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16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA

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

19 Plaintiff,

20 v.

21 UNIVERSITY OF PHOENIX,

22 Defendant.

CASE NO. CIV. S-03-0457 GEB DAD

**DEFENDANT UNIVERSITY OF PHOENIX'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION TO CERTIFY THE ORDER OF
AUGUST 17, 2007 FOR INTERLOCUTORY
APPEAL AND TO AMEND THE ORDER
ACCORDINGLY**

[Notice of Motion and Motion, Declaration of Jared
M. Toffer, and [Proposed] Order filed concurrently
herewith]

Judge: The Honorable Garland E. Burrell
Place: Courtroom 10
Date: October 22, 2007
Time: 9:00 a.m.

TABLE OF CONTENTS

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS	3
III. ARGUMENT	6
1. The Court’s Order Involves A Controlling Question of Law	7
2. Substantial Grounds For a Difference of Opinion Exist	8
a. The Language Of The Settlement Agreement Does Not Preclude ED’s Program Review From Constituting An Alternate Remedy	10
b. The “Government” Is Not Limited To The “Attorney General”	10
3. An Immediate Appeal May Materially Advance The Termination Of The Underlying Litigation	13
IV. CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Advanced Analogic Techs., Inv. v. Linear Tech. Corp.*,

5 2006 U.S. Dist. LEXIS 75084 (N.D. Cal., Oct. 4, 2006)..... 8, 14

6 *Axa Rosenberg Group v. Gulf Underwriters*,

7 No. C-04-0415 JCS, 2004 U.S. Dist. LEXIS 16851 (N.D. Cal. Aug. 16, 2004) 9

8 *In re Cement Antitrust Litig.*,

9 673 F.2d 1020 (9th Cir. 1982)..... 7, 13

10 *In re Cintas Corp. Overtime Pay Arb. Litig.*,

11 2007 U.S. Dist. LEXIS 35591 (N.D. Cal., May 2, 2007) 8, 14

12 *Jones v. Henry*,

13 2:05-cv-1067-GEB-GGH-P, 2007 U.S. Dist. LEXIS 14439 (E.D. Cal. Feb. 12,

14 2007) 13

15 *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In*

16 *Amministrazione Straordinaria*,

17 921 F.2d 21 (2nd Cir. 1990)..... 9

18 *Lemery v. Ford Motor Co.*,

19 244 F. Supp. 2d 720 (S.D. Tex. 2002) 7

20 *Lortiz v. CMT Blues*,

21 271 F. Supp. 2d 1252 (S.D. Cal. 2003)..... 13

22 *Marsall v. City of Portland*,

23 CV-01-1014-ST, 2004 U.S. Dist. LEXIS 15976 (D. Or. Aug. 9, 2004)..... 8, 9

24 *Ovando v. City of Los Angeles*,

25 92 F. Supp. 2d 1011 (C.D. Cal. 2000) 9

26 *United States ex rel. Barajas v. Northrop Corp.*,

27 258 F.3d 1004 (9th Cir. 2001)..... 4, 9, 10, 12

28 *United States ex rel. Bledsoe v. Community Health Sys., Inc.*,

342 F.3d 634 (6th Cir. 2003)..... 4, 9, 10, 12

United States ex rel. Huangyan Imp. & Exp. Corp v. Nature’s Farm Prods.,

370 F. Supp. 2d 993 (N.D. Cal. 2005) 9, 14

United States v. Woodbury,

263 F.2d 784 (9th Cir. 1959)..... 7

Statutes

28 U.S.C. § 1292(b) 7, 8, 13, 15

28 U.S.C. § 516..... 13

31 U.S.C. § 3729(a)(2)..... 11

31 U.S.C. § 3730(a) 11

31 U.S.C. § 3730(b)(1)..... 11

31 U.S.C. § 3730(c)(5)..... 4, 8, 11

**Table of Authorities
(Continued)**

Page(s)

Other Authorities

Fed. R. App. P. 5(a)(3)..... 6

S. Rep. No. 99-345 (1986),
as reprinted in 1986 U.S.C.C.A.N. 5266, 5292..... 11, 13

1
2
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4
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On August 17, 2007, this Court issued an Order (“Order”) denying Defendant University of
4 Phoenix’s Motion to Dismiss Relators’ Second Amended Complaint Pursuant to Rule 12(b)(1) of the
5 Federal Rules of Civil Procedure. University of Phoenix (“UOP”) respectfully requests that the
6 Court certify the Order for immediate interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C
7 § 1292(b) and amend the Order accordingly. Compelling reasons justify certification of the Court’s
8 Order for immediate appeal.

9 First, UOP’s motion to dismiss was premised on the ground that the Court lacks subject
10 matter jurisdiction to hear this case. Many courts have recognized that the issue of subject matter
11 jurisdiction is appropriate for interlocutory appeal because it is a threshold, dispositive issue. Here,
12 certification is particularly appropriate because, if the Court lacks subject matter jurisdiction, there is
13 a substantial risk that the parties and the Court will waste a significant amount of time and resources
14 litigating a case that the federal judiciary does not have jurisdiction to hear. Importantly, since the
15 Court denied UOP’s motion, Relators’ counsel have promised in the press that pretrial discovery in
16 this action will be extensive, and that litigation costs could exceed \$1 million. They have said that
17 they will seek reams of documents from UOP, and that as many as 90 witnesses may appear at trial
18 (and consequently have to be interviewed or deposed during discovery). They further claim that
19 damages, when this case is said and done, over two years from now, could reach \$2 billion. These
20 statements by Relators’ counsel demonstrate that it is critically important for the issue of subject
21 matter jurisdiction to be properly determined at the outset of the litigation. Otherwise, UOP may be
22 unnecessarily prejudiced by years of expensive and time-consuming litigation.

23 Second, as even Relators’ counsel have admitted, the legal issue bearing on whether the Court
24 has subject matter jurisdiction is a matter of first impression under the False Claims Act (“FCA”).
25 Thus, it makes sense to certify the Court’s Order for interlocutory appeal so the Ninth Circuit can
26 weigh in on this important issue before the parties and the Court are forced to exhaust a significant
27 amount of time and resources litigating a case that may be overturned after judgment.

1 Third, all of the requirements for the Court to certify its Order for immediate, interlocutory
2 review pursuant to 28 U.S.C § 1292(b) are satisfied:

- 3 1. The Court’s Order “involve[s] a controlling question of law” – namely, whether the
4 Government’s decision to pursue an administrative program review of UOP, rather than
5 intervene in this *qui tam* action, constituted the pursuit of an alternate remedy barring
6 Relators’ claims. Within this broader issue are more narrow controlling questions of law,
7 such as whether the terms of the Settlement Agreement bar the program review
8 proceedings from constituting an alternate remedy or whether the term “Government,” in
9 the FCA’s alternate remedy provision, is intended to mean the Attorney General.
- 10 2. “[T]here is a substantial ground for difference of opinion” as to these issues. Indeed,
11 during oral argument, Relators’ counsel admitted that UOP’s motion presented matters of
12 first impression. And, as indicated in UOP’s briefs and the Court’s questions during oral
13 argument, there is substantial authority supporting UOP’s position in the FCA, its
14 legislative history and the case law.
- 15 3. An immediate appeal from the Court’s Order denying UOP’s motion “may materially
16 advance the ultimate termination of the litigation.” If the Ninth Circuit determines that
17 the federal judiciary does not have subject matter jurisdiction then Relators’ claims will
18 be dismissed and the case will end. If, on the other hand, the Court’s Order is affirmed, it
19 will provide the parties and the Court repose, knowing that the Court’s Order on UOP’s
20 motion will not be reversed after final judgment, rendering meaningless the countless
21 hours of discovery, motion practice, and potential trial time that will occur between now
22 and then.

23 In short, with the amount of money potentially at stake in this litigation and the expense and
24 time that both parties (and the Court) will incur as this case proceeds, the interests of justice and
25 judicial economy militate in favor of the Court certifying its Order for immediate, interlocutory
26 appeal.

1 **II. STATEMENT OF FACTS**

2 The Court is well-acquainted with the facts in this case. Consequently, UOP provides below
3 only a short summary of the facts necessary to the Court’s determination of this motion.

4 Relators Mary Hendow and Julie Albertson (“Relators”) filed this *qui tam* FCA action on the
5 Government’s behalf against UOP in March 2003. Def.’s Req. for Jud. Not. in Support of Mot. to
6 Dismiss (filed Mar. 22, 2007) (“RJN”) Ex. A (Compl.). Two months later, the United States
7 Department of Justice (“DOJ”) declined to intervene to pursue the Government’s interests in this
8 action, consistent with a recommendation it had received from the United States Department of
9 Education (“ED”). RJN Ex. D (Not. of Election to Decline Intervention); Def.’s Not. of Supp.
10 Evidence in Support of Mot. to Dismiss (filed Aug. 9, 2007) (“Not. of Supp. Evidence”) Ex. G at 4,
11 7-8, 13 (Gov’t Opp. to Supp. Brief).

12 Then, specifically in light of DOJ’s decision not to intervene to pursue the Government’s
13 interests in this action, ED initiated an administrative program review of UOP based upon Relators’
14 allegations. RJN Ex. F (Declaration of Jennifer Woodward (Sept. 21, 2006)) (“Woodward Decl. I”)
15 ¶ 3; RJN Ex. G (Declaration of Jennifer Woodward (Jan. 19, 2007)) (“Woodward Decl. II”) ¶ 8; Not.
16 of Supp. Evidence Ex. A (Declaration of Jennifer Woodward (June 12, 2007)) (“Woodward Decl.
17 III”) ¶¶ 8-11; Not. of Supp. Evidence Ex. C (Declaration of Kent D. Talbert (June 15, 2007))
18 (“Talbert Decl. I”) ¶¶ 7-9; Not. of Supp. Evidence Ex. D (Gov’t Brief) at 15; Not. of Supp. Evidence
19 Ex. E (Declaration of Jennifer Woodward (July 24, 2007)) (“Woodward Decl. IV”) ¶¶ 6-10; Not. of
20 Supp. Evidence Ex. F (Declaration of Kent D. Talbert (July 24, 2007)) (“Talbert Decl. II”) ¶ 5; Not.
21 of Supp. Evidence Ex G (Gov’t Opp. to Supp. Brief) at 4-8, 10, 13.

22 Multiple members of ED have stated that this program review was “unique” or “unusual”
23 because it was initiated by Relators’ *qui tam* complaint, and that the purpose of the review was to
24 investigate the allegations asserted in Relators’ *qui tam* complaint in order to set an appropriate civil
25 money penalty. Woodward Decl. I ¶ 2; Woodward Decl. II ¶¶ 8-9; Woodward Decl. III ¶¶ 8, 11;
26 Wittman Decl. ¶¶ 8; Talbert Decl. I ¶ 8; Woodward Decl. IV ¶¶ 6, 10; Talbert Decl. II ¶ 5.

27 This program review resulted in ED staff further investigating Relators’ claims and
28 coordinating with Relators and their counsel. Woodward Decl. I ¶¶ 2-3; Woodward Decl. II ¶ 8;

1 Woodward Decl. III ¶¶ 9-11; Wittman Decl. ¶ 8; Talbert Decl. I ¶ 8; Woodward Decl. IV ¶¶ 6-7, 10;
2 Talbert Decl. II ¶ 7; Declaration of James L. Zelenay, Jr. (filed June 18, 2007) Exs. B-N. In February
3 2004, ED staff issued a program review report accusing UOP of engaging in the same conduct
4 alleged by Relators in this action. RJN Ex. H (ED, Program Review Report); *see also* Memo. of
5 Points & Authorities in Support of Mtn. to Dismiss (filed Mar. 22, 2007) at 6-7 (comparing Program
6 Review Report to Relators' Complaint). And, ultimately, in September 2004, UOP and ED agreed to
7 settle the program review, whereby UOP agreed to pay the Government \$9.8 million. RJN Ex. I
8 ("Settlement Agreement"). Around this same time, Relators' counsel sent UOP's counsel a letter
9 stating that "[Relators] shall be claiming their relators' share of any funds paid to the United States as
10 a result of the United States' pursuit of any alternative remedies. Regardless of the remedy via which
11 the Government requires UOP to pay up, we expect the relators' share to be substantial." Declaration
12 of James L. Zelenay, Jr. (filed June 18, 2007) Ex. A (8/2/04 Bartley Letter).

13 On March 22, 2007, UOP filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules
14 of Civil Procedure, arguing that the Government had pursued an alternate remedy under the FCA
15 through the ED proceedings and that Relators' *qui tam* claims against UOP were now moot. Def.'s
16 Mot. to Dismiss (filed Mar. 22, 2007). UOP relied upon 31 U.S.C. § 3730(c)(5), which provides:

17 Notwithstanding subsection (b) [outlining the options available to the Government
18 when a *qui tam* action is filed on its behalf], the Government may elect to pursue its
19 claim through any alternate remedy available to the Government, including any
20 administrative proceeding to determine a civil money penalty. If any such alternate
21 remedy is pursued in another proceeding, the person initiating the action shall have the
22 same rights in such proceeding as such person would have had if the action had
continued under this section. Any finding of fact or conclusion of law made in such
other proceeding that has become final shall be conclusive on all parties to an action
under this section.

23 31 U.S.C. § 3730(c)(5). UOP also relied upon the Ninth Circuit's decision in *United States ex rel.*
24 *Barajas v. Northrop Corp.*, 258 F.3d 1004 (9th Cir. 2001), and the Sixth Circuit's decision in *United*
25 *States ex rel. Bledsoe v. Community Health Sys., Inc.*, 342 F.3d 634 (6th Cir. 2003), both of which
26 demonstrated not only that ED's program review constituted the Government's pursuit of an
27 "alternate remedy," but also that the Government's election of that option (rather than intervene in
28

1 this case) barred Relators' claims. *See* Memo. of Points & Authorities in Support of Mtn. to Dismiss
2 (filed Mar. 22, 2007).

3 In opposition to UOP's motion, Relators asserted a number of arguments, two of which
4 appeared in the Court's Order. First, despite the authority from the Ninth and Sixth Circuits
5 supporting UOP's argument, Relators argued that ED's program review could not have constituted an
6 alternate remedy because the resulting settlement agreement contained a clause stating that ED "did
7 not have the authority to, and [the] Agreement [did] not, waive, compromise, restrict or settle any
8 action initiated against UOP . . . under [the FCA]." Settlement Agreement ¶ I.E; *see, e.g.*, Relators'
9 Opp. (filed June 6, 2007) at 2. Second, and despite the absence of authority supporting their position,
10 Relators argued that the program review proceedings could not have constituted an alternate remedy
11 because they were pursued by ED, rather than the Attorney General, who has the authority to settle
12 FCA claims, and the Attorney General was purportedly not involved in the Settlement Agreement.
13 *See* Relators' Opp. at 13-14.

14 On June 25, 2007, this Court held oral argument on UOP's motion. During argument, the
15 Court asked questions suggesting that Relators' arguments were not supported by clear legal
16 authority. First, the Court recognized a legitimate issue presented by Relators' argument based on
17 the language of the Settlement Agreement:

18 **Mr. Rubin** [Counsel for Relators]: I think it would be most helpful if I start [by] . . .
19 focusing on the language of the settlement agreement itself because there the parties to
20 the Department of Education program review made clear in negotiated language
21 between sophisticated parties that the program review settlement was resolving only
22 the program review and was not and could not settle any *qui tam* claims. . . .

22 **The Court:** *Similar language was used in the Bledsoe case. So how do you
23 distinguish this case from that case?*

23 Declaration of Jared M. Toffer ("Toffer Decl."), filed concurrently herewith, Ex. A (Reporter's
24 Transcript) (hereinafter "RT") at 11-12 (emphasis added).

25 Second, the Court raised questions concerning Relators' second argument that only the
26 Attorney General, rather than "the Government" (as outlined in the FCA), could pursue an alternate
27 remedy barring a relator's underlying *qui tam* claims from continuing:
28

1 **Mr. Rubin:** . . . [T]he election [of an alternate remedy] . . . occurs when the
2 government, including the Attorney General, decides how to resolve the case. . . .

3 **The Court:** I'm sorry. You said it occurs when the government, including the
4 Attorney General?

5 **Mr. Rubin:** That's right.

6 **The Court:** *Who's the "government?" What constitutes the "government" in your*
7 *argument?*

8 **The Court:** What I understand you to have argued is that the authority for your
9 argument is the Ninth Circuit *Barajas* case and *Bledsoe*. And if I read those cases, I
10 will see that the Attorney General was *not* involved, and that is *your* authority. But is
11 there authority on the books that supports your position other than those cases?

12 **Mr. Rubin:** We cited the *Peggy A. Bisig* case. We cited the *Dunleavy* case out of the
13 Third Circuit

14 **The Court:** Wait a minute. Is it a question about alternate remedy, or is it a question
15 about whether it should be considered an alternate remedy because the Attorney
16 General did not participate? And so the authority that you just cited . . . does it
17 involve the factual situation that you are presenting.

18 **Mr. Rubin:** There is no case that we are aware of, no case either party has cited, that
19 involves the precise issue before you. This is a case of first impression [N]either
20 side has authority directly on point.

21 RT at 18, 22-24 (emphasis added).

22 On August 17, 2007, the Court issued its Order denying UOP's motion to dismiss. Order at
23 3-4. Therein, the Court cited Relators' two above-mentioned arguments, *id.* at 3; and ultimately
24 found that: "Since the Settlement Agreement did not constitute an 'election' of an 'alternate remedy'
25 by the 'Government' within the meaning of the FCA, the Relators' action is not moot." Order at 3-4
26 (internal quotation marks in original).

27 **III. ARGUMENT**

28 Either *sua sponte* or on motion, a federal district court may amend a prior order to certify it
for immediate, interlocutory appeal where the relevant requirements are met. Fed. R. App. P. 5(a)(3)
("the district court may amend its order, either on its own or in response to a party's motion, to

1 include the required permission or statement” allowing a party to “petition for appeal”). The relevant
2 requirements for certification are found in 28 U.S.C. § 1292(b), which provides:

3 When a district judge, in making in a civil action an order not otherwise appealable
4 under this section, shall be of the opinion that such order involves a controlling
5 question of law as to which there is substantial ground for difference of opinion and
6 that an immediate appeal from the order may materially advance the ultimate
7 termination of the litigation, he shall so state in writing

8 28 U.S.C. § 1292(b). This provision has been recognized as imposing three separate requirements,
9 all of which are clearly met here. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).
10 First, the order must have “involve[d] a controlling question of law.” 28 U.S.C. § 1292(b). Second,
11 there must be “substantial ground for difference of opinion” as to that question. *Id.* Third, “an
12 immediate appeal from the order” must have the possibility of “materially advanc[ing] the ultimate
13 termination of the litigation.” *Id.* The Ninth Circuit has explained that an interlocutory appeal is “to
14 be used only in exceptional situations in which allowing an interlocutory appeal would avoid
15 protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026. That precise
16 situation exists here because the issue of subject matter jurisdiction can be dispositive and an
17 immediate appeal may render unnecessary years of lengthy and expensive litigation. *See. e.g.*,
18 *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 728 (S.D. Tex. 2002) (certifying order, stating: “It
19 would pain the Court to see both attorneys of this excellence and well motivated Parties proceed to
20 judgment after considerable expense and delay, only to discover that the judgment must be
21 overturned on appeal because the federal judiciary lacks subject matter jurisdiction.”).

22 **1. The Court’s Order Involves A Controlling Question of Law**

23 As UOP’s motion to dismiss challenged the Court’s subject matter jurisdiction, there is no
24 question that the court’s order “involves a controlling question of law.” 28 U.S.C. § 1292(b). “[A]ll
25 that must be shown in order for a question to be ‘controlling’ is that resolution of the issue on appeal
26 could materially affect the outcome of litigation in district court.” *Cement Antitrust Litig.*, 673 F.2d
27 at 1026. The issue need not be “dispositive of the lawsuit in order to be regarded as controlling,” but
28 it cannot be collateral to the basic issues of the case. *United States v. Woodbury*, 263 F.2d 784, 787
(9th Cir. 1959).

1 The controlling question at issue in UOP’s motion to dismiss and this Court’s Order is
2 whether the ED program review proceedings constituted an alternate remedy under the FCA barring
3 Relators’ *qui tam* claims against UOP by depriving this Court of subject matter jurisdiction. *See In*
4 *re Cintas Corp. Overtime Pay Arb. Litig.*, 2007 U.S. Dist. LEXIS 35591, at *3 (N.D. Cal., May 2,
5 2007) “the question whether the Court correctly found that it has subject matter jurisdiction in this
6 case is a controlling question of law”); *Advanced Analogic Techs., Inv. v. Linear Tech. Corp.*, 2006
7 U.S. Dist. LEXIS 75084, at *5 (N.D. Cal., Oct. 4, 2006) (“question of subject matter jurisdiction is
8 ‘controlling’”). If Relators’ *qui tam* claims are barred, all that would remain for this Court to
9 determine would be the amount of Relators’ entitlement to the \$9.8 million that UOP already paid the
10 Government. *See* 31 U.S.C. § 3730(c)(5). If the claims are not barred, Relators could proceed with
11 their action against UOP, which will include – according to Relators’ attorneys – litigation costs of
12 \$1 million or more and may result in as much as \$2 billion in damages. *See infra* Part IV.A.3.

13 There are additional controlling issues of law relevant to the Court’s Order – namely, (1)
14 whether the terms of the Settlement Agreement are relevant to determining if the program review
15 proceedings constituted an alternate remedy, and (2) whether the “Government,” as included in the
16 alternate remedy provision, is limited to the Attorney General or includes any administrative agency.
17 The answers to these questions have a direct bearing on whether the Court ultimately has subject
18 matter jurisdiction in this case and further justify certification of the Court’s Order.

19 2. Substantial Grounds For a Difference of Opinion Exist

20 The second requirement for certification under section 1292(b) is that a “substantial ground
21 for difference of opinion” exists as to the issue of law presented in the court’s order. 28 U.S.C.
22 § 1292(b). An issue “can be a controlling question of law for which there is a substantial ground for
23 difference of opinion when it is ‘difficult and of first impression.’” *Marsall v. City of Portland*, CV-
24 01-1014-ST, 2004 U.S. Dist. LEXIS 15976, at *20 (D. Or. Aug. 9, 2004) (quoting *Klinghoffer v.*
25 *S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*,

1 921 F.2d 21, 25 (2nd Cir. 1990)).¹ In determining whether a substantial ground for difference of
2 opinion truly exists, “a district court must analyze the strength of the arguments in opposition to the
3 challenged ruling.” *Marsall*, 2004 U.S. Dist. LEXIS 15976, at *20 (internal quotation marks
4 omitted).

5 Again, the Court’s Order meets this requirement. As Relators’ counsel admitted during oral
6 argument, a *qui tam* defendant’s motion to dismiss an action on alternate remedy grounds is a matter
7 of first impression:

8 **Mr. Rubin:** There is no case that we are aware of, no case either party has cited, that
9 involves the precise issue before you. This is a case of first impression [N]either
side has authority directly on point.

10 RT at 23-24.²

11 Moreover, as previously demonstrated in UOP’s original motion and as evidenced by the
12 Court’s questions during the hearing, substantial grounds for a difference of opinion exist. *See*
13 Memo. of Points & Authorities in Support of Mtn. to Dismiss (filed Mar. 22, 2007); Def.’s Reply in
14 Support of Mtn. to Dismiss (filed June 18, 2007). Both the Sixth Circuit’s decision in *Bledsoe* and
15 the Ninth Circuit’s decision in *Barajas* support UOP’s position, as the Court appreciated during oral
16 argument. *See infra* Part IV.A.2.a; *see also* RT at 11-12, 18:22-24. Additionally, the plain language
17 of the FCA, its legislative history, and constitutional principles all lean towards a finding that the ED
18 program review constituted on alternate remedy barring Relators’ case from proceeding. *See* Memo.
19
20

21
22 ¹ *See also United States ex rel. Huangyan Imp. & Exp. Corp. v. Nature’s Farm Prods.*, 370 F.
23 Supp. 2d 993, 1005 (N.D. Cal. 2005) (certifying FCA case for appeal in part because it involved
24 “questions of law on which there is no on-point precedent from the Ninth Circuit”); *Axa*
25 *Rosenberg Group v. Gulf Underwriters*, No. C-04-0415 JCS, 2004 U.S. Dist. LEXIS 16851, at
*32 (N.D. Cal. Aug. 16, 2004) (certifying issues for appeal because “[n]one of the cases relied on
by the parties are factually directly on point”); *Ovando v. City of Los Angeles*, 92 F. Supp. 2d
1011, 1025 (C.D. Cal. 2000) (certifying order in part because it “presents certain issues that
appear to be of first impression”).

26 ² To be clear, UOP *only* concurs that the matter of first impression here is its assertion, as a *qui tam*
27 defendant, that Relators’ claims against UOP are barred on alternate remedy grounds. Whether
28 ED’s administrative action and subsequent settlement constituted an alternate remedy is *not* a
matter of first impression, as the decisions in *Bledsoe* and *Barajas* make clear.

1 of Points & Authorities in Support of Mtn. to Dismiss (filed Mar. 22, 2007); Def.’s Reply in Support
2 of Mtn. to Dismiss (filed June 18, 2007).

3 Finally, Relators’ two arguments relied upon by the Court in its Order– i.e., that the terms of
4 the Settlement Agreement control and that the “Government” means the Attorney General in the FCA
5 – are both subject to substantial dispute.

6 **a. The Language Of The Settlement Agreement Does Not Preclude ED’s**
7 **Program Review From Constituting An Alternate Remedy**

8 First, as the Court appreciated during oral argument, the Sixth Circuit in *Bledsoe* found that
9 the terms of a settlement agreement resulting from an administrative process do not control whether
10 that process and the resulting settlement constituted an alternate remedy under the FCA – even
11 where, as here, the settlement agreement “specifically exclude[s]” the relator’s FCA claims from the
12 released claims. *Bledsoe*, 342 F.3d at 639; *see also* RT at 18, 22-24. According to the Sixth Circuit,
13 regardless of the language in the settlement agreement, “[i]f the government has recovered funds lost
14 from conduct asserted in Relator’s *qui tam* action, then the government has essentially settled
15 Relator’s claims” and has pursued an alternate remedy. *Id.* at 649.

16 Similarly in *Barajas*, the Ninth Circuit found that an Air Force suspension and debarment
17 proceeding constituted an alternate remedy, notwithstanding the fact that the resulting settlement
18 agreement did not release the defendant from FCA liability. *Barajas*, 258 F.3d at 1006, 1009-13.
19 The Ninth Circuit squarely rejected DOJ’s argument that the settlement did not constitute an alternate
20 remedy because the Air Force, like ED, did not “have any authority to prosecute or settle FCA
21 claims,” and the settlement’s release failed to include such. Def.’s Supp. Req. for Jud. Not. (filed
22 June 18, 2007) Ex. A (Answering Brief of Appellee United States in *Barajas*) at 22, *25-29.

23 **b. The “Government” Is Not Limited To The “Attorney General”**

24 Second, there is no support for Relators’ position that an alternate remedy under the FCA can
25 only be pursued by the Attorney General (as opposed to another federal agency), or that the Attorney
26 General must somehow be involved with the administrative proceedings for them to constitute an
27 alternate remedy. First, the plain language of the statute is clear: “the *Government* may elect to
28 pursue its claim through any alternate remedy available to the *Government*, including any

1 *administrative proceeding* to determine a civil money penalty.” 31 U.S.C. § 3730(c)(5). When the
2 FCA intends to refer solely to the Attorney General, as opposed to the broader “Government,” it does
3 so:

4 A person may bring a civil action for a violation of section 3729 for the person and for
5 the United States *Government*. The action shall be brought in the name of the
6 *Government*. The action may be dismissed only if the court and the *Attorney General*
7 give written consent to the dismissal and their reasons for consenting.

8 31 U.S.C. § 3730(b)(1) (emphasis added). *See also* 31 U.S.C. § 3730(a) (“The *Attorney General*
9 diligently shall investigate a violation under section 3729. If the *Attorney General* finds that a person
10 has violated or is violating section 3729, the *Attorney General* may bring a civil action under this
11 section against the person”) (emphasis added).

12 Second, it cannot be said that the term “Government” in the FCA is generally intended to
13 refer to the Attorney General. After all, the FCA provides liability for any person who “knowingly
14 makes . . . a false record or statement to get a false or fraudulent claim paid or approved *by the*
15 *Government*.” 31 U.S.C. § 3729(a)(2). If Relators’ argument (and this Court’s apparent holding)
16 were correct, it would mean that someone is liable under the FCA only when they attempt to defraud
17 the Attorney General, rather than any other agency of the Government, such as the Department of
18 Defense. Obviously, this is not the case.

19 The legislative history of the alternate remedy provision provides further support
20 demonstrating that Relators’ argument is incorrect. It provides:

21 [The alternate remedy provision] clarifies that the Government . . . may elect to pursue
22 any alternate remedy for recovery of the false claim which might be available under
23 *the administrative process*. *The Department of Health and Human Services* is
24 currently authorized to use administrative proceedings for the recovery of some false
25 claims. Earlier in this Congress, the Senate Government Affairs Committee favorably
26 reported S. 1134, the Program Fraud Civil Penalties Act, which would extend this type
27 of administrative mechanism for addressing false claims to *all Executive agencies*.
28 The committee intends that if civil monetary penalty proceedings are available, the
Government may elect to pursue the claim either judicially or through an
administrative civil penalty proceeding.

S. Rep. No. 99-345, at 27 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5292. There is nothing to
suggest that the term “Government” is limited to the Attorney General, or that an administrative
proceeding cannot be considered an alternate remedy unless the Attorney General was involved.

1 Quite the contrary, this legislative history contemplates that administrative agencies, without any
2 support from the Attorney General, may pursue an alternate remedy barring a relator’s underlying *qui*
3 *tam* claims from proceeding.

4 The case law is in accord. In both *Barajas* and *Bledsoe*, the Court found that proceedings
5 undertaken by an administrative agency, like ED, could constitute an alternate remedy. In *Bledsoe*,
6 for instance, the court found that a settlement between the *qui tam* defendant and the Department of
7 Health and Human Services, among others, could constitute an alternate remedy. *Bledsoe*, 342 F.3d
8 at 638-39, 649-50. The DOJ may have negotiated the agreement, but it was merely acting “on behalf
9 of” the federal agency. *Id.* at 639 n.5.

10 Even more persuasive is *Barajas*. There, the DOJ advanced *the exact same argument* that
11 Relators advance here in claiming that an agreement between the Air Force and a *qui tam* defendant
12 could not have constituted an alternate remedy:

13 As a matter of law, an Air Force decision on suspension and debarment of a contractor
14 cannot be an alternate remedy because only the Department of Justice (“DOJ”) has
15 authority to release and settle the types of claims that may be pursued as an alternate
16 remedy under Section 3730(c)(5). . . . In this case, the Air Force negotiated and
17 executed the Air Force Agreement The Air Force was the sole government
18 signatory to the Agreement. The Department of Justice was not a party to the Air
19 Force Agreement.

20 Def.’s Supp. Req. for Jud. Not. (filed June 18, 2007) Ex. A (Answering Brief of Appellee United
21 States in *Barajas*) at 26-28 (citations omitted). The DOJ then attempted to refute *Barajas*’ argument
22 that, “[t]he language of subsection (c)(5) . . . refers generally to ‘the Government,’ not to the
23 ‘Attorney General,’ as the FCA explicitly does elsewhere. . . .” *Id.* The Ninth Circuit, however,
24 *squarely rejected* the DOJ’s argument, and found that the “Government” in the alternate remedy
25 provision was *not* limited to the Attorney General. *Barajas*, 258 F.3d at 1006, 1009-13. Rather, the
26 “Government” means the Government, of which the Air Force, ED, and other federal agencies are
27 indisputably a part.

28 Additionally, to require that DOJ be involved in and control the disposition of an alternate
administrative remedy would clearly contravene Congressional intent that FCA claims could be
resolved through administrative action. Because DOJ’s settlement authority does not include
“administrative” proceedings of “Executive Agencies,” and indeed is limited by statute, *see* 28

1 U.S.C. § 516, Congress could not have intended such a requirement when it laid out the alternate
2 remedy provision. *See* S. Rep. No. 99-345, at 27 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266,
3 5292. Thus, it is clear that the underlying legal issues presented by UOP’s original motion, and the
4 arguments advanced by Relators, are all subject to a substantial difference of opinion.

5 **3. An Immediate Appeal May Materially Advance The Termination Of The**
6 **Underlying Litigation**

7 The third requirement for certification under section 1292(b) is that “an immediate appeal
8 from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C.
9 § 1292(b). As this Court has previously recognized, “[t]he Ninth Circuit has admonished that
10 interlocutory appeal under § 1292(b) is ‘to be used only in exceptional situations in which allowing
11 an interlocutory appeal would avoid protracted and expensive litigation.’” *Jones v. Henry*, 2:05-cv-
12 1067-GEB-GGH-P, 2007 U.S. Dist. LEXIS 14439, at *11-12 (E.D. Cal. Feb. 12, 2007) (Burrell, Jr.,
13 J.) (quoting *In re Cement Antitrust Litig.*, 673 F.2d at 1026). In other words, section 1292(b) “was
14 aimed at the ‘big’ and expensive case where an unusual amount of time and money may be expended
15 in the pre-trial phases of the case or where the trial itself is likely to be long and costly.” *Lortiz v.*
16 *CMT Blues*, 271 F. Supp. 2d 1252, 1254 (S.D. Cal. 2003) (internal quotation marks omitted).

17 This is just such a case. Trial in this matter is scheduled for September 15, 2009, more than
18 two years from now. *See* Aug. 6, 2007 Status (Pretrial Scheduling) Order at 5. Discovery is not
19 scheduled to end until February 2009. *Id.* at 2. Relators’ counsel have already promised in the press
20 that pretrial discovery will be extensive, that litigation costs could exceed \$1 million, that they will
21 seek reams of documents from UOP, and that there may be more than 90 witnesses at trial (all of
22 which will have to be interviewed and/or deposed during discovery). Toffer Decl. Ex. B (*Inside*
23 *Higher Education* article stating that Relators’ counsel “said [they] expected to perform extensive
24 discovery”); Ex. C (*Recorder* article stating that Relators’ counsel “predict[] that litigation expenses,
25 including a full-fledged discovery battle . . . , could cost \$1 million or more”); Ex. D (*L.A. Times*
26 article providing: “[Relators’ counsel] said that [ED] had interviewed more than 90 people . . . and
27 all of them were potential witnesses in a trial. . . . In addition, . . . [Relators’ counsel] said[] the
28 plaintiffs would seek reams of documents.”).

1 In addition, Relators’ counsel purport to seek over \$2 billion in damages. *See id.* Ex. E (*San*
2 *Jose Mercury News* article stating that “[t]here’s a lot at stake” and according to Relators’ attorneys,
3 “[t]he prospect of having to turn over as much as \$2 billion to the government . . . could threaten the
4 university’s survival”); Ex. F (*Chronicle of Higher Education* article stating Relators “allege that
5 [UOP] obtained billions of dollars . . . while violating federal policies”); *see also* Ex. C (*Recorder*
6 article stating that Relators’ counsel “estimated that eventual damages could exceed \$1 billion”). As
7 a result, the stakes in this litigation are extraordinarily high for both parties, which overwhelmingly
8 weighs in favor of certifying the Court’s Order to address the very serious question of the Court’s
9 subject matter jurisdiction. *See United States ex rel. Huangyan Imp. & Exp. Corp v. Nature’s Farm*
10 *Prods.*, 370 F. Supp. 2d 993, 1005 (N.D. Cal. 2005) (certifying FCA case in part because of “the
11 stakes are large – after trebling and civil penalties, there are tens of millions of dollars in
12 controversy” and because there may be unnecessary “onerous discovery”).

13 The disruptive, expensive, and protracted proceedings outlined by Relators’ counsel may all
14 be unnecessary, as an immediate appeal of this Court’s Order may end this litigation. Courts have
15 found that the issue of subject matter jurisdiction is particularly appropriate for interlocutory appeal
16 because it can result in a quick resolution to the litigation. *See In re Cintas Corp. Overtime Arb.*
17 *Litig.*, 2007 U.S. Dist. LEXIS 35591, at *3 (granting certification on issue of subject matter
18 jurisdiction because “reversal of the district court’s order ‘could’ . . . terminate the litigation.”);
19 *Advanced Analogic Techs., Inc.*, 2006 U.S. Dist. LEXIS 75084, at *8 (stating issue of subject matter
20 jurisdiction “may materially advance the ultimate termination of the instant action” and “the Court
21 would greatly benefit from obtaining the Federal Circuit’s decision on [the] issue before embarking
22 on potentially lengthy and costly litigation of the patent issues.”). After all, if the Ninth Circuit
23 disagrees with this Court’s Order and finds that the federal judiciary lacks subject matter jurisdiction,
24 Relators’ claims against UOP will be dismissed. On the other hand, if the Ninth Circuit affirms the
25 Court’s Order, it will provide the parties and the Court repose, knowing that the Court’s Order on
26 UOP’s motion will not be reversed after final judgment, rendering meaningless the countless hours of
27 discovery, motion practice, and potential trial time that may result from a failure to certify an
28 interlocutory appeal of the issue.

1 **IV. CONCLUSION**

2 All of the requirements for certification under 28 U.S.C. § 1292(b) are satisfied. Because the
3 Court's Order involves a threshold and dispositive issue of subject matter jurisdiction, judicial
4 economy and the interests of all parties will be best served if the Court certifies its Order for
5 immediate, interlocutory appeal. Otherwise, both the parties and the Court may squander the next
6 two years in meaningless discovery battles, summary judgment briefing, and – potentially – a lengthy
7 trial that could include as many as 90 witnesses. For the foregoing reasons, UOP respectfully
8 requests that the Court amend its Order to include a certification allowing immediate, interlocutory
9 appeal pursuant to 28 U.S.C. § 1292(b).

10
11 DATED: September 11, 2007

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