PANEL DECISION ENTERED APRIL 11, 2014

No. 12-7133

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
EX REL. STEPHEN M. SHEA,
Plaintiff-Appellant,

v.

CELLCO PARTNERSHIP, DOING BUSINESS AS VERIZON WIRELESS;
VERIZON BUSINESS NETWORK SERVICES INC.;
VERIZON FEDERAL INC.; MCI COMMUNICATIONS SERVICES, INC.,
DOING BUSINESS AS VERIZON BUSINESS SERVICES,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 09-cv-1050 (Kessler, J.)

DEFENDANTS-APPELLEES' REPLY IN SUPPORT OF THEIR MOTION FOR SUPPLEMENTAL BRIEFING ON ALTERNATIVE GROUNDS FOR AFFIRMANCE

SETH P. WAXMAN
JONATHAN G. CEDARBAUM
THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com

June 9, 2015

Nothing in Shea's opposition to Verizon's motion undercuts the four considerations Verizon identified as favoring this Court's permitting supplemental briefing so it may address the alternative grounds for affirmance previously advanced by Verizon both in the district court and before this Court. On the contrary, Shea's opposition only confirms the sensibleness of this Court's considering those alternative grounds for affirmance.

First, Shea's suggestion (at 2) that this Court "normal[ly]" does not consider alternative grounds for affirmance is simply incorrect. *See, e.g.*, *Pharmaceutical Care Mgmt. Ass'n v. District of Columbia*, 613 F.3d 179, 189 (D.C. Cir. 2010); *Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009); *Pigford v. Johanns*, 416 F.3d 12, 20 (D.C. Cir. 2005); *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004); *see also Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) ("A prevailing party seeks to enforce not a district court's reasoning, but the court's *judgment*. This Court, like all federal appellate courts, does not review lower court's opinions, but their *judgments*." (citation omitted)). Indeed, four of the six decisions Shea himself cites undercut his argument. They stand for the quite different proposition that an appellate court generally will not rule on an argument that was not at least *raised* before the district court. *See Singleton v. Wulff*, 428 U.S. 106, 120-122 (1976) ("The matter of what *questions may be taken up* and resolved *for the first time on appeal* is one left primarily to the discretion of the

courts of appeals, to be exercised on the facts of individual cases." (emphases added)); *see also Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984); *Eltayib v. U.S. Coast Guard*, 53 F. App'x 127, 127 (D.C. Cir. 2002). They are thus fully consistent with the proposition that in a case like this one, where the alternative grounds for affirmance *were* raised in the district court, it is appropriate for this Court to address them. Shea's other two authorities are also readily distinguishable. *Hamilton v. Geithner*, 666 F.3d 1344 (D.C. Cir. 2012), involved an issue that was not properly presented to the appellate court because it was "not fully briefed on appeal." *Id.* at 1359. In this case the alternative grounds for affirmance were briefed to this Court. Finally, in *Liberty Property Trust v. Republic Properties Corp.*, 577 F.3d 335 (D.C. Cir. 2009), this Court actually considered and ruled on a number of alternative grounds for affirmance raised by the appellees. *Id.* at 341-342. Despite Shea's rhetoric, he has not identified a case with the same procedural posture as this one where this Court declined to consider properly raised alternative grounds for affirmance.

Second, Verizon noted that the alternative grounds for affirmance here are questions of law and so would be reviewed by this Court de novo, further supporting the appropriateness of foregoing remand to the district court. Shea concedes (at 3) that the issues are indeed questions of law subject to de novo

review. Shea points out the obvious by noting that the same could be said for any issue of law—but not, he fails to acknowledge, for questions of fact, where a more deferential standard of review would apply. Thus, cases like this one—where the alternative grounds for affirmance are legal, rather than fact-intensive—are particularly appropriate for consideration by this Court without remand.

Third, Shea offers only two responses to Verizon's point that Shea's own deposition in an earlier hearing confirmed the public nature of the sources from which the materials supporting this suit were drawn. First, he notes (at 3) that Verizon settled Shea's first lawsuit in this series. Second, he quotes (at 3-4) two snippets from the district court's decision in that earlier suit resolving the dispute between Shea and the government over the percentage of the settlement to which Shea was entitled. These facts in no way support remanding to the district court as opposed to this Court's taking up the alternative grounds for affirmance itself.

Fourth, Shea contends that dismissing this action and permitting him to file yet another False Claims Act suit would somehow be more efficient than having this Court address the alternative grounds for affirmance that the parties have already been briefed. But he does not explain how moving a case toward definitive resolution could be less efficient than sending the litigation back to square one more than eight years after he filed his first suit. Shea suggests that if this Court addresses the alternative grounds for affirmance, a petition for rehearing or a

certiorari petition might be filed. But those possibilities threaten considerably less delay than the origination of new lawsuit.

Verizon's motion should be granted.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
JONATHAN G. CEDARBAUM
THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com

June 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN