QUESTIONS PRESENTED

In a Summary Order issued on July 13, 2009, and amended on July 16, 2009, (Appendix A) the Second Circuit affirmed the district court's judgment and decision of June 26, 2008, (Appendix B) dismissing Dr. Judy Wood's (Dr. Wood or petitioner) qui tam suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. Dr. Wood brought her FCA claims against Applied Research Associates, Inc., et al. (the "Contractor Defendants" or respondents), who provided services to the government in connection with the National Institute of Standards and Technology's (NIST) investigation of the collapses of the Twin Towers of the World Trade Center. The district court dismissed Dr. Wood's claims for (1) want of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A) and (2) failure to state a claim under Fed. R. Civ. P 12(b)(6) and plead fraud with particularity under Fed.R.Civ.P.9(b). The Second Circuit determined that Dr. Wood's claims fell short of the pleading standard required by Fed.R.Civ.P.9(b) and that the district court did not abuse its discretion in denying Wood leave to amend the Amended Complaint. But, the Second Circuit declined to reach the question of whether the district court had subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A).

During the pendency of Dr. Wood's appeal, the FCA was *retroactively* amended in a manner that has a direct bearing upon the pleading standard required by Fed.R.Civ.P.9(b) by virtue of a change in the FCA that is intended to clarify the FCA so as to make it easier for qui tam relators to survive motions to dismiss and for such cases to be allowed

to proceed to discovery, something that was denied in this case and which is routinely denied in qui tam cases. In addition, while the Second Circuit acknowledged on the one hand that the FCA had been retroactively amended[1], that court specifically declined to apply or otherwise engage in analysis of the retroactive amendment, on the other. In the absence of analysis of the retroactive change in the FCA, it is not possible for the Second Circuit to have reasonably concluded that district court did not abuse its discretion in denying Wood leave to amend the Amended Complaint. Indeed, the retroactive change in the FCA applies to *all* cases pending as of June 7, 2008, which includes, of course, this case.

The Congress acted to amend the FCA, retroactively in some respects, precisely in order to preclude the outcome handed down by the Second Circuit in this case. The Second Circuit acknowledged in its Summary Order that the Fraud Enforcement and Recovery Act, (FERA) Pub.L.No.111-21, 123 Stat. 1621 (2009) contained retroactive changes, but then held that the modifications did not change the analysis engaged in by the Second Circuit. The Second Circuit did not indicate which of the retroactive provisions of FERA it had reference to, let alone any rational for not applying the provisions that are retroactive. Thus far, the circuits have either side-stepped the issue of FERA's retroactivity and/or have denied that it has retroactive effect. In particular, the retroactive language that has not been either properly or consistently interpreted between and among the circuits is: "…(1) subparagraph (B) of *section 3729(a)(1) of title 31, United States Code* , as added

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[1] See Footnote 2 of the Second Circuit's July 16, 2009 Summary Order, AppendixA pg.18

by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (*31 U.S.C. 3729* et seq.) that are pending on or after that date…" This language is particularly apt in connection with the Second Circuit's upholding of the district court having declined to allow an amendment to the complaint. As FERA specifically made a statutory change applicable to cases pending as of June 7, 2008, as was this case, it follows that an amendment of the complaint must be permitted, as, in effect, that is what the law provides. Clear and direct conflict amongst the circuits exists in connection with FERA.

No circuit court has, as yet, engaged in a proper analysis of either FERA or of its retroactive provisions.

Two questions are presented:

1. Does that part of the FCA modified by FERA that is applicable to all cases pending as of June 7, 2008, mandate that all such complaints may be amended so as to conform to the mandate of the retroactively changed statute and/or to conform to the Congressional overturning of the decisions handed down in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004)?

2. Does the change, in relevant part, of what had been codified as 31 U.S.C. § 3729(a)(2) -- from, "…knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." -- to what is now codified as 31

U.S.C. § 3729(a)(1)(B) and stating: "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" -- prevent dismissal of FCA cases pending as of June 7, 2008, without an opportunity to amend complaints that were based upon the pre-FERA statutory language?

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OPINION BELOW

A Summary Order was issued by the U.S. Court of Appeals for the Second Circuit on July 13, 2009 and is reported at 2009 U.S. App. LEXIS 15402. An Amended Summary Order was issued on July 16, 2009. The Second Circuit affirmed the June 26, 2008 decision of the United States District Court for the Southern District of New York, reported at 2008 U.S. Dist. LEXIS 48761. See Appendices A-B

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked per 28 U.S.C. § 1254(1).

The Second Circuit's opinion and Summary Order was rendered on July 13, 2009 and amended on July 16, 2009. See appendix A.

The statutory provision believed to confer on this court jurisdiction to review on a writ of certiorari the summary order of the Second Circuit here appealed from is Sec. 4.of the Fraud Enforcement and Recovery Act, (FERA) Pub. L.No.111-21, 123 Stat. 1621 (2009) at (a)(1)(B) and at (f)(1).

STATUTES INVOLVED

Title 31 United States Code, Section 3729(a)(1)(B), as amended by the Fraud Enforcement and Recovery Act, (FERA) Pub. L.No.111-21, 123 Stat. 1621 (2009)

§ 3729. False claims

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

Title 31 United States Code, Section 3729(a)(2) [pre-FERA]

> "…knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

Fraud Enforcement and Recovery Act, (FERA) Pub. L.No.111-21, 123 Stat. 1621 (2009)

Sec. 4. CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW.

> (a) Clarification of the False Claims Act.-- *Section 3729 of title 31, United States Code*, is amended--
>
> (1) by striking subsection (a) and inserting the following:
>
> "(a) Liability for Certain Acts.--
>
> "(1) In general.-- Subject to paragraph (2), any person who--
>
> "(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> "(B) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

…

(f) Effective Date and Application.--The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that--

(1) subparagraph (B) of *section 3729(a)(1) of title 31, United States Code* , as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (*31 U.S.C. 3729* et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

STATEMENT OF THE CASE

Dr. Wood's claim of fraud consisted in a challenge to the work performed and to the payments received by a group of contractors, of which Applied Research Associates Inc. is the first named of them, arising in connection with the investigation of what caused the destruction of the Twin Towers of the World Trade Center on September 11, 2001. The work and the payments were pursuant to a Congressional mandate[2] that the

[2] The National Construction Safety Team Act, 15 U.S.C. § 1703 et seq. (the Act), "gives NIST comprehensive authority to complete the investigation of the WTC disaster." See also, 15 U.S.C. § 7311.

National Institute of Standards and Technology (NIST) make a determination, among other things, as to why and how the Twin Towers of the World Trade Center were destroyed on September 11, 2001.

NIST contracted out much of the scientific and technical work to be done to determine why and how the Twin Towers of the World Trade Center collapsed, or were destroyed, to a group of contractors who, by and large, are contractors in the area of weapons procurement and development and are, therefore, members of what is commonly referred to as the "military-industrial-complex."

Those who performed work and received payment from NIST are alleged to have engaged in scientific fraud by petitioner, Dr. Wood, a materials engineering scientist, based upon a process of fraud documented by Dr. Wood's original source research and findings that concluded that the Twin Towers of the World Trade Center were destroyed by an unconventional energy weapon that can be directed and thus is referred to as a form of what are called "directed energy weapons" (DEW). Moreover, ARA and some of the other respondents are manufacturers, developers and/or testers of the lethality effects of precisely that kind of weaponry; namely, DEW. The defendants know that "fire" cannot turn a 500,000-ton building to powder in 8-10 seconds.

As such, they knew or should have that the work they performed for NIST not only did not disclose why and how the Twin Towers were destroyed, but which went further and purposefully acquiesced in a willfully fraudulent curtailment of the scope of the investigation to a point in time that did not even address the actual phase or time frame

of the destruction of the Twin Towers. That is scientific fraud and/or willful blindness to it.

REASONS FOR ALLOWANCE OF THE WRIT

The treatment of this case in the courts below was blatantly misdirected in that it was assumed that the case had, as its purpose, that of making allegations concerning who destroyed the Twin Towers. As such, the case was characterized derisively as "a conspiracy theory" even though the evidence it relied on and the claims it made were clearly of a scientific nature of very high quality. That characterization of the case as a "conspiracy theory" was false and misleading; and, more importantly, appears to have resulted in cursory treatment, exemplified in, among other ways, the Second Circuit's refusal to apply FERA to it.

This is a case that centers on the fraud associated with determining what caused the destruction of the Twin Towers (as mandated by congress), not the identity of the perpetrators. The point is, Dr. Wood has demonstrated that the Twin Towers did not burn up nor did a significant portion of them crash down; they turned to powder in mid air and fire cannot turn a quarter-mile tall building to powder in 8-10 seconds. The respondents herein knew or should have known this and they therefore engaged in actionable fraud within the meaning of the FCA.

The FCA was retroactively modified and amended during the course of the proceedings within the Second Circuit. In upholding the lower court's dismissal of Dr. Wood's qui tam case, the court of appeals merely acknowledged the existence of the retroactive changes in the FCA but did not apply those changes to its consideration of Dr. Wood's appeal. The salient portion of the Second Circuit's consideration of the new law, FERA, can be found at footnote 2 of the July 13, 2009, Summary Order and states:

> "In 2009, after Wood's complaint was filed, the various causes of action in 31 U.S.C. § 3729 were reorganized and restated. *See* Fraud Enforcement and Recovery Act, Pub. L. no. 111-21, 123 Stat. 1621 (2009). While some of these changes are retroactive, they do not change the analysis herein. For ease of presentation, we reference the previous version of 31 U.S.C. § 3729, on which the parties' briefing is predicated.[3]

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE RETROACTIVE APPLICATION OF FERA.

A. Congressional overturning of Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004)

[3] While the parties briefing may have reference the older version of 31 U.S.C. § 3729 et seq., the petitioner herein brought the new law to the Second Circuit's attention in a pre-oral argument motion.

The enactment of a retroactive statutory change during the pendency of an appeal of a case that was and is based on the retroactively changed statute is not an everyday occurrence. However, that is what has happened in and with respect to this case. Despite that fact, the Second Circuit specifically chose to leave all issues relative to that change unresolved by choosing not to engage in an analysis of it, other than to acknowledge the retroactivity of the change. Here, the Second Circuit, by its own statement, did not consider the retroactive change.

FERA amends the FCA to clarify and correct interpretations of the law that were said, by Congress, to have been erroneous. The erroneous interpretations were said to be contained in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004). In Allison Engine, the Supreme Court held that Section 3729(a)(2) of the FCA requires the Government to prove that "a defendant must intend that the Government itself pay the claim," for there to be a violation. 128 S.Ct. at 2128. As a result, even when a subcontractor in a large Government contract knowingly submits a false claim to general contractor and gets paid with Government funds, there can be no liability unless the subcontractor intended to defraud the Federal Government, not just their general contractor. This is contrary to Congress's original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute.

Similarly, in Totten, the Court of Appeals for the District of Columbia Circuit held that liability under the FCA can only attach if the claim is "presented to an officer or employee of the Government before liability can attach." 380 F. 3d at 490. Known as the "presentment clause," the D.C. Circuit interpreted this clause to limit recovery for frauds committed by a Government contractor when the funds are expended by a Government grantee, such as Amtrak. The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.

.

Among other unresolved conflicts that have arisen post-FERA is that the circuits continue to cite, with approval, this court's decision in Allison Engine irrespective of the amending the language of 31 U.S.C. § 3729(a)(2) that replaces the words "to get" with the word "material." *See* S. Rep. No. 111-10 (2009). Thus, under the new version, that, as noted in this petition, is recodified as 31 U.S.C. § 3729(a)(1)(B), a person is liable under the FCA if he "knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim."

123 Stat. at 1621. Section 4(f) of FERA also provides that [T]he amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that

--

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

The changes are significant and the ones referenced as having retroactive effect so as to apply to all cases pending as of June 7, 2008, need to be analyzed and interpreted by this court so that the circuits and the lower courts may have guidance upon this important issue.

II. REVIEW IS NECESSARY TO RESOLVE CONFLICTS ARISING IN THE CIRCUITS CONCERNING THE EFFECT OF THE RETROACTIVE PROVISIONS OF FERA UPON FCA CASES PENDING AS OF JUNE 7, 2008.

A. AUTOMATIC RETROACTIVITY OF FERA

The universe of qui tam cases pending as of June 7, 2008, and therefore subject to the retroactivity provision of FERA, is not infinite, but it is significant enough to warrant a clarifying interpretation to be handed down by this court.

Another factor relevant here is that the legislative history of FERA made it clear that Congress disapproves of the way in which many courts, including the Second Circuit in the within case, have overly strictly applied F.R.Civ.P Rule 9(b) to FCA lawsuits. See 111 Congress 1st Session, S 386 2009.[4] Among the circuits that have either ignored the retroactivity provisions of FERA or have applied them differently and inconsistently with either the Second Circuit or in disregard of the overturning of the interpretation in Allison Engine, is United States v. Saybolt, 577 F.3d 195, (3d Cir. 2009.

The actual change in 31 U.S.C. § 3729(a)(1)(B) can obviously change the way in which claims of fraud are "particularized" for a variety of reasons, not least of which is that the requirement of what must be specified is made easier by virtue of that change. In any event, a litigant who had a case pending as of June 7, 2008, is not mandated by Congress to seek to have the retroactive changes made applicable. Instead, the law says clearly and unequivocally that the change applies to such cases. At a minimum, then, the courts are mandated, by law, to consider all such cases based on that retroactive change.

B. LEAVE TO AMEND COMPLAINT

In order to obtain the retroactive benefit of FERA, it follows that litigants must be afforded the opportunity to amend complaints so as to plead the

[4] Reference to that legislative history was submitted to the Second Circuit in a pre-oral argument motion.

different and the more lenient language of FERA prior to having their cases dismissed on the basis of failure to plead with particularity under F.R.Civ.P Rule 9(b) because the particularity requirements associated with the modified language of 31 U.S.C. § 3729(a)(1)(B), as it now reads, is factually, or at least arguably, easier. Any other construction here would deny the benefit of the retroactive change in the law.

It is also noted that Congress has, in any event, criticized the strict application of F.R.Civ.P rule 9(b) to FCA cases which provides all the more reason why review and clarification is needed.

CONCLUSION

For all of the foregoing reasons, petitioner, Dr. Wood, respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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