IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00573-RBJ

UNITED STATES ex rel. FIORISCE LLC,

Plaintiff,

v.

PERDOCEO EDUCATION CORPORATION,
COLORADO TECHNICAL UNIVERSITY, INC.,
AMERICAN INTERCONTINENTAL UNIVERSITY, INC.,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

I. Relator's Complaint is barred by the public disclosure bar.

Relator misstates the standard for the public disclosure bar. Contrary to Relator's suggestion (Doc. 47 at 3), "direct allegations of fraud [a]re unnecessary" to trigger the bar. *U.S. ex rel. Reed v. KeyPoint Gov. Sols.*, 923 F.3d 729, 748 (10th Cir. 2019). "In fact, the public disclosures need not allege any False Claims Act violations or even any wrongdoing." *Id.* at 745 (internal quotation marks and citation omitted). Nor must there be a "*complete* identity of allegations." *Id.* at 752 (citation omitted; emphasis in *Reed*).

Relator also ignores the contents of the public disclosures at issue. The most glaring examples of this are the *Republic Report* articles (Defs.' Mot. Exs. F and G),[1] which closely track Relator's key allegations, as reflected below:

[1] Relator dismissively refers to these disclosures as mere "blog posts." (Doc. 47 at 6). Defendants disagree with this characterization of the *Republic Report* articles, but the point is irrelevant: blog posts qualify as public disclosures. *See, e.g.*, *Green v. AmerisourceBergen Corp.*, 2017 WL 1209909, at *6 (S.D. Tex. Mar. 31, 2017).

***Republic Report* Articles**	**Relator's Allegations**
"[C]lasses at Perdoceo schools . . . are poor quality, rudimentary, low on instructor involvement, and almost impossible to flunk, because the company wants to keep students enrolled until they graduate or run out of financial aid." Ex. F at 4.	"For Defendants, Intellipath has nothing to do with improving the education process. It is simply about maximizing student retention and the Title IV funding that comes with it." Am. Compl. ¶ 51; "Defendants do this all for the purpose of making it virtually effortless for students to take and pass courses, and ultimately stay enrolled in school." *Id.* ¶ 52; "This is all to encourage students to remain enrolled by making coursework virtually effortless." *Id.* ¶ 54; "Perdoceo's sole objective is keeping students enrolled and maximizing the Title IV funding it receives on their behalf." *Id.* ¶ 78.
"AIU and CTU programs are not terribly difficult to get through, because many of the exams are multiple choice, using the schools' 'intellipath' system, and students have opportunities to correct their answers." Ex. G at 5.	"Defendants created the tests to be overly simplistic so students could readily pass them and then automatically skip the majority of lessons (if not all the lessons) in each unit." Am. Compl. ¶ 50. "Defendants designed Intellipath as an educational shortcut by providing students with woefully deficient course content and steering students through the content in the shortest amount of time possible." *Id.* ¶ 52.

Relator does not address these parallels, which alone "were sufficient to set the government on the trail of the alleged fraud . . . ." *Reed*, 923 F.3d at 744 (internal quotations and citations omitted). Nor does Relator meaningfully address Exhibit K, which makes clear that the Government has "reported extensively" on "deficient oversight of critical issues such as credit hours," particularly as it relates to Defendants' accreditor. Ex. K at 12. Or Exhibit I, which describes for-profit online education programs as "a gateway for massive fraud." Ex. I at 2. Or Exhibit E, which is cited in Paragraph 32 of the Amended Complaint.

Further, Relator does not meet its burden of showing that the "narrow" original source exception applies. *Reed*, 923 F.3d at 756.[2] Relator admits this exception requires "independent" knowledge of the fraud, which "must not be derivative of the information of others, even if those others may qualify as original sources." *U.S. ex rel. Fine v. Advanced Sci., Inc.*, 99 F.3d 1000, 1007 (10th Cir. 1999). Yet Relator's knowledge is derivative of its unidentified principal. *U.S. v. Allstate Ins. Co.*, 620 F. Supp. 3d 674, 693-94 (E.D. Mich. 2022) (citing Tenth Circuit precedent and holding that LLC "cannot claim to be the original source of information collected by" a different entity).[3]

Relator's allegations also do not materially add to the public disclosures. Relator makes much of the fact that its allegations go to scienter, and it purports to quote *Reed* for the proposition that "when a relator brings forth knowledge of scienter that is not specifically contained in a qualifying public disclosure it should be presumed to materially add value." (Doc. 47). But this is not what *Reed* said. The quote Relator attributes to *Reed* is from a law review article *Reed* cited. 923 F.3d at 761. Far from endorsing the commentator's view, *Reed* took pains to "underscore" that its holding was not "based solely on" scienter. *Id.* at 763. Rather, it was based "on the *combined, synergistic effect* of the allegations of distinct misconduct" and the Defendants' "knowing efforts to cover up" that misconduct. *Id.* (emphasis in original).

---

[2] Relator argues "[t]he 2010 amendments 'radically changed' the FCA to 'lower the bar for relators,' especially as to what qualifies as an original source." (Doc. 47 at 8) (quoting *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298-99 (3d Cir. 2016)). This is not the law. *Reed* specifically rejected the holding in *Moore* because it "could allow the original-source exception to swallow the public disclosure bar." 923 F.3d at 758.

[3] Relator sidesteps this by citing *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049 (8th Cir. 2002), for the point that "an LLC 'has no legal status separate from its members.'" (Doc. 47 at 10). Another district court recently rejected this same argument in the context of an LLC-relator. *U.S. ex rel. 3729, LLC v. Express Scripts Holding Co.*, 2023 WL 4056042, at *13 n.7 (S.D. Cal. June 16, 2023), *appeal filed*, No. 23-55645 (9th Cir. 2023).

Here, "Relator's scienter allegations are inextricably tied to" credit hour fraud—"not to a 'new scheme' as in *Reed*." *U.S. v. Molina Healthcare of N.M., Inc.*, 2023 WL 5526373, at *13 (D.N.M. Aug. 28, 2023) (rep. & rec.). Relator did not plead scienter in a "distinct context" apart from that alleged fraud, vitiating its reliance on *Reed*. 923 F.3d at 763.

II. Relator fails to satisfy Rule 9(b) as to AIU.

"Fair notice" requires Relator to allege the "who, what, when, where, and how of the alleged claims." *U.S. ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730, 745 (10th Cir. 2018). Relator ignores this standard, and Relator cannot simply bootstrap claims against AIU based on speculation that AIU *must* be involved in the same alleged fraud as CTU because they are owned by the same parent company. *See U.S. ex rel. Schaengold v. Mem'l Health, Inc.*, 2014 WL 6908856, at *12 (S.D. Ga. Dec. 8, 2014).

Unlike its detailed allegations against CTU and its various employees, Relator identifies no one at AIU who was involved in the alleged fraudulent scheme, nor any particular course at AIU for which the educational content was, allegedly, fraudulently deficient. Rather, Relator suggests that the Court may rely on Relator's allegation that it "knows" the same scheme is occurring at AIU (Am. Compl. ¶ 75). This is inadequate under Rule 9(b).

III. Relator's claim that Perdoceo "caused the submission of false claims" fails.

For these claims, the Tenth Circuit requires more than "mere passive acquiescence" or a "failure to halt the misconduct" (Doc. 47 at 11), and it has rejected a loose "but for" causation standard in favor of a more restrictive proximate cause standard. *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 715 n.17 (10th Cir. 2006). Relator must particularly plead a "sufficient nexus," and not just an "attenuated link," "between defendants' specific

actions and the presentation of the false claim." *Id.* at 714. Relator overstates its allegations against Perdoceo in effort to meet this standard. The general allegations that Ms. Komar played a role in designing intellipath® (Am. Compl. ¶ 49), that she provided data to CTU (*id.* ¶ 87), and that an unnamed "Vice Provost of Technology" transferred data (*id.* ¶ 108) do not adequately plead that Perdoceo caused the submission of any alleged false claim.[4]

By: /s/ *Kyle P. Seelbach*

Martin Loring
4801 Main Street, Suite 1000
Kansas City, MO 64412
Phone: 816.983.8000
Fax: 816.983.8080
martin.loring@huschblackwell.com

Kyle P. Seelbach
Madeline Townsley
8001 Forsyth Boulevard, Suite 1500
St. Louis, MO 63105
Phone: 314.480.1500
Fax: 314.480.1505
kyle.seelbach@huschblackwell.com
madeline.townsley@huschblackwell.com

Jeffrey D. Whitney
1801 Wewatta Street, Suite 1000
Denver, CO 80202
Phone: 303.749.7200
Fax: 303.749.7272
Jeff.whitney@huschblackwell.com

Gregg N. Sofer
111 Congress Avenue, Suite 1400
Austin, TX 78701-4093
Phone: 202.378.2383
Fax: 512.479.1101
gregg.sofer@huschblackwell.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

On November 27, 2023, a copy of the foregoing was filed with the Clerk of the Court and served on counsel of record via the Court's ECF system.

/s/ *Christine Herrmann*

[4] *Cf. U.S. ex rel. Landis v. Hospice Care of Kansas, LLC*, 2010 WL 5067614, at *5 (D. Kan. Dec. 7, 2010) (allegations of causation sufficient where there were particular allegations that a company pressured its employees not to discharge patients regardless of whether they were eligible for hospice benefits).