



January 14, 2022

Steven Harpe
Oklahoma State Chief Operating Officer
Deputy Secretary of Digital Transformation and Administration
Director, Office of Management and Enterprise Services
2300 N. Lincoln Blvd. Suite 101
Oklahoma City, OK 73105

Sent via email

Dear Mr. Harpe:

We are in receipt of your correspondence dated December 27, 2021 (your "Letter") in which you request certain information and convey your intent to recover Governors Emergency Education Relief ("GEER") funds distributed for "unintended and potentially fraudulent purposes." To the extent that you believe program applicants or recipients of GEER funds have used those funds in improper ways and choose to pursue recovery actions against those individuals, Kleo, Inc., d/b/a ClassWallet ("ClassWallet," "we," or "us") would intend to perform in connection with such proceedings those obligations that we may have under that certain State of Oklahoma Contract by and between the State of Oklahoma by and through the Office of Management and Enterprise Services for the benefit of the Office of Educational Quality and Accountability (individually and collectively, the "State" or "you") and ClassWallet, dated August 6, 2020 (the "Contract") and under applicable law. However, to the extent that your Letter seeks to impose additional duties or responsibilities on ClassWallet or to somehow suggest culpability of ClassWallet in such matters, we must respectfully refuse such additional duties and responsibilities and reject such a suggestion.

As you are aware, the agreements between the State and ClassWallet pertaining to the performance by ClassWallet of services in support of the State's implementation and administration of the GEER funds programs (collectively, the "Program") are set forth by the Contract. We would respectfully reject the assertions in your Letter as to the intent of the parties or the purpose of the Contract to the extent those would purport to differ from the terms set forth in the Contract documentation, taken as a whole (nor should anything in this letter be understood to indicate any expansion of the agreement between the parties as documented by the Contract), as the Contract speaks for itself in that regard. The State is a sophisticated party, and the Contract contains explicit language in Section 26.14, which provides that the Contract serves as the sole valid and binding representation of the agreements between the State and ClassWallet relative to these matters.

Your Letter also purports to constitute notice that the State "will further seek to recover those funds for which no detailed use has been documented or provided by ClassWallet." The purpose of and basis for this notice, as articulated in your Letter, are not clear to us. To the extent that the State believes that it has a basis for recovery from any recipient or recipients of Program funds based upon the improper use of those funds by a recipient or recipients or fraud by a recipient or recipients in respect of the Program, such notice would more appropriately be addressed to the individuals that the State believes to be culpable for such impropriety, as any appropriate action by the State for recovery would presumably lie



against those individuals, in respect of their own actions for which they are found culpable based upon the applicable facts and law in each case, irrespective of data provided (or not provided, as the case may be) by ClassWallet. ClassWallet has performed under the Contract in all material respects; we note that your Letter does not indicate otherwise, nor has the State previously provided any indication to ClassWallet that it believed ClassWallet to be in breach of the Contract.

In terms of your informational requests, your Letter requests that ClassWallet “provide the detail for” \$1,622,344.87 in Program expenditures that represent the difference between the \$6,124,280.44 in Program spend reflected in ClassWallet’s “final report on the program” and \$4,501,935.57 reflected in “the spreadsheet of itemized expenditures”. For your convenience of reference, an appropriately encrypted and password-protected report containing itemized transactional activity over the life of the Program has been provided contemporaneously with this correspondence, by separate transmittal.

Your letter also requests that ClassWallet “provide additional information substantiating the educational use” of and “justifying the educational context for” certain “attached purchases.” While the nature of the reference to “attached purchases” is unclear (the Excel spreadsheet data provided with your Letter appears to contain various purchase-related data for all Program purchases through December 30, 2020), we would note that such a substantiation exercise is not within the scope of services to which the parties agreed in the Contract, and data gathering in respect of specific recipient purchase context and use is not within the scope of the functionality of the Systems established pursuant to the Contract. In other words, ClassWallet does not have this recipient-level use data as such data-gathering was never contemplated as a feature or function of the Systems established under the Contract.

ClassWallet was engaged solely to provide an Application System and a Fiscal Management and Payment System (the “Systems”) through the software-as-a-service arrangements with the State memorialized in the Contract. Attachment C to the Contract (the “Scope of Work”) sets forth a number of specific functional requirements of these Systems, including the ability to create notional virtual wallets for account holders, the ability of account holders to effect payment and check balances, and the ability for schools to register to receive funds. This Scope of Work is part of the negotiated Contract with the State, and reflects the specific functional requirements agreed upon by the parties in respect of the Systems in application. For example, the Scope of Work contains a number of technical specifications in respect of the hardware and operating systems and web browser specifications with which the Systems were to be compatible, specific availability of customer service and the channels through which it was to be available, specific application data capabilities and flows and other very detailed information. However, the Scope of Work does not (nor does the Contract more broadly) provide that ClassWallet is to collect data relative to the specific context for or uses of Program purchases by recipients, and the Systems were not configured to collect these data as part of the implementation and configuration process. To the extent that these data are or were required to be collected from recipients of Program funds, we would presume that the State has arranged, or will arrange, for alternative means of data collection, and is thus in the best position to consider directly the data provided by Program fund recipients to substantiate or justify the educational context of any Program purchases.

More broadly, to the extent that your Letter infers that ClassWallet has administrative responsibility for the Program or programmatic control or grant compliance responsibilities more generally, we would fundamentally disagree. Such a position conflates the delivery by ClassWallet of certain limited and specifically-defined software services and Systems pursuant to the Contract, which the State could use as tools to facilitate the establishment and effective administration of the Program, with the fundamental



authority and responsibility to appropriately use those tools in support of broader programmatic authority and responsibility – authority and responsibility that was reserved to the State as the pass-through entity in respect of the Program. This is ground that has previously been covered extensively with the Office of Management and Enterprise Services and the Office of Educational Quality and Accountability, but we will do so again here, for your convenience of reference.

Your Letter includes the statement that “Pursuant to 2 C.F.R. §200.332, the State of Oklahoma has reviewed the expenditures ClassWallet reported as subrecipients of the Governor’s Emergency Education Relief Fund’s Bridge the Gap Digital Wallet Program to determine eligibility.” To the extent that this statement is intended to mean that you are considering ClassWallet as a “subrecipient” under the Program for relevant federal law purposes, we believe this characterization is in error.

As you are likely aware, in order for an entity to be considered a subrecipient in respect of a federal program, that entity must be the recipient of a subaward for the purpose of carrying out a portion of a federal award, which subaward creates a federal assistance relationship with the subrecipient. Given the significance of such a relationship, the granting of a subaward must be a clear and affirmative action, made with specific purpose and within a specific framework. The mere flow of Program funds is not sufficient to create a subaward as, notably and significantly to this matter, the definition of “subaward” under 2 C.F.R. §200.1 specifically and explicitly excludes payments to a contractor or payments to an individual that is a beneficiary of a Federal program. Rather, subrecipients of a federal award have discretion and authority to exercise executive function in respect of the conduct of a federal program under which the subaward is made.

Among other characteristics which may define the subrecipient role are the authority of the subrecipient entity to determine who is eligible to receive what federal assistance, that the entity’s performance is measured in relation to whether objectives of a federal program are met, responsibility of the entity for programmatic decision-making, responsibility for adherence to applicable federal program requirements specified in the federal award, and the authority and discretion to use the federal funds to carry out a program for a public purpose specified in authorizing statute. These are not characteristics of ClassWallet’s role relative to the Program.

ClassWallet’s role and authority were limited to providing the Systems and services to the State as the relevant pass-through entity for the Program, as set forth in the Contract. While the Statement of Work contemplates that the Application System have certain capabilities, including providing the ability for users to “import and upload” certain applicant data, “provide verification review of income” and “compare reported income,” to generate certain communications, and to facilitate certain processing workstreams, it does not grant ClassWallet the authority to establish Program eligibility parameters or to make other executive decisions in respect of the application of Program funds, or for that matter any discretion in terms of the use of funds under the Program. Under Section 26.8(C) of the Contract, it is clearly stated that the State granted to ClassWallet through the Contract “only the ... rights specified in the Contract and all other rights and interests are expressly reserved.” Under the Contract, ClassWallet had neither responsibility for nor authority to exercise programmatic decision-making in respect of the Program or its associated federal funds – it was the State, not ClassWallet, which established the eligibility criteria relative to the Program and made decisions relative to the adjustment of those criteria over time

– nor did the Contract provide for responsibility for adherence to applicable federal program requirements as specified in the federal award.¹

The Contract does not contemplate the measurement of ClassWallet’s performance relative to the objectives of the federal program. In fact, the Contract does not specifically address the objectives of the underlying federal program in any respect. Rather, the Contract provides simply for the payment of a single implementation fee to ClassWallet in two tranches as the Systems achieve go-live milestones.

On the other hand, the centrality and significance of the State’s role in the administration and oversight of the Program is and was clear by virtue of the authority reserved to it by the Contract and the facts and circumstances more generally, including the representations made to the U.S. Department of Education by the State as part of the Certification and Agreement for Funding under the Education Stabilization Fund Program Governors Emergency Education Relief Fund (the “Agreement for Funding”), *inter alia*, that “the state will use a portion of the GEER funds for activities to address the unique needs of those identified in Section 18004(d)(4) of the CARES Act...”, and that “The state is looking at standing up a digital platform that will allow all students in the state access to robust educational material.... The state will continue to build it out with resources, best practices, and innovation so we can develop and expand”, and the certifications and assurances made in Part D to the Agreement for Funding, *inter alia*, that “The State will comply with all applicable assurances in OMB Standard Forms 424B and D (Assurances for Non-Construction and Construction Programs)” (emphases added). As to this last point, we would note particularly the certification and assurance made under paragraph 17 of Standard Form 424B, that the State “will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations,” which collectively establish uniform audit requirements for non-Federal entities that administer Federal awards. In short, the State applied for federal funding under the premise that it would, in principle, “[stand] up” and “continue to build ... out” a digital platform to facilitate educational access, and that it would comply with the recordkeeping and audit requirements applicable to it as a recipient of funds to further that State objective. This statement of programmatic vision and intent transcends the narrow purposes for which ClassWallet was contracted; while the Contract does indicate that ClassWallet will provide an Application System and Fiscal Management and Payment System for purposes of “assisting state schools and personnel,” this is only a small part of the broader vision for digital outreach described by the State in the Agreement for Funding, a vision that was not captured in the Contract nor otherwise shared by the State with ClassWallet.²

Had the State intended for ClassWallet to be a subrecipient in respect of the Program as that term is established under 2 C.F.R. §200.331, the State, as the pass-through entity in such a structure, would also have been obligated under 2 C.F.R. §200.332(a) to “[e]nsure that every subaward is clearly identified to the subrecipient as a subaward.” The State did not do so, whether in the Contract or otherwise. In addition, were ClassWallet to be designated as a subrecipient, the Contract would have had to specifically include “[a]ll requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal

¹ In fact, ClassWallet was never provided with a copy of the federal award by the State.

² As noted above, ClassWallet has never been provided with a copy of the Application for Funding by the State, but rather subsequently gained access to the document through a search of publicly available federal records.

award,” as well as appropriate terms and conditions concerning closeout of the subaward pursuant to 2 C.F.R. § 200.332(a)(6). The Contract does neither.

In addition, at the time of the subaward, the State would have been required under federal law to provide certain specific pieces of information to ClassWallet, among them it’s unique subrecipient entity identifier, the Federal Award Identification Number (FAIN), the Federal Award Date, the Subaward Period of Performance Start and End Date, the Subaward Budget Period Start and End Date, the name of the federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity, and the Assistance Listings Number at time of disbursement. These were not provided. The State would also have had to provide the Amount of Federal Funds Obligated by the pass-through entity to the subrecipient, the Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current financial obligation, the Total Amount of the Federal Award committed to the subrecipient by the pass-through entity, the Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA). Not only did the State not provide such information, Section 26.2 of the Contract specifically provides that “the State shall not guaranty any minimum or maximum amount of Supplier products or services required under the Contract.”

In short, if the State had desired for ClassWallet to be a subrecipient in respect of the Program funds, it would have been required to confer a fundamentally different and more expansive set of authority and duties, documented by a fundamentally different contract, which contained certain explicit disclosures making the nature of subrecipient status and the obligations attendant to such status clear. None of this happened. These failures, together with the fundamental failure of the State to identify to ClassWallet the funds loaded to the Fiscal Management and Payment System as a subaward, are sufficient on their face to indicate that no such subaward existed and that the parties had no intent for ClassWallet to be considered a subrecipient under the Program at the time of the Contract.

Instead, the scope of services to be provided under the Contract and the manner in which the Contract was entered into provide further clarification that it was the intent of both ClassWallet and the State that ClassWallet serve in a role as a “contractor” of the State relative to the Program, as that term is established under 2 C.F.R. §200.331.

The Contract consistently refers to ClassWallet as a “Supplier” of services and refers to the “procurement” of information technology services by the State from ClassWallet. The definitions in the Scope of Work make clear that ClassWallet is not an Account Holder or a Stakeholder, and ClassWallet does not have control or discretion with regard to any federal funds held or disbursed by the notional virtual wallet accounts. Instead, through the Contract, the State contracted to purchase ancillary services from ClassWallet so that the State could carry out the Program.

The form and substance of the Contract, and ClassWallet’s performance under the Contract, are completely aligned with the characteristics of a contractor relationship. Specifically, ClassWallet provides its services within normal business operations, provides similar goods or services to many different purchasers,³ normally operates in a competitive environment, provides goods or services that are ancillary to the operation of the federal program, and is not subject to compliance requirements of the federal program as a result of the agreement, though similar requirements may apply for other reasons.

³ The Contract specifically contemplates such non-exclusivity in Section 26.8(B).



We hope that this information is helpful to you. As mentioned above, ClassWallet has performed under the Contract to date and will continue to honor what obligations it may have under the Contract and applicable law. However, we will not entertain the notion that there is some amorphous, greater set of issues relative to the Program for which ClassWallet is responsible, or that the nature of ClassWallet's obligations relative to the Program were anything other than as narrowly and explicitly defined under the Contract.

Respectfully,

Skeeter Scott

Skeeter Scott, Esq
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ClassWallet

Cc: Jamie Rosenberg
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