**

No. 06-15423

D.C. No. CV-04-00320-CW

**MEMORANDUM\***

Appeal from the United States District Court  
for the Northern District of California  
Claudia Wilken, District Judge, Presiding

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Argued and Submitted December 7, 2007  
San Francisco, California

Before: **KOZINSKI**, Chief Judge, **COWEN\*\*** and **HAWKINS**, Circuit  
Judges.

1. Relators have not pled with sufficient particularity any facts indicating that the periodic salary adjustments violated the Higher Education Act or its associated regulations. The Act does not prohibit salary reviews generally, but rather bars the payment of a “commission, bonus, or other incentive payment” solely on the basis of recruitment success. 20 U.S.C. § 1094(a)(20). Relators have not pled specific facts supporting the inference that salary reviews were performed solely on the basis of recruiting success. Nor have relators pled with sufficient particularity any facts demonstrating that the salary review system was merely a sham mechanism for funneling improper incentive pay. See Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001). Cf. United States ex rel. Hendow v. University of Phoenix, 461 F.3d 1166, 1169–70 (9th Cir. 2006) (alleging fraud with sufficient particularity).

---

\*\* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

2. The decision to fire an employee is not covered by the Act because termination is not a prohibited "commission, bonus, or other incentive payment." 20 U.S.C. § 1094(a)(20).

3. We need not determine whether the safe harbor regulation is actually valid. If defendants complied with a facially valid regulation, relators cannot show the required scienter under the False Claims Act for actions after the safe harbor regulation was promulgated. See United States ex rel. Hochman v. Nackman, 145 F.3d 1069, 1073-74 (9th Cir. 1998). The safe harbor regulation is not facially invalid because the Higher Education Act prohibits direct or indirect bonuses, while the regulation specifies permissible means by which to calculate base salaries. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

**AFFIRMED.**

**EXHIBIT K**



# **FORM 10-K**

**APOLLO GROUP INC - APOL**

**Filed: November 14, 2005 (period: August 31, 2005)**

**Annual report which provides a comprehensive overview of the company for the past year**

Table of Contents

- directing the potential student to one of our specific URL addresses on the Internet that are used to track individual marketing campaigns for reach and effectiveness.

*Re-Marketing.* Re-marketing efforts include both direct mail and e-mail sent to existing leads in our database. Re-marketing is a very successful part of our marketing campaign because of our growing database of qualified prospects.

*Referrals.* Referrals continue to be an important source of new students; including those from employers, co-workers, current students, alumni, family members, and other friends.

*Print and Broadcast.* We rely on print and broadcast advertising to target new prospects and to assist with building brand recognition.

**Competition**

The higher education market is highly fragmented and competitive with no private or public institution enjoying a significant market share. We compete primarily with four-year and two-year degree-granting public and private regionally accredited colleges and universities. Many of these colleges and universities enroll working adults in addition to the traditional 18 to 24 year-old students. We expect that these colleges and universities will continue to modify their existing programs to serve working adults more effectively. In addition, many colleges and universities have announced various distance education initiatives.

We believe that the competitive factors in the higher education market include the following:

- the ability to provide easy and convenient access to programs and classes;
- reliable and high-quality products and services;
- qualified and experienced faculty;
- cost of the program;
- reputation of programs, classes, and services; and
- the time necessary to earn a degree.

In terms of non-degree programs offered by us, we compete with a variety of business and information technology providers, primarily those in the for-profit training sector. Many of these competitors have significantly more market share and longer-term relationships with key vendors.

Institute for Professional Development faces competition from other entities offering higher education curriculum development and management services for adult education programs. The majority of Institute for Professional Development's current competitors provide short-term, pre-packaged curriculum or turn-key programs.

**Employees**

At August 31, 2005, we had the following numbers of employees:

	<u>Full-Time</u>	<u>Part-Time</u>	<u>Faculty</u>	<u>Total</u>
University of Phoenix	10,053	142	20,154(2)	30,349
College for Financial Planning	71	1	9(4)	81
Total	<u>11,302</u>	<u>170</u>	<u>21,194</u>	<u>32,666</u>

(1) Consists primarily of employees in executive management, information systems, corporate accounting, financial aid, and human resources.

**EXHIBIT L**

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13 Attorneys for Defendant,  
UNIVERSITY OF PHOENIX  
14

15 UNITED STATES DISTRICT COURT  
16 FOR THE EASTERN DISTRICT OF CALIFORNIA  
17

18 UNITED STATES OF AMERICA, ex rel.  
MARY HENDOW and JULIE ALBERTSON,  
19  
20 Plaintiff,  
21 v.  
22 UNIVERSITY OF PHOENIX,  
23 Defendant.

CASE NO. CV-03-0457 GEB DAD  
**DECLARATION OF DIANE THOMPSON  
IN SUPPORT OF DEFENDANT'S  
OPPOSITION TO RELATORS' MOTION  
TO COMPEL**

24 I, Diane Thompson, declare that:

- 25 1. I have personal knowledge of the facts recited herein and, if called and sworn as a  
26 witness, I would and could competently testify thereto.  
27 2. I am the Chief Human Resources Officer for Apollo Group, Inc. ("Apollo"), parent  
28 company of the University of Phoenix ("University"). Prior to assuming my current role, I held the

1 position of Vice President/Counsel of Human Resources for Apollo from October 2000 to March  
2 2006. From 1998 through 2000, I was Apollo's Director of Human Resources.

3 3. Relators seek to extend the discovery period in this action, but doing so would  
4 exponentially increase University's discovery burden because of University's significant growth over  
5 the last several years. For each additional year of discovery University must respond to, the burden  
6 becomes more significant because of the increasing size of University. Since Relators filed their  
7 Complaint in 2004, University has grown by over 4,000 employees and added over 40 locations  
8 throughout the country. The growth of the University over is set forth in the following chart:

9

	1995	2000	2003	2004	2005	2006	2007
10 <b>Number of Staff</b>	1,480	3,972	8,185	10,650	11,472	13,121	14,719
11 <b>Number of Faculty</b>	2,835	11,738	17,387	19,263	21,194	23,295	21,699
12 <b>Number of Students</b>	36,848	100,900	200,100	238,400	271,400	282,300	313,700
13 <b>Number of Locations</b>	75	153	192	219	244	262	259

14

15 4. Specifically, University's enrollment department, which includes its Enrollment  
16 Counselors ("EC's"), has grown significantly. The following chart shows the growth in the number  
17 of University EC's from 1999 to the present:

18

Date	University EC's
12/31/1999	447
12/31/2000	606
12/31/2001	1,123
12/31/2002	1,657
12/31/2003	2,553
12/31/2004	3,375
12/31/2005	3,816
12/31/2006	4,813
12/31/2007	5,509
As of 09/25/2008	6,271

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23

24 5. Starting in mid-2003, I became the head of the Enrollment Counselor Compensation  
25 Committee ("Compensation Committee"), which was organized to oversee and revise University's  
26 policies concerning EC compensation. In June 2004, Apollo implemented a new compensation plan  
27 for enrollment counselors. Attached and Exhibit I is a true and correct copy of that compensation  
28 plan.

1           6.       The June 2004 compensation plan was significantly different from prior plans in that  
2 the status of EC's was changed from exempt to non-exempt under applicable labor laws.  
3 Furthermore, the June 2004 compensation plan adopted a computerized employee evaluation system.  
4 Under the June 2004 compensation plan, EC's were evaluated on the same categories as the prior  
5 plan (Job Performance, Working Relationships, Customer Service, Judgment and Professional  
6 Development), but because EC's were now evaluated using an electronic system, each of the  
7 categories was assigned a specific percentage weight. Furthermore, under the June 2004 plan, an  
8 EC's overall rating was automatically calculated by the review system based on the ratings that EC  
9 received on the various evaluation categories and the weights assigned to those categories.

10           7.       Additionally, the June 2004 compensation plan took advantage of regulatory safe  
11 harbors that were adopted the Department of Education in November 2002. For example, as allowed  
12 by the safe harbor, the June 2004 plan allowed EC's salaries to be adjusted both up or down. Also,  
13 EC's were eligible for a salary adjustments up to twice a year.

14           8.       Attached as Exhibit 2 is a true and correct copy of a PowerPoint presentation from  
15 2004 entitled "Enrollment Department Enhancements." Exhibit 2 explains some of the changes  
16 implemented by the June 2004 plan.

17           9.       Attached as Exhibit 3 are true and correct copies of the minutes from meetings of the  
18 Compensation Committee from July 2003 to May 2004. These minutes track the development of the  
19 June 2004 compensation plan and the changes from the prior plans.

20           10.      In support of their motion, Relators attach the declaration of Chris Connor, Leckman  
21 Decl., Ex. D, who was employed by a temp agency, Apollo One. Mr. Connor worked at the Dallas  
22 location for less than six weeks. Because of his short tenure, and the fact that he was employed by a  
23 temp agency, Mr. Connor never received a performance review under University's EC compensation  
24 plan and he never became eligible for a salary adjustment as a University EC.

25           //

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I declare under penalty of perjury that the foregoing is true and correct. Executed on  
September 26, 2008 in Phoenix, Arizona.

  
Diane Thompson