

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

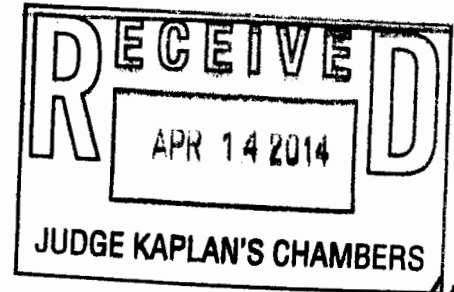
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UNITED STATES OF AMERICA,

Plaintiff,

v.

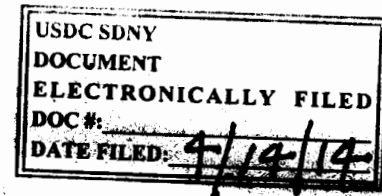
THE ACADEMIC ADVANTAGE,
EDWIN GUZMAN, LUZ MERCEDES,
ARLETTE HERNANDEZ, KRISTIN JOYNER,
NILSA DALMASI, RAYVON JONES,
ALICIA MCKAY, TERESA OSORIO, and
AYESHA YOUNG,

Defendants.
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Civil Case No. 14-cv-1664 (260) *LAK*

STIPULATION AND ORDER OF
SETTLEMENT AND DISMISSAL *PROBATE*



WHEREAS, this Stipulation and Order of Settlement and Dismissal (“Stipulation”) is entered into by and among the United States of America (“United States” or “Government”), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, and Luz Mercedes (“Mercedes”), by her authorized representative (collectively, “Parties”);

WHEREAS, during the 2010/2011 academic year and the 2011/2012 academic year (the “Covered Period”), Mercedes was an employee of The Academic Advantage (“Academic Advantage”). Throughout the Covered Period, Academic Advantage provided Supplemental Educational Services (“SES”), in the form of after-school tutoring, to students attending underperforming public schools in New York City. In exchange for providing these after-school tutoring services, the New York City Department of Education paid Academic Advantage a fixed amount of money per hour for each student that it tutored, using funds provided to New York State by the federal Government pursuant to the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.*;

WHEREAS, contemporaneous with the filing of this Stipulation, the Government is filing a civil fraud complaint (“Complaint”) against Academic Advantage and a number of its former employees, including Mercedes, asserting claims under the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*, and the common law. As to Mercedes, the Complaint alleges, among other things, that, during the Covered Period, she executed false certifications on student attendance sheets at public schools in New York, New York, to make it appear that more students had attended Academic Advantage’s after-school SES tutoring program than had, in fact, attended. The Complaint further alleges that Mercedes’ conduct enabled Academic Advantage to bill and obtain federal funds for tutoring services that it never provided (together with all allegations asserted against Mercedes in the Complaint, “Covered Conduct”); and

WHEREAS, the Parties have reached a mutually agreeable resolution addressing Defendant's conduct through this Stipulation;

NOW, THEREFORE, upon the Parties' agreement, IT IS HEREBY ORDERED that:

TERMS AND CONDITIONS

1. The Parties consent to this Court's exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them.

2. Mercedes hereby admits, acknowledges, and accepts responsibility for the following conduct:

a. During the Covered Period, Academic Advantage employed individuals whom it referred to as "Site Managers" to manage its after-school SES tutoring program at particular New York City public schools.

b. During the Covered Period, Mercedes was employed by Academic Advantage as a Site Manager, and was responsible for managing Academic Advantage's after-school tutoring program at multiple public schools in New York, New York.

c. During the Covered Period, Mercedes engaged in the following fraudulent conduct in connection with Academic Advantage's SES program in New York City:

(1) Mercedes routinely forged student signatures on daily student attendance sheets to make it appear that more students had attended Academic Advantage's SES tutoring classes than had, in fact, attended; and

(2) Mercedes routinely signed false certifications on daily student attendance sheets, falsely certifying that after-school tutoring had been provided to all of the students whose purported signatures appeared on the sheets, even though she knew that tutoring had not been provided to many of those students.

d. Mercedes' above-referenced conduct enabled Academic Advantage to bill and obtain federal funds for tutoring services that were never provided.

3. In the context of a coordinated criminal proceeding, Mercedes has entered into an agreement with the Government ("Agreement") and has pled guilty to a three-count Information charging her with conspiring to make false statements, in violation of 18 U.S.C. § 371, and making false statements, in violation of 18 U.S.C. §§ 1001 and 1002. Pursuant to the

Agreement, Mercedes has consented to pay restitution to the Government pursuant to 18 U.S.C. §§ 3663, 3663A and 3664, in an amount to be determined in the context of the criminal proceeding against her (“Restitution Amount”). The method and timing of the payment of the Restitution Amount (“Payment Conditions”) will also be determined in the context of the criminal proceeding against Mercedes.

4. Mercedes has executed a judgment in favor of the Government, and against her, in the amount of \$101,758.90 (“Judgment”). The Judgment is attached hereto as Exhibit A. Pursuant to this Stipulation, the Government agrees to accept the Restitution Amount to be paid in accordance with the Payment Conditions in full satisfaction of the afore-mentioned Judgment and of the Government’s claims against Mercedes arising out of the Covered Conduct. Should Mercedes violate the terms of the Payment Conditions, Mercedes agrees that, pursuant to the procedure set forth in Paragraph 7 below, the full Judgment shall become due and payable and the Government may take action to collect on the Judgment.

5. Contingent upon Mercedes’ full compliance with the terms of this Stipulation and the Payment Conditions, and subject to any exceptions, qualifications or reservations set forth in this Stipulation, the Government releases her from any civil or administrative monetary claims that the Government has, or may have, for the Covered Conduct under the FCA, 31 U.S.C. § 3729 *et seq.*, the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.*, and the common law theories of payment by mistake and unjust enrichment; provided, however, that nothing in this Stipulation shall be construed as a release of any claims that the Government has, or may have, against any other individual or entity in connection with the Covered Conduct.

(c) offset the amount due under the Judgment from any amounts due and owing Mercedes by any department, agency or agent of the United States; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. In the event that the United States opts to rescind this Stipulation pursuant to this Paragraph, Mercedes shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that relate to the Covered Conduct, except to the extent such defenses were available on the Effective Date (defined below). Mercedes shall not contest any offset imposed or any collection action undertaken by the Government pursuant to this Paragraph, either administratively or in any court. In addition, Mercedes shall pay to the Government all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses. In the event that the United States opts to seek specific performance of the Payment Conditions, interest shall accrue at the rate of 9% per annum compounded annually on any payments that are due and owing under the Payment Conditions, beginning thirty (30) calendar days after delivery of the notice of Default.

8. Nothing in this Stipulation constitutes an agreement by the United States concerning the characterization of the Restitution Amount or the Judgment for purposes of the Internal Revenue laws, Title 26 of the United States Code.

9. Mercedes releases the Government, its agencies, officers, agents, employees and servants, from any claims that Mercedes has asserted, could have asserted, or may assert in the future against the Government, its agencies, officers, agents, employees and servants, related to the Covered Conduct, as well as the Government's investigation, prosecution and settlement thereof.

10. This Stipulation is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity.

11. Mercedes represents and warrants that she has reviewed her financial situation, that she is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and that she reasonably believes that she shall remain solvent following compliance with this Stipulation. Further, the Parties warrant that, in evaluating whether to execute this Stipulation, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Mercedes, within the meaning of 11 U.S.C. § 547(c)(1); and (b) have concluded that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Mercedes was or became indebted on or after the date of this Stipulation, within the meaning of 11 U.S.C. § 548(a)(1).

12. If within 91 days of the Effective Date of this Stipulation or any payment made pursuant to this Stipulation, Mercedes commences, or a third party commences, any case, action, or other proceeding under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking an order for relief of Mercedes' debts, or seeking to adjudicate Mercedes as bankrupt or insolvent; or (b) seeking appointment of a trustee, custodian, or other similar official for Mercedes or for all or part of Mercedes' assets, Mercedes agrees as follows:

a. Mercedes' obligations under this Stipulation, the Payment Conditions or the Judgment may not be avoided pursuant to 11 U.S.C. § 547, and Mercedes shall not argue or otherwise take the position in any such case, action, or proceeding that (i)

Mercedes' obligations under this Stipulation, the Payment Conditions or the Judgment may be avoided under 11 U.S.C. § 547; (ii) Mercedes was insolvent at the time this Stipulation was entered into; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation do not constitute a contemporaneous exchange for new value given to Mercedes.

b. If any of Mercedes' obligations under this Stipulation, the Payment Conditions or the Judgment are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the Government, at its option, may rescind this Stipulation and reinstate the claims in the Complaint against Mercedes, and pursue any civil and/or administrative claim, action, or proceeding against Mercedes that would otherwise be covered by the release in Paragraph 5 above. Mercedes agrees that (i) any such claim, action, or proceeding brought by the Government would not be subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the case, action, or proceeding described in the first clause of this Paragraph, and Mercedes shall not argue or otherwise contend that the claim, action, or proceeding is subject to an automatic stay; (ii) Mercedes shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any claim, action, or proceeding that is brought by the Government within 60 calendar days of written notification to Mercedes that the Stipulation has been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the Effective Date; and (iii) the Government has a valid claim against Mercedes for the Restitution Amount and the Judgment, and the Government may pursue the claim in the

case, action, or proceeding described in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

c. Mercedes acknowledges that the agreements in this Paragraph are provided in exchange for valuable consideration provided in this Stipulation.

13. Mercedes agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Mercedes in connection with:

- (1) the matters covered by this Stipulation;
- (2) the United States' audit(s) and civil and/or criminal investigation(s) of the matters covered by this Stipulation;
- (3) Mercedes' investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and/or criminal investigation(s) in connection with the matters covered by this Stipulation (including attorney's fees);
- (4) the negotiation and performance of this Stipulation; and
- (5) any payments Mercedes makes to the United States pursuant to this Stipulation or the Payment Conditions,

are unallowable costs for government contracting purposes (hereinafter referred to as "Unallowable Costs").

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by Mercedes, and Mercedes shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Within 90 days of the Effective Date of this Stipulation, Mercedes shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Mercedes or any of her agents from the United States. The United States, including the Department of Justice and/or the affected agencies, reserves its right to audit, examine, or re-examine Mercedes' books and records and to disagree with any calculations submitted by Mercedes regarding any Unallowable Costs included in payments previously sought by Mercedes, or the effect of any such Unallowable Costs on the amount of such payments.

14. Each Party shall bear its own legal and other costs incurred in connection with this matter.

15. Any failure by the Government to insist upon the material performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the Government, notwithstanding that failure, shall have the right thereafter to insist upon material performance of any and all of the provisions of this Stipulation.

16. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party in any subsequent dispute.

17. Subject to the exceptions set forth in this Stipulation, and in consideration of the obligations of Mercedes as set forth in this Stipulation, and conditioned upon Mercedes' full compliance with the terms of this Stipulation and the Payment Conditions, the Government shall

dismiss with prejudice the claims against Mercedes (and only Mercedes) in the Complaint; provided, however, that nothing in this Stipulation shall require the Government to dismiss the claims it has asserted against any other individual or entity in the Complaint; and provided further that nothing in this Stipulation shall preclude the Government from amending the Complaint to assert claims against any additional individuals or entities; and provided further that the Court shall retain jurisdiction over this Stipulation and each Party to enforce the obligations of each Party under this Stipulation.

18. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties.

19. The undersigned counsel and any other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and/or entities indicated below.

20. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

21. Any notices pursuant to this Stipulation shall be in writing and shall be delivered by hand, express courier, or email followed by postage-prepaid mail, and shall be addressed as follows:

IF TO THE UNITED STATES:

Christopher B. Harwood
Assistant United States Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10007
Email: christopher.harwood@usdoj.gov

IF TO MERCEDES:

Beth Farber
Harris, O'Brien, St. Laurent & Houghteling LLP
111 Broadway
Suite 402
New York, NY 10006
Email: farber@harrisobrien.com

22. The Effective Date of this Stipulation is the date upon which this Stipulation is entered by the Court.


Agreed to by:

THE UNITED STATES OF AMERICA

Dated: New York, New York
March 11, 2014

PREET BHARARA
United States Attorney for the
Southern District of New York

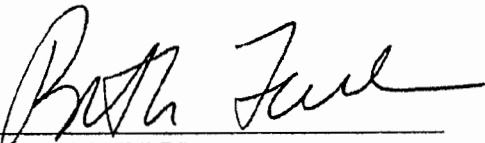
By:


CHRISTOPHER B. HARWOOD
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2728

Attorney for the United States of America

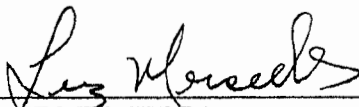
LUZ MERCEDES

Dated: New York, New York
3-6-14, 2014


By: 
BETH FARBER
Harris, O'Brien, St. Laurent & Houghteling LLP
111 Broadway
Suite 402
New York, NY 10006
Telephone: (212) 785-4275

Attorney for Luz Mercedes

Dated: New York, New York
3 13, 2014

By: 
LUZ MERCEDES

SO ORDERED:


UNITED STATES DISTRICT JUDGE

Dated: New York, New York
4/14, 2014