No. 07-214

In The
Supreme Court of the United States

ALLISON ENGINE COMPANY, INC., *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
ROGER L. SANDERS AND ROGER L. THACKER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR MARSHA FARMER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Your *amicus curiae*, Marsha Farmer, is the relator in an action under the False Claims Act against the City of Houston and Houston Area Urban League for overcharges in connection with the City's federally funded Emergency Home Repair Program. A summary judgment having been entered against her based upon *United States of America ex rel. Totten* v. *Bombardier Corp.,* 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032 she has appealed to the Court of Appeals for the Fifth Circuit, where oral argument was held on August 8, 2007.

STATUTORY PROVISIONS INVOLVED

31 U.S.C. §3729. False claims

(a) Liability for Certain Acts. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a

[1] The parties have consented to the filing of this brief, as reflected by letters filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement ***to get a false or fraudulent claim*** paid or ***approved*** by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * *

(6) . . . ***or***

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government . . .".

(b) Knowing and Knowingly Defined. For the purpose of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts with deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no poof of specific intent to defraud required.

(c) Claim Defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a *contractor, grantee, or*

other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(Emphasis supplied.)

STATEMENT

Marsha Farmer sued the City of Houston and Houston Area Urban League under the False Claims Act for false claims submitted for work done and materials supplied under the City of Houston's Emergency Home Repair Program, which was funded by the Department of Housing and Urban Development (HUD) under a federal block grant. *United States of America ex rel. Marsha Farmer* v. *City of Houston, et al.,* Civil Action No. H-03-3713, in the District Court for the Southern District of Texas, Houston Division. In her amended complaint she specified seventy-two instances of improper charges by the City of Houston and its subrecipient, Houston Area Urban League (one of four subrecipients). More than six thousand houses were repaired under the Program. Her action was filed on September 12, 2003. The government did not intervene. As the result of her disclosures the Department of Housing and Urban Development shut

down the entire Program[2] and began administrative proceedings to correct the many abuses which had occurred, using new personnel and the City of Houston's non-federal funds. These are ongoing.

However, eleven months after the *qui tam* action was filed the Court of Appeals for the District of Columbia decided *United States of America ex rel. Totten* v. *Bombardier Corp.,* 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032 announcing that 31 U.S.C. §3729(a)(2) included a presentment requirement. Based upon *Totten* the district court entered summary judgment against relator dismissing the *qui tam* action with prejudice.[3] She appealed to the United States Court of Appeals for the Fifth Circuit, *United States ex rel. Marsha Farmer* v. *City of Houston; Houston Area Urban League*, Case No. 06-20740, which heard oral argument on August 8, 2007; the case is now under submission. (The Government filed

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[2] Following dismissal of the qui tam case, defendants sought to rule relator for costs. The Court declined to do so stating, "Finally, even though Ms. Farmer's legal claims failed, the litigation was productive in that it led to the City's Emergency Home Repair Program being shut down by HUD." *United States of America ex rel. Marsha Farmer* v. *City of Houston et al.*, 2006 U.S. Dist. LEXIS 84154 (So. Dist. Tex. 2006).

[3] The district court had originally declined to dismiss the case, *United States of America, et al.* v. *City of Houston and Houston Area Urban League,* 2005 U.S. Dist. LEXIS 18387 (So. Dist. Tex. 2005), but the *Totten* case caused the district court to dismiss it, *United States of America, et al.* v. *City of Houston, et al.*, U.S. Dist. LEXIS 57741 (So. Dist. Tex. 2006).

an *amicus curiae* brief on her behalf in the Court of Appeals.)

The contract between the City of Houston and the Houston Area Urban League provided that all records were subject to audit by the federal Government.

ARGUMENT

I. THE MAIN PURPOSE OF THE FALSE CLAIMS ACT WAS TO STOP FRAUDULENT ACTIVITIES.

The False Claims Act[4] was enacted under Draconian circumstances on March 2, 1863 – two months before the battle of Gettysburg (July 1, 1863). It was emergency legislation. The survival of the Union was in doubt.

The Act made it clear that simply presenting a false claim was a crime, regardless of whether it was paid. Liability was automatic: the attempt, which consisted of presenting the claim, was the crime. Congress wanted to streamline the war effort by doing away with the administrative headaches involved in verifying claims. In addition, in case that warning not to file false claims was ignored, the Act provided that using false documents to get federal funds was a crime and punitive damages were recoverable. Using

[4] Appendix A.

false documents to get "approval" of a false claim, i.e., to deceive federal auditors, was a crime, and it was a crime to conceal a debt owing to the Government.

II. THE SURVIVING CIVIL PROVISIONS ARE IN THE ALTERNATIVE.

The surviving civil statutory provisions which are descendants from the False Claims Act are by their terms alternative:

1. Attempting to misappropriate funds by presenting a claim: 31 U.S.C. §3729(a)(1);
2. Using false documents to misappropriate funds: 31 U.S.C. §3729(a)(2);
3. Using false documents to deceive federal auditors, i. e., to get "***approval***": 31 U.S.C. §3729(a)(2);
4. Using false documents to conceal obligations to the Government: 31 U.S.C. §3729(a)(7);
5. Conspiracies: 31 U.S.C. §3729(a)(3).

However, *Totten*, based upon an analysis of the legislative history of the present provisions of the Act and the "provenance" of §3729(a)(1) and §3729(a)(2) held that the two sections should be construed together so that presentment was an element of a cause of action under §3729(a)(2). In fact using false documents, including false invoices, to misappropriate federal funds and using false documents to deceive federal auditors later on when disbursements are

systematically reviewed, such as false business entries to support the false invoices which were previously paid, are separate violations of the Act which occur at different times and which should be separately actionable under the plain language of the Act.

III. JUDICIALLY INSERTING A PRESENTMENT REQUIREMENT INTO 31 U.S.C. §3729(a)(2) WOULD CAUSE OBSTACLES NOT INTENDED BY CONGRESS.

The question before this Court and the Fifth Circuit Court of Appeals is whether a relator who can show widespread overcharges paid with federal funds must go further and, in effect, locate the headwaters of the Nile by tracing the payments all the way back to the Government. In your *amicus curiae's* action involving repairs to more than six thousand houses the burden of showing every single presentment from which the payments resulted would be burdensome. Many of the presentments may not be capable of being located. Many of the misrepresentations may have occurred later on, to deceive the auditors. There is no sound policy reason why all of these wrongful activities must be tied to presentments to the Government. Petitioners argue that there is a danger that people who merely intended to cheat universities or other recipients may unwittingly be exposed to the so-called Draconian remedies prescribed in the Act, but that is hardly the case: these so-called innocent crooks can persuasively argue that they did not

"knowingly" cheat the Government, that they only intended to cheat someone else and that they resembled bona fide purchasers for value without notice.

The problem of showing presentment was presented to a district court in the District of Columbia in *United States of America ex rel. El Amin* v. *The George Washington University*, 2007 U.S. Dist. LEXIS 85327 (D.C. 11/27/07), a case squarely governed by *United States of America ex rel. Totten* v. *Bombardier Corp.,* 380 F.3d 488 (D.C. Cir. 2004), cert. den., 544 U.S. 1032. The case involved Medicare fraud. Relators spent ten years in discovery and performed a manual search in the Federal Records Center of millions of pages of documents, but were only able to come up with two hundred twenty three hard copy claim forms of which only fifty related to the anesthesiologists identified in the complaint. Defendants sought summary judgment with respect to any claims besides those identified in the fifty claim forms. The court denied the motion, stating:

> "While it is evident that the FCA requires Relators to prove the existence of 'a false or fraudulent claim' nothing in the FCA requires Relators to possess (and present to the factfinder) the actual claim form, whether it be paper or electronic, submitted to the government."

The court noted that some HCFA claim forms were submitted electronically and others were submitted

in hard copy format, observing that "neither Defendant nor Relators seem to know when Defendant submitted claims electronically and when it submitted them in hard copy format."

The court concluded, "Based on the effort Relators undertook to locate the HCFA claim forms, and the reliability of secondary evidence in their possession, the Court concludes that the best evidence rule does not bar secondary evidence of Medicare claims." The court relied on *United States ex rel. Magid* v. *Wilderman,* 2004 U.S. Dist. LEXIS 8459 and 17494 (E.D. Pa. 2004), another Medicare case in which the plaintiff could not come up with HCFA-1500 claim forms but used other evidence including EOMB forms which showed the amounts Medicare reimbursed defendant for the claims to show that invoices had been inflated. Defendant alleged that there could have been errors in transmitting data from the HCFA-1500 claim forms into the Medicare computer system so that the EOMB forms would not accurately reflect the claims submitted, but the court said that was an issue for the factfinder, so that summary judgment was not justified.

In the City of Houston's Emergency Home Repair Program letters of credit were used. As a matter of regulatory procedure disbursements would not be made without the use of electronic drawdown vouchers prescribed by the U.S. Treasury Financial Manual Part 6-2040.10, promulgated pursuant to 31 C.F.R. §210.3 *et seq.,* which provides:

> The recipient organization will submit a properly completed payment voucher to the commercial bank for transmission to the appropriate Federal Reserve bank or branch as funds are required for immediate disbursement needs. At the time, the commercial bank may credit the account of the recipient organization with the amount of funds being drawn down if agreed to by the bank and the recipient organization.
>
> The Federal Reserve will review the payment voucher for completeness and correctness, verifying the letter-of-credit number, agency location code (ALC, which was formerly referred to as the eight digit agency station symbol), signatures, and that the amount requested is within the available balance of the letter of credit.
>
> The Federal Reserve bank or branch credits the reserve account of the commercial bank, advises the commercial bank of acceptance of the payment voucher, and charges the account of the U.S. Treasury.

And in Section 2025.10 it is provided:

> All disbursements, whether in cash, or by checks or electronic payments drawn on the U.S. Treasury or designated depository banks, for authorized and lawful payments and/or refunds of amounts collected, shall be supported with sufficient information on the disbursement vouchers, or on documents attached to them, to enable the audit of the

> transactions of certifying and disbursing officers, as required by law.

Does Congress intend that your *amicus curiae* in her case be required to come up with direct evidence of presentment of every claim which resulted in payments for repairs to over six thousand houses, even though it is undisputed that the entire Program was financed with federal funds? Are plaintiffs in False Claims Act cases required to master the labyrinthine details of regulatory procedures by which federal funds are disbursed? Relator did discover on her own numerous false invoices paid with federal funds which included overcharges for materials and labor, and her discovery caused HUD to shut down the Emergency Home Repair Program. Extensive discovery was underway when her action was dismissed. One thing is certain: federal funds payable under a letter of credit do not just walk out of the door. (Ultimately, if her case goes to trial, she will be able to rely on factual findings by HUD in its ongoing administrative proceeding, 31 U.S.C. §3729(c)(5).)

In the *El-Amin* case, discussed above, the result of the court's decision was to leave the case on the docket for trial on the merits. That leaves open the question before *this* Court in the case at bar: when that trial occurs must the relator obtain a favorable answer to the question whether the claims were presented? A literal minded jury may find that only fifty claims were proved. This Court should hold that presentment is not an issue in a case brought under 31 U.S.C. §3729(a)(2). Every false invoice and every

false supporting document subsequently contrived to support such invoice will be separately actionable, as they should be. Such a holding should result in affirmance in the case at bar, and such a holding would also simplify the Fifth Circuit's disposition of *United States of America ex rel. Marsha Farmer* v. *City of Houston and Houston Area Urban League,* Case No. 06-20740, in the United States Court of Appeals for the Fifth Circuit. Such a holding will carry into effect the Congressional policy that the Act should be broadly construed. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544-45, 63 S.Ct. 379, 87 L.Ed. 443 (1943); *United States* v. *McNinch*, 356 U.S. 595, 599 (1958); *United States* v. *Neifert-White Company*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968).

Many of the overcharges alleged in your *amicus curiae's* qui tam action involved repairs which took place following Houston's Tropical Storm Allison in 2001. Her action is probably a small preview of cases which will arise from Hurricane Katrina, which will also raise the question whether plaintiffs in False Claims Act cases must prove presentment in addition to showing that federal funds were wrongfully appropriated by companies doing repair work after that monumental disaster.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A: The False Claims Act (Original), Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863)

March 2, 1863. CHAP. *LXVIL-An Act to prevent and punish Frauds upon the Government of the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, or cause to be made or statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States or any department or officer thereof; any person in said forces or service who, for

the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any agreement, combination, or conspiracy to cheat or defraud the Government of the United States, or any department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly and wilfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States; any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service having charge, possession, custody, or control of any money or other public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or wilfully to

conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service who shall knowingly purchase or receive, in pledge for any obligation or indebtedness, from any soldier, officer, or other person called into or employed in said forces or service, any arms, equipment, ammunition, clothes, or military stores, or other public property, such soldier, officer, or other person not having the lawful right to pledge or sell the same, shall be deemed guilty of a criminal offence, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States, and of the militia when called into and employed in the actual service of the United States in time of war, and to the provisions of this act. And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

SEC. 2. *And be it further enacted,* That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

SEC. 3. *And be it further enacted,* That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

SEC. 4. *And be it further enacted,* That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases,

the several district courts of the Territories of the United States within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 5. *And be it further enacted,* That it shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of this act by persons liable to such suit, and found within their respective districts or territories, and to cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the said sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 6. *And be it further enacted,* That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount

of such forfeiture, as well as one half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

SEC. 7. *And be it further enacted,* That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.

SEC. 8. *And be it further enacted,* That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such officer, agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

SEC. 9. *And be it further enacted,* That all acts and parts of acts inconsistent with or repugnant to any of

the provisions of this act are hereby repealed, saving, however, and excepting any and all suits or prosecutions now commenced pending, and all rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; all which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid and effectual as if this present act had not been passed; nor shall this act be so construed as in any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages have been so recovered, to the extent of one half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract. APPROVED, March 2, 1863.