

WILMERHALE

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Mr. Mark Langer
Clerk
U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: *United States ex rel. Shea v. Cellco Partnership et al.*, No. 12-7133

Dear Mr. Langer:

Defendants-Appellees respectfully respond to yesterday's letter from Relator-Appellant Shea submitting *United States ex rel. Heath v. AT&T*, No. 14-7094 (D.C. Cir.), as supplemental authority.

Heath determined that the False Claims Act's first-to-file bar is not jurisdictional. Slip Op. 10-14. Shea contends that this holding requires that his Second Amended Complaint "should not be dismissed in any fashion, even without prejudice." Shea's contention is contrary to the Act's plain terms, this Court's decision in this case, and *Heath*.

The first-to-file bar refers to "actions," not "complaints." Because Shea's earlier, related suit was pending when he filed his current action, the first-to-file bar required that his current action be dismissed, as the district court recognized.

In affirming dismissal of Shea's action, this Court considered it of no moment whether the first-to-file bar was jurisdictional or not. The majority made no mention of the issue. And Judge Srinivasan, in his separate opinion explained that "[t]his case does not require a definitive resolution of the jurisdictional or nonjurisdictional character of the first-to-file bar." 748 F.3d at 345. He went on to explain his view that Shea's case should be dismissed without prejudice rather than with. But his conclusion that dismissal was required only confirms that, he, like the other members of the panel, determined that dismissal was mandated regardless of whether the first-to-file bar is jurisdictional. In discussing this case, *Heath* made

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these very points: “Confronting the jurisdictional question was not necessary in *Shea* because the only issue presented on appeal was whether the district court properly dismissed the case as barred by the first-to-file rule. Even if the district court wrongly characterized its dismissal as jurisdictional, we could sustain that judgment for failure to state a claim under Rule 12(b)(6).” Slip Op. 11.

Far from supporting Shea’s effort to escape dismissal, *Heath* supports Defendants-Appellees’ motion for supplemental briefing so that this Court may consider alternative grounds for affirming dismissal with prejudice. *Heath* is another case in which this Court endorsed the appropriateness of addressing alternative grounds for affirmance that were presented to but not addressed by the district court. *Id.* at 18-19.

Respectfully submitted,

/s/ Seth P. Waxman

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