IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7133

UNITED STATES OF AMERICA, EX REL. STEPHEN M. SHEA,

Plaintiff-Appellant,

v.

CELLCO PARTNERSHIP, DOING BUSINESS AS VERIZON WIRELESS, ET AL.,

Defendants-Appellees

PLAINTIFF-APPELLANT'S RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR SUPPLEMENTAL BRIEFING ON ALTERNATIVE GROUNDS FOR AFFIRMANCE

Christopher B. Mead
Mark London
Lance Robinson
Stuart A. Berman
London & Mead
1225 19th Street, NW, Suite 320
Washington, DC 20036
(202) 331-3334

RESPONSE IN OPPOSITION TO MOTION FOR SUPPLEMENTAL BRIEFING ON ALTERNATIVE GROUNDS FOR AFFIRMANCE

On June 1, 2015, the Supreme Court vacated this Court's prior judgment and remanded the case for further consideration in light of its unanimous decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 575 U.S. ___ (U.S. May 26, 2015) (No. 12-1497). *Kellogg Brown & Root Services* held "that a *qui tam* suit under the FCA [False Claims Act] ceases to be 'pending' once it is dismissed," so that dismissal of a subsequently-filed claim with prejudice pursuant to the FCA's first-to-file provision, 31 U.S.C. § 3730(b)(5), was error. Slip op. at 13. Defendants-Appellees (collectively "Verizon") do not dispute that under *Kellogg Brown & Root Services*, the district court erred in dismissing plaintiff-appellant Stephen M. Shea's second amended complaint ("SAC") with prejudice on first-to-file grounds.

As described in the panel opinion, this appeal involves the second of Shea's two *qui tam* actions against Verizon. Verizon paid $93.5 million to settle *Verizon I*. The district court adopted Verizon's primary argument for dismissal of *Verizon II*, that the first-to-file bar barred Shea's second case alleging false claims on additional government contracts. JA 303-22. The district court did not address Verizon's secondary arguments that the SAC was barred by the FCA's public disclosure bar and that Shea failed to plead fraud with the particularity

required by Fed. R. Civ. P. 8 and 9(b).[1] Nevertheless, Verizon now moves to have this Court address those issues in the first instance, even though they have never been decided by the district court. This Court should deny the motion.

As this Court has stated many times, its "normal rule" is to avoid reviewing questions of law that were not passed upon by the district court. *Liberty Property Trust v. Republic Properties Corp.*, 577 F.3d 335, 341 (D.C. Cir. 2009)(Sentelle, C.J.)(citing *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984), and *Eltayib v. United States Coast Guard*, 53 F. App'x 127 (D.C. Cir. 2002)); *Hamilton v. Geithner*, 666 F.3d 1344, 1359 (D.C. Cir. 2012). As the Supreme Court has stated: "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003)(Edwards, J.).

Without ever acknowledging the "normal rule" and "general rule," Verizon cites cases in which this Court has exercised its discretion to affirm judgments based on alternative grounds that the district court never addressed.

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[1] *See* Exhibits 2 and 3 to Verizon's Motion for Supplemental Briefing on Alternative Grounds for Affirmance ("Motion"). The first-to-file issue was the lead argument in Verizon's memorandum, *see* Ex. 2 at 12-20, followed by the public disclosure argument, *id*. at 20-29, and the Rule 9(b) argument, *id*. at 29-42.

Motion at 2. But Verizon provides no persuasive reasons for this Court to address issues never decided by the district court. First, Verizon contends that the district court's resolution of its alternative legal arguments will ultimately be subject to *de novo* review. Motion at 3. Such an argument could be made about *any* legal issue that has been raised but not decided in the district court.

Next, Verizon argues the merits of its public disclosure claim, contending that "relator's own statements confirm that his suit is foreclosed by the public disclosure bar." *Id*. Verizon's summary assertion provides no reason for this Court to depart from its normal rule, and ignores the history of *Verizon I* and *Verizon II*. In both cases, Shea used his expertise as a telecommunications consultant, informed by confidential documents, to discover and alert the government to Verizon's fraud relating to federal contracts. After Verizon settled *Verizon I* for $93.5 million in 2011, the district court held that "it may well be that without this lawsuit, Verizon would have continued to overcharge the United States indefinitely, i.e., as long as it could get away with it."[2]

The court also found that government auditors "simply did not have the relevant experience that Shea had in understanding the extremely complex

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[2] *United States ex rel. Shea v. Verizon Communications, Inc.*, 844 F.Supp.2d 78, 82 (D.D.C. 2012). The quoted language reflects the district court's modification of the opinion after it was published. *See* Civil Action No. 07-0111(GK), Dkt. 74 (March 29, 2012).

administration of Government contracts."[3] The district court's opinion in *Verizon I* refutes Verizon's claim that Shea lacked direct and personal knowledge of the fraud and did not provide sufficiently specific information.[4] That court should be permitted to utilize its knowledge of the cases to address the public disclosure argument in *Verizon II*.

Finally, Verizon disingenuously argues that this Court could bring Shea's action "to a prompt conclusion" by retaining jurisdiction. Motion at 3. Once the Supreme Court issues its mandate, the speediest way for this Court to move this case towards resolution is to promptly vacate the district court's judgment and remand for further proceedings consistent with *Kellogg Brown & Root Services*. The district court can then modify its prior judgment from dismissal *with* prejudice to dismissal *without* prejudice, Shea can file a new complaint, and the case can proceed on the usual track for FCA actions. If the case is contested to judgment, the losing party can present all issues in one appeal.

The course of action Verizon proposes, on the other hand, is a recipe for delay. If this Court retains jurisdiction and resolves Verizon's remaining arguments, the losing party could then petition for panel rehearing and/or rehearing en banc, followed by a petition to the Supreme Court for a writ of certiorari. Even

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[3] *Id.* at 86.

[4] Given these facts, Verizon's characterization of Shea's cause of action as "meritless," Motion at 4, is both irrelevant and unfounded.

if Shea prevails, it would be many months, if not longer, before this case is returned to the district court for dismissal of the SAC without prejudice so that Shea can do what the Supreme Court has said he is entitled to do: file a new complaint.

The district court dismissed the SAC on November 15, 2012, JA 303-22, and it entered an order on December 27, 2012 specifying that the dismissal of Shea's claims was with prejudice. JA 323-24. This case has been in appellate jurisdiction for more than two-and-a-half years. It is time for it to return to the trial court and move forward.

For these reasons, Verizon's motion should be denied and the case remanded to the district court for further proceedings consistent with *Kellogg Brown & Root Services*.[5]

[5] Verizon asks this Court to mandate that the district court address the public disclosure and Rule 9(b) issues. Motion at 4 n.3. As noted above, Shea submits that *Kellogg Brown & Root Services* mandates that the district court be directed to dismiss the SAC without prejudice. If the district court addressed the public disclosure and Rule 9(b) issues and then ruled in Shea's favor, it would still have to dismiss the SAC. It would make no sense for the district court to hear arguments about the sufficiency of the pending complaint.

Respectfully submitted,

/s/

Christopher B. Mead
Mark London
Lance Robinson
Stuart A. Berman
London & Mead
1225 19th Street, NW, Suite 320
Washington, D.C. 20036
Tel.: (202) 331-3334
cmead@londonandmead.com
Attorneys for Appellant

Dated: June 8, 2015

CERTIFICATE OF SERVICE

I certify that on June 8, 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/
Christopher B. Mead

CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 27(a)(4), counsel for appellant Stephen M. Shea submit the following certificate:

The parties to this appeal are appellant Stephen M. Shea, the Relator in the district court proceedings; the United States, which did not intervene in the district court but filed a Statement of Interest and participated in this appeal as amicus curiae supporting appellant's petition for rehearing; and appellees Cellco Partnership d/b/a Verizon Wireless, Verizon Business Network Services Inc., Verizon Federal Inc., and MCI Communications Services, Inc. d/b/a Verizon Business Services. The Chamber of Commerce of the United States of America participated as amicus curiae in support of appellees.

/s/
Christopher B. Mead

June 8, 2015