

1 TIMOTHY J. HATCH, SBN 165369
thatch@gibsondunn.com
2 JAMES L. ZELENAY, JR., SBN 237339
jzelenay@gibsondunn.com
3 GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
4 Los Angeles, California 90071-3197
Telephone: (213) 229-7000
5 Facsimile: (213) 229-7520

6 JARED M. TOFFER, SBN 223139
jtoffer@gibsondunn.com
7 GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Dr.
8 Irvine, California 92612-4412
Telephone: (949) 451-3800
9 Facsimile: (949) 451-4220

10 CHRISTY JOSEPH, SBN 136785
cjoseph@swlaw.com
11 SNELL & WILMER LLP
600 Anton Boulevard, Suite 1400
12 Costa Mesa, California 92626-7689
Telephone: (714) 427-7000
13 Facsimile: (714) 427-7799

CHARLES J. STEVENS, SBN 106981
cjs@stevensandococonnell.com
BRADLEY A. BENBROOK, SBN 177786
bab@stevensandococonnell.com
STEVENS & O'CONNELL LLP
400 Capital Mall, Suite 1400
Sacramento, CA 95814-4412
Telephone: (916) 329-9111
Facsimile: (916) 329-9110

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15 Attorneys for Defendant,
UNIVERSITY OF PHOENIX

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
REPLY IN SUPPORT OF ITS MOTION TO
CERTIFY THE ORDER OF AUGUST 17, 2007
FOR INTERLOCUTORY APPEAL AND TO
AMEND THE ORDER ACCORDINGLY**

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

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I. INTRODUCTION

The Court should certify the August 17, 2007 Order (“Order”) denying Defendant University of Phoenix’s motion to dismiss for immediate, interlocutory review. Nothing that Relators assert in their opposition demonstrates otherwise.¹

Relators do not dispute that the Order deals with the fundamental threshold issue of whether the Court has subject matter jurisdiction to hear Relators’ claims against University of Phoenix (“UOP”). Rather, Relators appear to claim that the Court should not grant interlocutory review of the Order because this is not an “exceptional” case justifying review and because the requirements of 28 U.S.C. § 1292(b) have not been satisfied. Relators are wrong on both counts.

First, this clearly is an exceptional situation, in which allowing an interlocutory appeal may avoid protracted and expensive litigation. After all, should the Court not certify the Order for immediate review, there is a substantial risk that the parties and the Court will spend the next two years litigating a case that the federal judiciary does not have jurisdiction to hear.

Moreover, the resources that the parties and the Court will spend during these two potentially wasted years will be extraordinary. Relators, for instance, have already stated in the press that they are seeking “billions” of dollars in this action and that litigation costs alone could reach into the millions. They have stated that they will seek reams of documents from UOP and that the trial may have more than 90 witnesses, all of whom will have to be deposed and/or interviewed. There likely will be intense discovery disputes, voluminous motion practice, and massive cross-motions for summary judgment. There even may be a trial lasting weeks, if not months.

To ensure that a case of this magnitude does not unnecessarily continue down an extremely expensive and time-consuming path, the Court should certify its Order for immediate appeal. As one court has stated, the “exceptional” case under section 1292(b) appropriate for interlocutory appeal is the “‘big’ and expensive case where an unusual amount of time and money may be expended in the

¹ Nor does Leeland White, who filed (or sought leave to file) objections to the instant motion on September 17, 2007 and October 3, 2007, have any standing or right to file such. At any rate, Mr. White’s arguments are without merit. There is, for example, no “10 day cap” on motions to amend an order pursuant to 28 U.S.C. § 1292(b), and the instant motion is not filed for any improper purpose.

1 pre-trial phases . . . or where the trial itself is likely to be long and costly.” *Lortiz v. CMT Blues*, 271
2 F. Supp. 2d 1252, 1254 (S.D. Cal. 2003) (internal quotation marks omitted). There is no question
3 that this is such a case.

4 Second, the requirements for interlocutory appeal under section 1292(b) are easily satisfied.
5 As a preliminary matter, the Order “involve[d] a controlling question of law” – namely, whether the
6 Government’s decision to pursue an administrative program review of UOP, rather than intervene in
7 this *qui tam* action, constituted the pursuit of an “alternate remedy” under the False Claims Act
8 (“FCA”), 31 U.S.C. § 3730(c)(5), barring Relators’ claims from proceeding. This issue is not a
9 “question of fact,” as claimed by Relators. Rather, it is a legal question relating to this Court’s
10 subject matter jurisdiction. Moreover, although Relators are correct in claiming that issues of
11 jurisdiction are not “*per se* reviewable,” there can be no question that they are regularly certified for
12 appeal and that, here, the Court’s Order presented a “controlling question of law.”

13 There is also a “substantial ground for difference of opinion” as to this question of law under
14 section 1292(b). Relators try to avoid this fact by arguing that UOP has merely demonstrated that its
15 motion to dismiss presented matters of first impression, and by reasserting the arguments that they
16 made in opposition to UOP’s underlying motion to dismiss. But UOP has done more than show that
17 the issues addressed in the Court’s Order were merely undecided. It also demonstrated that its
18 motion to dismiss was amply supported by the plain language of the FCA, its legislative history, and
19 case law. Indeed, during oral argument on UOP’s motion, the Court itself recognized that there is
20 authority supporting UOP’s position, creating – at the least – a substantial ground for difference of
21 opinion.

22 Finally, an immediate appeal from the Court’s Order “may materially advance the ultimate
23 termination of the litigation” under section 1292(b). After all, should the Ninth Circuit reverse,
24 Relators’ claims against UOP will be dismissed and there will be nothing left for the Court to
25 determine except the amount of Relators’ share of the \$9.8 million that UOP has already paid to the
26 Government.

1 All of this may prove unnecessary if the Ninth Circuit disagrees with this Court’s decision in
2 the Order. Thus, it is appropriate to certify the Order for immediate review to avoid this potential
3 waste of time and resources. *See, e.g., United States ex rel. Huangyan Imp. & Exp. Corp v. Nature’s*
4 *Farm Prods.*, 370 F. Supp. 2d 993, 1005 (N.D. Cal. 2005) (certifying FCA case in part because “the
5 stakes are large – after trebling and civil penalties, there are tens of millions of dollars in
6 controversy” and because there may be unnecessary “onerous discovery”).

7 In short, this is precisely the type of “big” and “expensive” case, with “protracted and
8 expensive” proceedings, that Congress had in mind in enacting section 1292(b). “Exceptional”
9 circumstances justify an immediate, interlocutory appeal.

10 **III. THE REQUIREMENTS FOR INTERLOCUTORY APPEAL UNDER** 11 **SECTION 1292(b) ARE SATISFIED**

12 Relators also claim that the three basic requirements for interlocutory appeal under section
13 1292(b) are absent. Relators’ arguments fail as a matter of law.

14 **A. The Court’s Order Involves A Controlling Question Of Law**

15 As UOP outlined in its motion, the controlling question of law presented by the Court’s Order
16 is whether the Government’s decision to pursue an administrative program review of UOP, rather
17 than intervene in this *qui tam* action, constituted the pursuit of an alternate remedy under the FCA
18 barring Relators’ claims from proceeding and depriving this Court of subject matter jurisdiction. *See*
19 *Memo.* at 7-8. In response, Relators assert three arguments, all of which fail.

20 First, Relators claim that UOP has not demonstrated that there is a controlling question of law
21 because issues of subject matter jurisdiction are not “*per se* reviewable.” *Opp.* at 2, 8. While it is
22 true that not *every* issue of subject matter jurisdiction is *per se* reviewable, courts recognize that the
23 threshold issue of subject matter jurisdiction is particularly appropriate for interlocutory appeal. *See,*
24 *e.g., United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) (“Examples of . . . questions
25 [appropriate for section 1292(b) review] are those relating to jurisdiction . . . which the district court
26 has decided in a manner which keeps the litigation alive but which, if answered differently on appeal,
27 would terminate the case.”); *In re Cintas Corp. Overtime Pay Arb. Litig.*, Case No. M:06-cv-01781-
28 SBA, 2007 U.S. Dist. LEXIS 35591, at *3 (N.D. Cal. May 2, 2007) (“the question whether the Court

1 correctly found that it has subject matter jurisdiction in this case is a controlling question of law”)
2 (citing various cases); *Advanced Analogic Techs., Inv. v. Linear Tech. Corp.*, No. C-06-00735 MMC,
3 2006 U.S. Dist. LEXIS 75084, at *5 (N.D. Cal. Oct. 4, 2006) (“question of subject matter jurisdiction
4 is ‘controlling’”). Moreover, in this particular case, the question of subject matter jurisdiction is
5 clearly “controlling.” Should the Ninth Circuit disagree with this Court’s Order, Relators’ claims
6 against UOP will be dismissed in their entirety, meaning that “resolution of [this] issue on appeal
7 could materially affect the outcome of litigation in district court.” *In re Cement Antitrust Litig.*, 673
8 F.2d 1020, 1026 (9th Cir. 1982).

9 Second, Relators claim that the Court’s Order actually involved a “question of fact,” rather
10 than a controlling “question of law,” because it may have relied upon the undisputed terms of the
11 underlying Settlement Agreement between UOP and ED. Opp. at 2, 12. The Court’s Order,
12 however, decided the *legal question* of whether it no longer had subject matter jurisdiction because
13 the Government pursued an alternate remedy. That the Court may have looked at certain undisputed
14 facts in reaching its conclusion does not mean that the question itself was not one of law reviewable
15 under section 1292(b). Indeed, issues related to jurisdiction regularly call for the court to make a
16 legal determination based upon an awareness of the underlying undisputed facts. Nevertheless,
17 courts regularly (and correctly) certify these issues for interlocutory review. *See, e.g., Moe v. United*
18 *States*, 326 F.3d 1065, 1069 (9th Cir. 2003) (reviewing under section 1292(b) the jurisdictional
19 question of whether plaintiff’s claims were preempted, which depended upon an analysis of whether
20 the types of injuries suffered by plaintiff were covered by an alternate statute providing an exclusive
21 remedy); *Goldberg v. CPC Int’l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (reviewing under section
22 1292(b) the question of whether there was diversity jurisdiction, which depended upon an analysis of
23 the potential amount(s) in controversy); *SHR Ltd. P’ship v. Braun*, 888 F.2d 455, 459 (6th Cir. 1989)
24 (reviewing under section 1292(b) the question of whether there was diversity jurisdiction even
25 though Michigan limited partners were opposing parties to Michigan trustees).² Here, the

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27 ² *See also United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (accepting
28 section 1292(b) review of whether relator’s *qui tam* claims should be dismissed because the
Government already possessed the “essential information upon which the suit [wa]s predicated”);
[Footnote continued on next page]

1 “questions” at issue in the Court’s Order were ones of law, not fact, and they did not require the
2 Court to make any “factual findings” or make factual determinations, such as those related to witness
3 credibility. Thus, certifying a review of these questions will not, as Relators claim, inflict upon the
4 Court of Appeals “an unaccustomed and ill-suited role as factfinder[.]” or ask for the Ninth Circuit to
5 “[d]etermin[e] the relative weight to give specific evidence.” Opp. at 2, 12 (internal quotation marks
6 and citations omitted).³

7 Third, Relators claim that the issue of whether the “Government” is limited to the “Attorney
8 General” is merely “collateral.” Opp. at 10-11 (citing *Woodbury*, 263 F.2d at 788 (finding the issue
9 of whether certain documents were privileged to be collateral)). The issue of whether the
10 “Government” is limited to the “Attorney General,” however, was a focal point of the Court’s
11 hearing on the motion to dismiss and apparently provided a basis for the Court’s Order denying
12 UOP’s motion. *See, e.g.*, Declaration of Jared M. Toffer in Support of Mtn. to Certify (filed Sept. 11,
13 2007) Ex. A (Reporter’s Transcript) (hereinafter “RT”) at 18-20, 22-25, 36-37, 40-41; Order at 3-4
14 (stating that the Settlement Agreement did not constitute an alternate remedy by “the ‘Government’”
15 (internal quotation marks in original). Thus, the issue is not “collateral.”

16 Accordingly, the first requirement for certification is satisfied, and all of Relators’ arguments
17 to the contrary are without merit.

18 **B. Substantial Ground For a Difference of Opinion Exists**

19 In its motion, UOP also demonstrated that a substantial ground for difference of opinion
20 exists as to the questions raised in the Court’s Order, because: (i) all parties, including Relators’
21 counsel, recognized that UOP’s motion to dismiss raised certain matters of first impression; and (ii)
22 the position that UOP took in its motion to dismiss, which the Court denied in its Order, finds support
23

24 [Footnote continued from previous page]

25 *Army Times Publ’g Co. v. Watts*, 730 F.2d 1398, 1400-01 (11th Cir. 1984) (reversing under
26 section 1292(b) the denial of a motion to dismiss for lack of personal jurisdiction based on twelve
27 “relevant jurisdictional facts as found by the district court a[nd] undisputed by the parties”).

28 ³ Moreover, pure questions of law were posed by the subsidiary issues in the Court’s Order,
including: (i) whether the terms of a settlement agreement affect whether administrative
proceedings constituted an alternate remedy, and (ii) whether the term “Government,” in the
alternate remedy provision, is limited to the “Attorney General.” *See* Memo. at 8.

1 in the plain language of the FCA, its legislative history, and the case law. Memo. at 8-13. In
2 response, Relators assert two sets of arguments, both of which fail to demonstrate that there is no
3 substantial ground for difference of opinion.

4 First, Relators contend that UOP cannot rely solely upon the fact that its motion to dismiss
5 raised matters of first impression. Opp. at 1, 6-7. This argument fails because UOP did *not* rely
6 solely upon this fact. Rather, UOP argued that a substantial ground for difference of opinion was
7 also demonstrated by the fact that its position found support in various sources of authority, including
8 the plain language of the FCA and Ninth and Sixth Circuit precedent. *See* Memo. at 9-13.
9 Moreover, and at any rate, Relators simply cannot dispute that courts consider whether a matter is
10 one of first impression in determining whether to certify an order for immediate review. *See, e.g.,*
11 *Marsall v. City of Portland*, CV-01-1014-ST, 2004 U.S. Dist. LEXIS 15976, at *20 (D. Or. Aug. 9,
12 2004) (an issue “can be a controlling question of law for which there is a substantial ground for
13 difference of opinion when it is ‘difficult and of first impression’”) (quoting *Klinghoffer v. S.N.C.*
14 *Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*, 921
15 F.2d 21, 25 (2d Cir. 1990)). *See also Huangyan Imp. & Exp. Corp*, 370 F. Supp. 2d at 1005
16 (certifying FCA case for appeal in part because it involved “questions of law on which there is no on-
17 point precedent from the Ninth Circuit”); *Axa Rosenberg Group v. Gulf Underwriters*, No. C-04-
18 0415 JCS, 2004 U.S. Dist. LEXIS 16851, at *32 (N.D. Cal. Aug. 16, 2004) (certifying issues for
19 appeal because “[n]one of the cases relied on by the parties are factually directly on point”); *Ovando*
20 *v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1025 (C.D. Cal. 2000) (certifying order in part because it
21 “presents certain issues that appear to be of first impression”).

22 Second, Relators attempt to prove that there is no substantial ground for difference of opinion
23 as to the issues raised in the Court’s Order simply by reasserting the arguments that they made in
24 opposition to UOP’s motion to dismiss. Opp. at 1-2, 7-11. Of course, this does not demonstrate that
25 there is no dispute as to these issues. Indeed, if anything, Relators’ arguments highlight the
26 substantial grounds upon which a difference of opinion exists with respect to these matters. UOP
27 does not reassert all of the arguments it made in its motion to dismiss here, but incorporates those
28

1 arguments by reference. *See* Def.’s Memo. of Points & Authorities in Support of Mtn. to Dismiss
2 (filed Mar. 22, 2007); Def.’s Reply in Support of Mtn. to Dismiss (filed June 18, 2007).⁴

3 **C. An Immediate Appeal May Materially Advance The Termination Of This Litigation**

4 As explained in UOP’s motion, an immediate appeal of the Court’s Order also may materially
5 advance the ultimate termination of this litigation. Memo. at 13-14. After all, should the Ninth
6 Circuit reverse, Relators’ claims against UOP will be dismissed and all that will remain will be for
7 the Court to determine how much, if any, Relators are entitled to of the \$9.8 million that UOP has
8 already paid the Government as a result of the Government’s choice to pursue an alternate remedy.
9 Relators, recognizing that this requirement is satisfied, resort to asserting a number of arguments
10 which misrepresent either the applicable law or the facts.

11 First, Relators argue that the Order should not be certified because “an immediate appeal by
12 UOP has little, if any, likelihood of success before the Ninth Circuit.” Opp. at 12; *see also id.* at 2-3.
13 This is not a requirement. Rather, UOP merely has to show (and has shown) that there is a
14 substantial ground for difference of opinion as to the controlling questions of law in the Court’s
15 Order and that an immediate appeal “may materially advance the ultimate termination of the
16 litigation.” 28 U.S.C. § 1292(b). In any event, UOP does believe that an appeal has a likelihood of
17 success before the Ninth Circuit, especially considering the fact that UOP’s position finds support in
18 the Ninth Circuit’s *Barajas* decision.

21 ⁴ Of note, Relators make several misrepresentations in reasserting their arguments from the motion
22 to dismiss. For instance, Relators claim that no defendant has *ever* sought the dismissal of an
23 FCA action based upon the Government’s pursuit of an alternate remedy. Opp. at 7. But as
24 Relators are well aware, Northrop raised UOP’s *exact argument* in *Barajas*. *See* Def.’s Req. for
25 Judicial Not. in Support of Mot. to Dismiss (filed Mar. 22, 2007) Exs. J-L (briefing on Northrop’s
26 motion to dismiss relator’s claims under the alternate remedy provision). Moreover, it is clear
27 that the Ninth Circuit would have endorsed this argument had it had the opportunity to do so.
28 *United States ex rel. Barajas v. Northrop Corp.*, 258 F.3d 1004, 1010 (9th Cir. 2001) (“[T]he use
of the term ‘alternate remedy’ makes clear that the government must choose one remedy or the
other” – i.e., the alternate remedy proceedings or the *qui tam* action – “it cannot choose both.”).
Similarly, Relators claim that UOP’s motion to dismiss was destined to fail because the parties
did not comply with 31 U.S.C. § 3730(c)(2)(B). Opp. at 11. That provision, however, has
nothing to do with the Government’s pursuit of an alternate remedy and the consequential
dismissal of a relator’s *qui tam* action.

1 Second, Relators claim that “there would be no savings in time or money” if the Court
2 certified the Order for immediate appeal and the Ninth Circuit reversed. Opp. at 3; *see also id.* at 12-
3 13. In support of this argument, Relators cite to the Ninth Circuit’s 2006 annual report, which states
4 that the median time from notice of appeal to disposition in the Ninth Circuit in 2006 was 15.5
5 months. Opp. at 3, 12-13. However, 15.5 months from the Court’s hearing on the instant motion is
6 approximately February 2009, which is more than six months before trial (even accounting for the
7 month that Relators claim it will take for the Ninth Circuit to accept a certification petition) and
8 almost two months before the motion hearing cut-off date. Thus, should the Ninth Circuit accept an
9 interlocutory appeal and reverse the Court’s Order, the parties and the Court will likely be saved at
10 least six months of litigation, in addition to trial time, even if this action is not stayed pending the
11 appeal.

12 Moreover, these savings will be greatly increased if the parties seek to expedite the
13 proceedings before the Ninth Circuit and/or this action is stayed pending the appeal. In the former
14 situation, the Ninth Circuit will likely render a decision long before the 15.5 month period set forth
15 by Relators. In the latter case, the parties and the Court will be able to avoid expending virtually *any*
16 resources in these proceedings prior to a decision by the Ninth Circuit.

17 Third, and finally, Relators assert that even if the Ninth Circuit accepted an interlocutory
18 appeal and reversed the Order, they would still have claims against UOP. *See* Opp. at 2-3, 13.
19 Specifically, Relators contend that because their claims purportedly cover a longer period of time
20 than what was at issue in the program review, UOP’s motion to dismiss does not fully dispose of
21 their action. *See id.* This again misrepresents the situation.

22 As an initial matter, Relators do not assert claims based upon conduct occurring *after* the
23 period covered by the program review. In fact, Relators’ Second Amended Complaint (“SAC”) was
24 filed on March 4, 2004, approximately 4 months *before* that last date covered in the program review,
25 June 30, 2004. Def.’s Req. for Jud. Not. in Support of Mot. to Dismiss (filed Mar. 22, 2007) Ex. H
26 (Program Review Report). Thus, the *program review* actually covers a later period than Relators’
27 claims.

28

1 Moreover, nothing changes simply because Relators allege in their SAC that UOP's purported
2 misconduct continues "through the present." See SAC ¶¶ 1, 62, 65. That term merely means that
3 UOP's alleged conduct continued to the date that the SAC was filed. See, e.g., *Steward v. Int'l*
4 *Longshoremen's Ass'n*, No. 06-14772, 2007 U.S. App. LEXIS 7498, at *3 (11th Cir. Mar. 28, 2007)
5 (when a plaintiff alleges in his complaint that defendant's misconduct continues through "the
6 present," he only alleges that the misconduct continues to "the date he filed his complaint"); *United*
7 *States v. Fisher*, 112 F. Supp. 233, 235 (W.D. Ky. 1953) (when plaintiff alleges in its complaint that
8 defendant's conduct continues "to the present," that means to "the date the complaint was filed").
9 See also *Franzie v. Equitable Life Assurance Soc'y*, No. 94-2036-CIV-NESBITT, 1995 U.S. Dist.
10 LEXIS 20140, at *22 (S.D. Fla. Sept. 29, 1995) ("the present" in a complaint means "the date the
11 Complaint was filed"). Relators are not entitled to assert claims against UOP up to today, October
12 15, 2007, simply because their Complaint, filed over 3 years ago, alleged that UOP's conduct
13 continued up to then. In other words, Relators have not alleged, generally or with particularity, any
14 misconduct occurring after March 4, 2004. Cf. *Lancaster Community Hosp. v. Antelope Valley Med.*
15 *Group, Inc.*, 940 F.2d 397 (9th Cir. 1991) (plaintiff's allegation that defendant's misconduct
16 continued "through the present" was too vague to satisfy Fed. R. Civ. P. 9(b)).⁵

17 Meanwhile, Relators' claims *prior* to the period covered by the program review are fully
18 disposed of through UOP's motion to dismiss. Relators filed this action on behalf of the
19 Government, and they purported to assert claims dating back to March 7, 1997 (six years before the
20 original Complaint was filed). At the point this action was filed, the Government had the choice of
21 intervening, declining to intervene, or pursuing an alternate remedy to the exclusion of the
22 continuance of this action. UOP argues in its motion to dismiss that the Government chose the last
23 option by pursuing the ED program review proceedings. That the Government then sought remedies
24 in the program review for purported conduct dating back to 1998 (rather than 1997) does not alter the

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27 ⁵ Of course, Relators could seek leave to amend their Complaint to attempt to allege with
28 particularity purported misconduct occurring after March 2004, but UOP would then have the
opportunity to challenge the sufficiency of those allegations under Rule 9(b).

1 effect of the Government's choice. And the effect of that choice was to bar the entirety of this case
2 from proceeding.

3 **IV. CONCLUSION**

4 This is just the type of "exceptional" case contemplated by section 1292(b). Because the
5 Court's Order involves a threshold and dispositive issue of subject matter jurisdiction, judicial
6 economy and the interests of all parties will be best served if the Court certifies its Order for
7 immediate, interlocutory appeal. UOP respectfully requests that the Court amend its Order to include
8 a certification allowing immediate, interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

9
10 DATED: October 15, 2007

11 STEVENS & O'CONNELL LLP
12 Charles J. Stevens
13 Bradley A. Benbrook

14 SNELL & WILMER LLP
15 Christy Joseph

16 GIBSON, DUNN & CRUTCHER LLP
17 Timothy J. Hatch
18 James L. Zelenay

19 By: /s/ James L. Zelenay
20 James L. Zelenay

21 Attorneys for Defendant,
22 UNIVERSITY OF PHOENIX
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1 **CERTIFICATE OF SERVICE**

2 I, James Zelenay, hereby certify as follows:

3 I am employed in the County of Los Angeles, State of California; I am over the age of
4 eighteen years and am not a party to this action; my business address is 333 South Grand Avenue,
5 Los Angeles, California, in said County and State; I am a member of the bar of this Court and am an
6 associate with the law firm of Gibson, Dunn & Crutcher LLP; on October 15, 2007, I served the
7 following:

8 **DEFENDANT UNIVERSITY OF PHOENIX'S REPLY IN SUPPORT OF ITS**
9 **MOTION TO CERTIFY THE ORDER OF AUGUST 17, 2007 FOR**
10 **INTERLOCUTORY APPEAL AND TO AMEND THE ORDER**
11 **ACCORDINGLY**

12 on the interested parties in this action, by:

13 **Service by Electronic Mail:** by electronically filing the foregoing with the Clerk of the
14 Court using the CM/ECF system which will send notification of such filing to the following:

15 Cliff Palefsky
16 Mcguinn, Hillsman & Palefsky
17 535 Pacific Avenue
18 San Francisco, CA 94133
19 Telephone: 415-421-9292
20 Fax: 415-403-0202
21 Email: uroy2@aol.com

22 Daniel Robert Bartley
23 Bartley Law Offices
24 Post Office Box 686
25 7665 Redwood Boulevard, Suite 200
26 Novato, CA 94948-0686
27 Telephone: 415-898-4741
28 Fax: 415-898-4841
Email: DanielBartleyLaw@aol.com

James M. Finberg
Altshuler Berzon LLP
177 Post Street
Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Fax: 415-362-8064

1 Email: jfinberg@altshulerberzon.com

2 Michael Rubin
3 Altshuler Berzon LLP
4 177 Post Street, Suite 300
5 San Francisco, CA 94108
6 Telephone: 415-421-7151
7 Fax: 415-362-8064
8 Email: mrubin@altshulerberzon.com

9 Nancy G. Krop, Esq.
10 Law Offices of Nancy G. Krop
11 274 Redwood Shores Parkway, #334
12 Redwood City, CA 94065
13 Telephone: 650-596-8823
14 Fax: 650-596-8839
15 E-Mail: nkrop@kroplaw.com

16 Peter E. Leckman
17 Altshuler Berzon LLP
18 177 Post Street
19 Suite 300
20 San Francisco, CA 94108
21 Telephone: 415-421-7151
22 Fax: 415-362-8064
23 Email: pleckman@altshulerberzon.com

24 Robert J. Nelson
25 Lieff Cabraser Heimann and Bernstein
26 275 Battery Street
27 30th Floor
28 San Francisco, CA 94111
Telephone: 415-956-1000
Fax: 415-956-1008
Email: rnelson@lchb.com

Kendall J Newman
United States Attorney
501 I Street
Suite 10-100
Sacramento, CA 95814
Telephone: 916-554-2821
Fax: 916-554-2900
Email: kendall.newman@usdoj.gov

1 **Service by Commercial Overnight Messenger:** causing a true and correct copy thereof to
2 be placed in an envelope addressed to the following:

3 Jay D. Majors
4 U.S. Department of Justice
5 Civil Division
6 601 D. Street, N.W., Room 9550
7 Washington, DC 20004
8 E-Mail: Jay.Majors@usdoj.gov

9
10 Leeland O. White
11 815 La Cruz
12 El Paso, TX 79902

13 and after sealing said envelope I caused same to be delivered to the aforementioned by qualified
14 commercial overnight messenger.

15 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing
16 document(s), and all copies made from same, were printed on recycled paper, and that this Certificate
17 of Service was executed by me on October 15, 2007 at Los Angeles, California.

18 _____
19 /s/ James Zelenay

20 James Zelenay
21
22
23
24
25
26
27
28