Case No. 17-7003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *et al.*,
ex rel. LAURENCE SCHNEIDER

Appellant, Relator,

vs.

J.P. MORGAN CHASE BANK, N.A., *et al.*

Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(U.S. District Judge Rosemary M. Collyer)

Civil Action No. 14-1047 (RMC)

CORRECTED APPELLANT'S BRIEF

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May 22, 2017

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Appellant Laurence Schneider states that he is a private individual and not subject to Rule 26.1.

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GLOSSARY OF ABBREVIATIONS

FCA	False Claims Act
HAMP	Home Affordable Modification Program
OCC	Office of the Comptroller of the Currency
RCV1	Recovery One Population

JURISDICTIONAL STATEMENT

This is a civil action brought under the False Claims Act, 31 U.S.C. §§ 3729–3733 ("FCA") by Appellant Laurence Schneider, acting for himself and on behalf of the United States, against Defendants , J.P. Morgan Chase Bank, N. A., J.P. Morgan Chase & Co., and Chase Home Finance LLC. The district court had subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1345 and 31 U.S.C. § 3732(a). This Court has appellate jurisdiction under 28 U.S.C. § 1291. This is an appeal from a "final appealable order" of the district court entered on December 22, 2016. ECF Doc. #119, Joint Appendix ("JA") 23. The order incorporated the opinion entered on the same date. ECF Doc. #118, JA 1-22. The Notice of Appeal was timely filed on January 5, 2017. ECF Doc. #120.

STATEMENT OF ISSUES

Issue 1

Plaintiff/Relator Schneider brought this action under the False Claims Act ("FCA") alleging that Chase had filed false certifications of compliance with the National Mortgage Settlement Agreement [hereinafter "Consent Judgment"]. The Consent Judgment requires that government parties exhaust pre-enforcement procedures prior to filing an enforcement action in the district court. Was Schneider, as a private citizen and non-party to the agreement, required to exhaust those procedures before filling his FCA action?

Issue 2

Additionally, Schneider alleged that Chase submitted two false certifications of compliance with the Home Affordable Modification Program ("HAMP") in September 2010 related to violations of the HAMP. The district court dismissed the HAMP allegations by finding that all the violations of the HAMP that Schneider alleged in his complaint occurred after 2010. Did the court err in dismissing Schneider's HAMP claims when the complaint contains a number of allegations of violations of the HAMP occurring *before* 2010?

STATEMENT OF THE CASE

Appellant/Relator Laurence Schneider initially filed this action in the U.S. District Court for the District of South Carolina on May 6, 2013, against Defendants, J.P. Morgan Chase Bank, N. A., J.P. Morgan Chase & Co., and Chase Home Finance LLC (collectively "Chase")[1] on behalf of the United States, individual states with laws similar to the FCA, and himself. ECF Doc. #1. Schneider previously provided the information on which his action was based to the United States and the state parties with equivalent FCA statutes on March 28, 2013. 2nd Am. Compl. ¶ 50. JA 40. Subsequently, after the United States declined to intervene in his action and he had served the complaint on Chase, Schneider moved to have the case transferred to the U.S. District Court for the District of Columbia. ECF Doc. #57. That motion was granted and the case was transferred on June 19, 2014. ECF Doc. #58.

With new counsel, Schneider moved to file his First Amended Complaint under seal on October 23, 2014. ECF Doc. #78. That motion was granted on November 17, 2014. ECF Doc. #79. The government again declined to intervene and the First Amended Complaint was served on Chase. ECF Doc. #96. Schneider filed his Second Amended Complaint on October 2, 2015, which

[1] Chase Home Finance LLC merged into JPMorgan Chase Bank, N.A. in 2011 and no longer exists as a separate entity.

corrected certain factual errors and added further relevant information that had come to his attention after the First Amended Complaint was filed. ECF Doc. #102, JA. 24-121. Chase then filed its motion to dismiss the Second Amended Complaint on November 12, 2015. ECF Doc. #105. This motion was fully briefed by January 15, 2016. ECF Doc. #112. The district court granted Chase's motion on December 22, 2016, [ECF Doc. #118, JA 1-22], and issued a "final appealable order" on the same date. ECF Doc. #119, JA 23. This appeal followed.

1. Schneider's original complaint sought to recover damages and civil penalties under the False Claims Act ("FCA"), 31 USC §§ 3729-3733, based on false claims made by Chase related to its performance under the National Mortgage Settlement Agreement (Consent Judgment). ECF Doc. #1. Under the Consent Judgment, Chase was required to meet certain loan servicing standards and consumer relief provisions. When Chase failed to meet those standards and conditions, it was required to make specified payments to the United States and was also subject to penalties. In order to avoid these payments and penalties, Chase filed false reports and certifications with the court appointed Monitor of the Consent Judgment. In its December 22, 2016 decision, the district court dismissed the Consent Judgment allegations with prejudice, stating that Schneider, "standing in the shoes" of the government, failed to exhaust the pre-enforcement procedures

required by the Consent Judgment for governmental parties before filing an enforcement action. ECF Doc. #118.

The exhaustion requirements cited by the court are found in Exhibit E of the Consent Judgment. They are:

> **G. Dispute Resolution Procedures.** Servicer, the Monitor, and the Monitoring Committee will engage in good faith efforts to reach agreement on the proper resolution of any dispute concerning any issue arising under this Consent Judgment, including any dispute or disagreement related to the withholding of consent, the exercise of discretion, or the denial of any application. Subject to Section J, below, in the event that a dispute cannot be resolved, Servicer, the Monitor, or the Monitoring Committee may petition the Court for resolution of the dispute. Where a provision of this agreement requires agreement, consent of, or approval of any application or action by a Party or the Monitor, such agreement, consent or approval shall not be unreasonably withheld.
>
> * * *
>
> **J. Enforcement**
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> 1. **Consent Judgment.** This Consent Judgment shall be filed in the U.S. District Court for the District of Columbia (the "Court") and shall be enforceable therein. Servicer and the Releasing Parties shall waive their rights to seek judicial review or otherwise challenge or contest in any court the validity or effectiveness of this Consent Judgment. Servicer and the Releasing Parties agree not to contest any jurisdictional facts, including the Court's authority to enter this Consent Judgment.
>
> 2. **Enforcing Authorities.** Servicer's obligations under this Consent Judgment shall be enforceable solely in the U.S. District Court for the District of Columbia. An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee. Monitor Report(s) and Quarterly Report(s) shall not be admissible into evidence by a Party to this Consent Judgment except in an action in the Court to enforce this Consent

> Judgment. In addition, unless immediate action is necessary in order to prevent irreparable and immediate harm, prior to commencing any enforcement action, a Party must provide notice to the Monitoring Committee of its intent to bring an action to enforce this Consent Judgment. The members of the Monitoring Committee shall have no more than 21 days to determine whether to bring an enforcement action. If the members of the Monitoring Committee decline to bring an enforcement action, the Party must wait 21 additional days after such a determination by the members of the Monitoring Committee before commencing an enforcement action.

Exhibit E at E14-E15, Add. 9-10.

The district court's decision presents a number of logical and practical issues including whether Schneider, as a private citizen, could have standing to challenge Chase's performance under the Consent Judgment prior to filing his FCA action. The Consent Judgment language set out above does not contemplate that a private party has that authority. The decision also raises the question of whether the Consent Judgment can supersede the FCA, especially when the Consent Judgment specifically states that it is subject to the FCA.

2. The First Amended Complaint and Second Amended Complaint added allegations that Chase violated the Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement [hereinafter "Servicer Participation Agreement"] entered into between the United States and Chase. Under the Commitment, Chase was required to meet servicing standards specified in the HAMP and provide loan modifications to its borrowers. These allegations were based on the same loan servicing practices that violated the

Consent Judgment, which had begun as early as 2000. Chase was paid various amounts for each loan modification by the Government. Chase also received additional incentive payments based on its performance. Payments were conditioned upon Chase certifying that it was in compliance with the HAMP servicing standards. Chase falsely certified that it was in compliance with those standards and created false records to support each certification. The district court dismissed the HAMP allegations without prejudice by finding that Schneider's Second Amended Complaint did not allege any violations of the HAMP prior to September 2009, when Chase submitted the alleged false certifications set out in the complaint. The court stated:

> In light of the terms set by Treasury, noncompliance with HAMP would be shown only if Chase's nonsolicitation of RCV1 loans for HAMP modification had a material effect on Chase's "ability to comply" with the HAMP requirements. Relator makes no such allegations. His arguments concerning RCV1 loans eligible for modification focus on their eligibility under the National Mortgage Settlement, not HAMP.
>
> * * *
>
> Both of these instances of alleged false claims occurred in 2010, before the National Mortgage Settlement in 2012 and, therefore, any data about RCV1 loans discharged and reported to the Monitor as a result of the National Mortgage Settlement in 2012 or later are irrelevant to the falsity of the alleged claims made under HAMP in 2010. Relator's Complaint focuses on actions during the 3-year compliance period of the National Mortgage Settlement period and provides no allegations identifying the "fact misrepresented" to the HAMP compliance monitor in 2010.

JA 18-19.

As set out in detail below, there are a number paragraphs in the Second Amended Complaint that allege that violations of the HAMP were occurring before 2010. If there is any question regarding that issue, it must be resolved in favor of the plaintiff. "Ambiguities must be resolved in favor of Plaintiff, giving him the benefit of every reasonable inference drawn from the well-pleaded facts and allegations in the complaint." *Leftwich v. Gallaudet Univ.*, 878 F. Supp. 2d 90 (D.D.C. 2012).

BACKGROUND

Appellee Chase's fraud arises out of its response to efforts by the United States and forty-nine States[2] and the District of Columbia to remedy the misconduct of Chase and other financial institutions whose actions significantly contributed to the consumer housing crisis. 2nd Am. Compl. ¶ 3, JA 28 . Chase's misconduct resulted in the issuance of improper mortgages, premature and unauthorized foreclosures, violation of service members' and other homeowners' rights and protections, the use of false and deceptive affidavits and other

[2] States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming; the Commonwealths of Kentucky, Massachusetts, Pennsylvania and Virginia, and the District of Columbia.

documents, and the waste and abuse of taxpayer funds. 2nd Am. Compl. ¶ 4, JA 28.

In March 2012, after a lengthy investigation, the U.S. Department of Justice and the States filed a complaint against Chase and the other banks responsible for the fraudulent and unfair mortgage practices. Specifically, the Government alleged that Chase, as well as other financial institutions, engaged in improper practices related to mortgage origination, mortgage servicing, and foreclosures, including, but not limited to, irresponsible and inadequate oversight of the banks' quality control standards. 2nd Am. Compl. ¶ 5, JA 28-29.

In April 2012, the district court approved a settlement between the Federal Government, the States, the Defendants and four other banks, which resulted in the Consent Judgment. The operative document of this agreement was the Consent Judgment. *See United States v. Bank of America, Corp*., 1:12-cv-00361-RMC, ECF Doc. #10 (April 4, 2012). Included in the Consent Judgment are Consumer Relief provisions, which require Chase to provide over $4 billion in consumer relief to their borrowers. This relief was to be in the form of, among other things, loan modification, loan forgiveness, and loan refinancing. Chase received "credits" towards its Consumer Relief obligations by forgiving or modifying loans it maintained as a result of complying with the procedures and requirements

contained in Exhibits D and D-1 of the Consent Judgment. 2nd Am. Compl. ¶ 7, JA 29.

The Consent Judgment also contains Servicing Standards in Exhibit A that were intended to be used as a basis for granting Consumer Relief. The Servicing Standards were tested through various established "Metrics" and were designed to improve upon the lack of quality control and communication with borrowers. Chase's compliance was overseen by an independent Monitor. 2nd Am. Compl. ¶ 8, JA 29-30.

The Servicing Standards and Consumer Relief requirements of the Consent Judgment were based on a series of Treasury Directives that were themselves designed as part of the Making Home Affordable program. The HAMP was a critical part of the Government's broad strategy to help homeowners avoid foreclosure, stabilize the country's housing market, and improve the nation's economy by setting uniform and industry wide default servicing protocols, policies and procedures for the distribution of federal and proprietary loan modification programs. 2nd Am. Compl. ¶ 9, JA 30. Both the Servicing Standards and Consumer Relief requirements of the Consent Judgment are subject to and interpreted "by the terms and provisions of Servicer Participation Agreement with the Department of Treasury." Add 3 & 7. Exhibits A and D of the Consent

Judgment contain largely identical provisions related to governing law and interpretation:

> Exhibit A
>
> **IX. GENERAL PROVISIONS, DEFINITIONS, AND IMPLEMENTATION.**
>
> A. Applicable Requirements.
>
> 1. The servicing standards and any modifications or other actions taken in accordance with the servicing standards *are expressly subject to, and shall be interpreted in accordance* with, (a) applicable federal, state and local laws, rules and regulations, including, but not limited to, any requirements of the federal banking regulators, (b) the terms of the applicable mortgage loan documents, (c) Section 201 of the Helping Families Save Their Homes Act of 2009, and (d) the terms and provisions of the Servicer Participation Agreement with the Department of Treasury. . . .

Exhibit A at A-41 (emphasis added). Add. 3.

> Exhibit D
>
> 11. Applicable Requirements
>
> The provision of consumer relief by the Servicer in accordance with this Agreement in connection with any residential mortgage loan *is expressly subject to, and shall be interpreted* in accordance with, as applicable, the terms and provisions of the Servicer Participation Agreement with the U.S. Department of Treasury. . . .

Exhibit D at 12 (emphasis added). Add. 7.

The Servicer Participation Agreement referenced in each of these provisions contains the following provision:

> (f) Servicer acknowledges that the provision of false or misleading information to Fannie Mae or Freddie Mac in connection with any of the Programs or pursuant to the Agreement may constitute a violation of: (a) Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (b) *the civil False Claims Act (3 I U.S.C. §§ 3729-3733)*.

Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement at B4 (emphasis added), JA 127.

Relator discovered, during the course of investigating Chase's servicing practices related to loans his companies[3] had previously purchased from Chase between 2006 and 2010, that Chase maintains a large set of loans outside of its primary System of Records, which is known as the Recovery One population ("RCV1"). 2nd Am. Compl. ¶ 16, JA 31-32. RCV1 was described to the Monitor by Chase as an "application" for loans that had been charged off but still part of its main System of Records. *Id.* However, once loans had been charged off by Chase, the accuracy and integrity of the information pertaining to the borrowers' accounts whose loans became part of the RCV1 population was, and continues to be, fatally and irreparably flawed. *Id.* Chase began this practice in 2000. 2nd Am. Compl. ¶¶ 188, 194, JA 72, 74. The loans in the RCV1 were not serviced according to the requirements of Federal law, the Consent Judgment, the HAMP, or any of the other

[3] S&A Capital Partners, Inc., Mortgage Resolution Servicing, LLC, and 1st Fidelity Loan Servicing, LLC (the "Schneider Entities") [2nd Am. Compl. ¶¶ 47-49 JA 39-40]

consent orders or settlements reached by Chase with any government agency prior to the Consent Judgment. 2nd Am. Compl. ¶ 16. JA 31-32. The number and original value of loans in RCV-1 was significant. Schneider estimated that it exceeded 500,000 loans. 2nd Am. Compl. ¶ 228. JA 81. Documentary evidence showed that 160,000 of these loans had a total aggregate outstanding balance of over $12 billion. 2nd Am. Compl. ¶ 225, JA 80.

Chase instituted a practice of sending unsolicited debt-forgiveness letters to pre-selected borrowers of valueless loans. 2nd Am. Compl. ¶ 17, JA 32-33. This practice did not meet the Servicing Standards set out in the Consent Judgment to establish eligibility for credits toward its Consumer Relief obligations. It also violated the Anti-Blight procedures set out in the Servicing Standards for forgiving and releasing first liens. Chase sought to take credit for valueless charged-off and third-party owned loans instead of applying the Consumer Relief procedures under the Consent Judgment and Making Home Affordable loan modification programs to properly vetted borrowers who could have applied for and benefitted from the relief and modification programs—the borrowers that were originally intended by the Government to receive the benefit of the Government's bargain with Chase. *Id.*

The purpose of this scheme was to quickly satisfy the Defendant's Consumer Relief obligations as cheaply as possible, without actually providing the

relief that Chase promised in exchange for the settlement that Chase reached with the Federal Government and the States. For example, Chase converted a pool of approximately $3 billion in second liens, whose lifetime collectability was only $4.2 million, into credits equal to $397 million dollars. 2nd Am. Compl. ¶ 214, JA 79. In a single move, Chase planned to increase its rate of return on these defaulted loans by nearly 100 times. *Id.* Since the requirement to provide $4 billion in consumer relief was intended in part as a punishment for Chase's past fraudulent and unfair mortgage practices, this result—which could only be accomplished by violating servicing and crediting provisions of the Consent Judgment—was obviously not the intent of that settlement.

In addition, Chase applied for and received HAMP incentive payments without complying with the HAMP's mandatory requirements. 2nd Am Compl. ¶ 39, JA 37. In short, Chase decreased its liabilities, increased its revenues, avoided its obligations, and provided little to no relief to consumers.

The Servicing Standards and the Consumer Relief Requirements of the Consent Judgment are set forth in Exhibits A and D of that document. 2nd Am. Compl. ¶¶ 71, 97, JA 45, 51-52. As indicated, the Consent Judgment is governed by the underlying Servicer Participation Agreement of the Making Home Affordable program, which required mandatory compliance with the Treasury Directives under the Making Home Affordable Handbook. 2nd Am. Compl. ¶ 136,

JA 59. Chase is required to demonstrate compliance with the Handbook's guidelines in the form of periodic certifications to the government. Chase ignored the requirements of Exhibits A and D of the Consent Judgment, especially with respect to the RCV1 population of loans. Therefore, Chase has been unable to service with any accuracy the charged-off loans it owns and to segregate those loans that it no longer owns. As such, any certifications of compliance with the Consent Judgment or the Servicer Participation Agreement are false claims.

Chase's false claims related to its performance under the Consent Judgment and the Home Affordable Modification Program were confirmed by two independent investigations by the U.S. Trustee Program and the Office of the Comptroller of the Currency ("OCC"). On March 3, 2015 the Department of Justice announced that the U.S. Trustee Program had entered into a $50 million settlement agreement with JP Morgan Chase. As part of the settlement, Chase acknowledged that it filed over 50,000 false payment change notices in bankruptcy courts around the country. 2nd Am. Compl. ¶ 167, JA 67-68. The false documents described in the U.S. Trustee Program settlement directly violated the servicing requirements related to bankruptcy proceedings set out in Exhibit A of the Consent Judgment. 2nd Am. Compl. ¶ 171, JA 69. As the Department of Justice noted when entering into the settlement:

> It is shocking that the conduct admitted to by Chase in this settlement, including the filing of tens of thousands of documents in court that

> never had been reviewed by the people who attested to their accuracy, continued as long as it did. . . . [Y]ears after uncovering improper mortgage servicing practices and entering into court-ordered settlements to fix flawed systems, it is deeply disturbing that a major bank would still make improper court filings and fail to provide adequate and timely notices to homeowners about payments due.

U.S. Trustee Program Reaches $50 Million Settlement with JPMorgan Chase to Protect Homeowners in Bankruptcy, *U.S. Dep't of Justice* (March 3, 2015), https://www.justice.gov/opa/pr/us-trustee-program-reaches-50-million-settlement-jpmorgan-chase-protect-homeowners-bankruptcy.

Similarly, on June 16, 2015, the OCC filed a document in bankruptcy court titled "CONSENT ORDER AMENDING THE 2011 CONSENT ORDER and 2013 AMENDMENT TO THE 2011 CONSENT ORDER" regarding Chase. 2nd Am. Compl. ¶ 169, JA 68-69. The original consent order was issued after the OCC "identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank's initiation and handling of foreclosure proceedings." As part of the original OCC consent order, Chase agreed to take specific actions to correct its servicing deficiencies. The OCC's amended consent order details the many ways in which Chase violated these commitments and as a consequence submitted false certifications when it asserted that it did abide by its commitments. *Id.*

SUMMARY OF ARGUMENT

1. By requiring Mr. Schneider to exhaust the government's pre-litigation remedies set out in the Consent Judgment before filing his FCA action, the district court created conditions that no relator could possibly meet. The court stated that Schneider "stood in the shoes" of the government and therefore was required to follow any requirement imposed on the government. The problem with this logic is that prior to filing his FCA complaint, Schneider had no standing to challenge Chase's fraud and violations of the Consent Judgment since he was not a party to that agreement. Therefore, there was no statutory or contractual vehicle that would have permitted Schneider to challenge Chase's performance under the Consent Judgment apart from the FCA. For this reason alone, the district court's dismissal of Schneider's action must be reversed.

Moreover, there is no authority requiring a relator or the government to exhaust contractual or administrative remedies before filing an FCA action. This is not an action to enforce the contractual terms of the Consent Judgment. Instead, it is an action alleging false certifications of compliance with that agreement. When the allegations involve fraud, the FCA is the appropriate vehicle for seeking redress. This is particularly true when, as here, the Consent Judgment is governed by another agreement that specifically acknowledges that an FCA action may be brought to remedy fraud. Further, at the same time that Chase's performance was

being monitored under the Consent Judgment, two separate government agencies brought enforcement actions for the same servicing violations covered by the Consent Judgment without following the pre-litigation procedures outlined in that agreement. All of these factors demonstrate that the district court's decision requiring exhaustion of contractual remedies before the filing of an FCA case is unprecedented, quite extraordinary and beyond any such requirement imposed by any other court.

2. The district court simply misread the complaint when it asserted that Schneider did not allege any facts concerning violations of the Home Affordable Modification Program occurring prior to 2010 that would have made the year 2010 claims of compliance false. The complaint clearly states that the defective servicing practices associated with RCV1 began in the year 2000 and that the mortgages Schneider purchased between 2006 and 2010 "were saturated with violations of past and present regulations, statutes and other governmental requirements for first and second federally related home mortgage loans." 2nd Am. Compl. ¶ 10, JA 30. In the context of the complaint, these allegations fairly assert that Chase was violating the HAMP before 2010, which, therefore, made its certifications of compliance with the HAMP in 2010 false.

ARGUMENT

I. STANDARD OF REVIEW

Courts of Appeals review *de novo* a district court's ruling on a Rule 12(b)(6) motion to dismiss. *Kowal v. MCI Commc'ns Corp*. 16 F.3d 1271, 1276. (D.C. Cir. 1994). "The complaint is construed liberally in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Id. See also Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004).

II. SCHNEIDER WAS NOT REQUIRED TO FOLLOW THE PRE-LITIGATION PROCEDURES OF THE CONSENT JUDGMENT BEFORE HE FILED HIS FCA CASE.

A. The Relator Does Not Stand in the Shoes of the Government for all Purposes and Does So Only After the Government Has Declined to Intervene.

The district court stated that Schneider was required "to have exhausted all remedies the Federal Government would have been required to exhaust prior to filing his suit." Opinion at 13, JA 13. This position was premised on the finding in other cases that the relator "stands is the shoes of the federal government as a plaintiff." *Id.* (citing *United States ex rel. Morgan v. Sci. Application Int'l Co.*, 604 F. Supp. 2d 245, 249 (D.D.C. 2009)). This logic, as applied to this case, is faulty for a number of reasons.

The rule that the Relator stands in the shoes of the government applies only *after* the government has declined to intervene in the FCA action. *See United*

States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993) ("If the government declines to prosecute the alleged wrongdoer, the qui tam plaintiff effectively stands in the shoes of the government."). This rule was applicable in *Morgan* because the government declined to intervene in his case. Also in *Morgan*, the relator was not represented by counsel, and since a lay person is not qualified to represent the United States, *see Rockefeller v. Westinghouse Elec. Co.*, 274 F.Supp.2d 10, 16 (D.D.C. 2003), *aff'd*, No. 03–7120, 2004 WL 180264 (D.C. Cir. Jan. 21, 2004), the court found that the relator may not proceed *pro se*. *Morgan*, 604 F. Supp. 2d at 249.

In other circumstances the rule does not apply. For example, relators have only 30 days to appeal dismissals, not the 60 days that the government is given. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 929 (2009). If the rule that relators stand in the shoes of the government were applied to all cases, then they would have the full 60 days to file an appeal. Further, if the government does intervene in the case, it has "the primary responsibility for prosecuting the action," and is not bound by any action of the relator. 31 U.S.C. § 3730(c)(1). The government may settle the case over the relator's objection whether or not it intervenes. 31 U.S.C. § 3730(c)(2)(B). The relator cannot dismiss or settle the action without the government's consent. 31 U.S.C. § 3730(c)(3). Thus, the rule

that the relator stands in the shoes of the government is limited by circumstances and only after the government has declined to intervene in the action.

B. Prior to Filing His FCA Action Schneider Did Not Have Standing to Raise Objections Under the Consent Judgment.

As demonstrated, the rule that the relator stands in the shoes of the government applies only after the relator files his case and the government declines to intervene. Before he filed his FCA case, Schneider could not have stood in the shoes of the government since he had no standing to challenge Chase's compliance with the Consent Judgment. A relator's standing extends only to the legal actions permitted by the FCA. *See United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 451-52 (S.D.N.Y. 2001) (holding that a relator lacks standing to bring common law claims of fraud, mistake of fact, and unjust enrichment); *United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F. Supp. 2d 141, 149 (D. Mass. 2000) (same); *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (2002) (holding that a plaintiff must suffer an injury in fact in order to satisfy one of the three elements for the "constitutional minimum of standing. . . ."). Except for the FCA, there is no procedure for Schneider, as a private citizen, to challenge Chase's compliance with the Consent Judgment.

The district court described the exhaustion requirements that a party was required to follow before filing an action as:

> Under the National Mortgage Settlement, a party wishing to dispute compliance by a signatory bank was required to follow explicit steps: (1) give notice to the allegedly noncompliant bank, the Monitor, and the Monitoring Committee; and (2) "engage in good faith efforts to reach agreement on the proper resolution of any dispute." Consent Judgment, Ex. E at E-14; *see also id*. at E-15.

Opinion at 13, JA 13.

The procedures cited by the district court do not permit Schneider's participation. Paragraph G of Exhibit E addressing dispute resolution procedures states only that the "Servicer, the Monitor, and the Monitoring Committee will engage in good faith efforts to reach agreement on the proper resolution of any dispute concerning any issue arising under this Consent Judgment." App. 9. It does not refer to any private party who may have a grievance against a Servicer such as Chase. Therefore, this provision does not require or permit, by its terms, a private party such as Schneider to engage in discussions with the bank to reach a resolution of his allegations of fraud, or suggest that a private citizen may take over the role of the federal government on the monitoring committee. If Schneider truly stepped into the shoes of the government, he would have been given a seat on the monitoring committee. Obviously, such an action is not contemplated by the Consent Judgment or the FCA.

Moreover, Paragraph G of Exhibit E does not specifically refer to the federal government, or suggest that the federal government, apart from the Monitoring Committee, has an obligation to engage in "good faith efforts" to resolve disputes.

Therefore, not only was the district court in error in suggesting that the relator had to engage in dispute resolution with Chase before he filed his action, the district court was also in error when it stated that the federal government must seek resolution of disputes before it could file an enforcement action.

Similarly, Paragraph J of Exhibit J states only that "an enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee," and that "a Party must provide notice to the Monitoring Committee of its intent to bring an action to enforce this Consent Judgment." Add. 10. Obviously, Schneider was not a party to the Consent Judgment before or after he filed his complaint. Certainly, there is no legal rationale that could make him a party to the Consent Judgment before he filed his complaint. "It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc*. 534 U.S. 298, 294 (2002). Because Schneider had no relationship with the government before he filed his FCA complaint, it was impossible for him to "stand in the shoes" of the government before the complaint was filed. Therefore, there is nothing in the Consent Judgment that would require Schneider to give notice to the Monitoring Committee under Paragraph J before filing his action.

C. The Servicer Participation Agreement Signed by Chase Makes the Consent Judgment Subject to the FCA.

The district court's ruling dismisses the fact that the Consent Judgment and the HAMP are subject to the Servicer Participation Agreement [Opinion 13-14, JA 13-14], and that the Servicer Participation Agreement specifically provides that any false claims made in connection with the Servicer Participation Agreement are subject to the FCA. It states:

> Servicer acknowledges that the provision of false or misleading information to Fannie Mae or Freddie Mac in connection with any of the Programs or pursuant to the Agreement may constitute a violation of: (a) Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (b) *the civil False Claims Act (3 I U.S.C. §§ 3729-3733).*

Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement at B-4, Ex. 1 (emphasis added), JA 127.

Based on this agreement, there should be no question that any false claims made by Chase in connection with compliance with either the Consent Judgment or the HAMP are subject to the FCA.

D. Procedural Requirements of Contracts and Regulations Cannot Supersede FCA Requirements.

Before this case, no court has ever held that relators, or the government, must exhaust remedies before filing an FCA action. *See United States ex rel. Spay v. CVS Caremark Corp*., No. 009-4672, 2013 WL 1755214, (E.D. Pa. April 24, 2013) ("Defendants have not cited—and this Court's own research cannot

unearth—any case or statutory provision imposing any exhaustion of administrative remedies requirement on plaintiffs bringing FCA claims, either in the Medicare context or any other context.").

Even though there are no cases that support an exhaustion requirement before the filing of an FCA action regarding the performance under a contract, there are numerous cases that acknowledge the different remedies available to the government to deal with mere contract violations on one hand and fraudulent representations involving contract performance on the other. An early example is *United States v. Williams*, 162 F. Supp. 903 (M.D. Ala. 1957), which held that a final decision by the Armed Services Board of Contract Appeals does not preclude the Government from bringing an action under the False Claims Act based upon the same matters. *Id.* at 905.

Courts have recognized that the FCA is the appropriate remedy for fraud as opposed to mere contract violations and provides different remedies than those available under a contract. *See United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (The FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts.") (citations omitted); *see also United States ex rel. Wilson v. Kellogg Brown & Root, Co.*, 525 F.3d 370, 383 (4th Cir. 2008), ("[B]reach of contract claims are not the same as fraudulent conduct claims, and the normal run of contractual disputes are not cognizable

under the False Claims Act."); *Steury*, 625 F.3d at 268 (explaining the "crucial distinction between punitive FCA liability and ordinary breaches of contract") (citing *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 680 (5th Cir. 2003)). And further, noting the essential difference between contract claims and FCA claims, the Fourth Circuit has noted that "[i]f every dispute involving contractual performance were to be transformed into a *qui tam* FCA suit, the prospect of litigation in government contracting would literally have no end." *Kellogg*, 525 F.3d at 373. The District Court for the District of Columbia expounded on the difference between the FCA and a contract dispute, while recognizing the underlying policy considerations of the FCA:

> To blur the distinction between fraud and breach of contract, then, is to contradict the purpose of the statute. "Allowing [the FCA] to be used in run-of-the-mill contract disagreements . . . would burden, not help, the contracting process, thereby driving up costs for the government and, by extension, the American public."

United States v. Kellogg Brown & Root Servs., Inc., 800 F.Supp.2d 143, 155 (D.D.C. 2011) (quoting *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Constr. Co.*, 612 F.3d 724, 726–27 (4th Cir. 2010).

Here, Schneider is not attempting to rectify a breach of contract, or obtain compliance with the Consent Judgment, which would be the object of an action filed under Paragraph J of Exhibit E. Instead, he filed an action alleging fraudulent assertions of compliance with the requirements of the contract by Chase. The

distinction is important, because if the government were proceeding under a contract enforcement action, it would have known that Chase was not in compliance based on the work of the Monitor and would only be attempting to secure that compliance. Indeed, the requirements of Paragraph J of Exhibit E apply only to "enforcement actions under this Consent Judgment." Ex. E at E15, Add. 10. They do not apply to actions under the FCA. An FCA action is appropriate here because Chase made false claims of compliance that were not contemplated by the Consent Judgment.

As noted, the alternative dispute mechanism that the district court focuses on is limited to disputes that the Monitor or the Monitoring Committee raises based on Chase's known practices. It does not deal with false claims and fraud of which the Monitor or the Monitoring Committee are unaware. It is important to remember that "the objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made'. . . This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) (internal quotation marks and citation omitted). The district court's holding is similar to the argument that, when faced with an FCA action, the

court should defer to an agency's primary jurisdiction. Most courts that have confronted a primary jurisdiction argument have rejected it. *See United States ex rel. Wall v. Circle C Const., LLC*, 697 F.3d 345, 353 (6th Cir. 2012). "This is particularly true where the gravamen of the Complaint is that defendants defrauded the Government by falsely certifying compliance with governing administrative regulations." *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 340, 353 (S.D.N.Y.2004). Thus, even if the Consent Judgment—through the Servicer Participation Agreement—did not provide for FCA enforcement, this action would still be proper.

E. The Government's Separate Enforcement Actions Regarding Chase's Violations of the Bankruptcy and Foreclosure Servicing Standards Demonstrate that the Government Did Not Have to Exhaust the Remedies Contained in Exhibit E Before it Brought Those Actions.

As noted, both the U.S. Trustee Program and the Office of the Comptroller of the Currency conducted enforcement actions and issued penalties involving servicing practices that violated the servicing standards of the Consent Judgment. 2nd Am. Compl. ¶¶ 167 -169, JA 67-68. Both of those settlements sprang from actions that did not reference the Consent Judgment. There was no suggestion that the monitoring committee was involved in those actions. Since Chase entered into these settlements, it obviously did not object based on the view that the government's sole remedies were under Exhibit E of the Consent Judgment. Therefore, these settlements represent adequate precedent, that the provisions

under Exhibit E of the Consent Judgment are not the government's sole remedies for addressing fraudulent servicing practices.

F. Giving Chase Notice of Schneider's Allegations Before the Filing of the Complaint Would Defeat the Purposes of the Seal and Potentially Impact First-to-File Requirements and Public Disclosure Bar.

The exhaustion requirements of the Consent Judgment are completely at odds with the procedures of the FCA. Giving Chase notice of a potential FCA action against it would defeat the purpose of the seal requirement, and the first-to-file rule and create public disclosure issues.

The seal requirement was inserted into the current statute in 1986 to assist the government. As noted by the Supreme Court in *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*:

> At the time, "perhaps the most serious problem plaguing effective enforcement" of the FCA was "a lack of resources on the part of Federal enforcement agencies." [S. Rep. No. 99–345, at 7 (1986)]. The Senate Committee Report indicates that the seal provision was meant to allay the Government's concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation. *Id.* at 24.

137 S. Ct. 436, 443 (2017).

This benefit to the government would be lost if the relator were required to disclose his allegations to the defendant before he filed his action. Obviously, if a defendant learns that it may be subject to an investigation before it begins, the defendant can take steps to clean up the documents that may confirm the fraud and instruct potential witnesses how to respond to certain questions. Therefore, the

district court's suggestion that the relator inform the defendant before filing an FCA action against it is completely antithetical to the purposes of the seal requirement.

In addition, disclosing the existence of his action prior to filing his complaint could expose Schneider to public disclosure and first-to-file issues. For example, the defendant could arrange for a story in the press that discusses the same issues that would be addressed in the complaint. Such an action would be the basis for a motion to dismiss on public disclosure grounds. No relator would want to be put in the position of having to litigate that issue. Also, a delay could give another relator an opportunity to file a similar action in another district court that would effectively bar the relator that first raised the issue.

In short, the court's requirement that a relator exhaust the government's remedies would be detrimental to the purposes of the statute and create unnecessary uncertainties at the beginning of the case.

G. Schneider Effectively Gave the Monitoring Committee and Chase Notice of His Allegations Before the Commencement of Litigation.

Even though Schneider was not obligated to follow the pre-litigation exhaustion requirements of Exhibit E, by following the requirements of the FCA he effectively accomplished the same result. Schneider notified the Department of Justice and States with FCA-like statutes more than 39 days prior to filing his action. 2nd Am. Compl. ¶ 50, JA 40. The Monitoring Committee is composed of

some of the States that received notice of Schneider's FCA complaint. ECF Doc. # 11. Under Ex. E, Paragraph J of the Consent Judgment this is all of the notice required of the federal government before commencing an enforcement action. Under Paragraph J, the federal government was not required to notify Chase prior to filling an enforcement action. However, Chase was effectively notified of Schneider's allegations when the complaint was partially unsealed and given to Chase by the government in November 2013 [ECF Doc. # 20] well before the complaint was formally served and litigation commenced in May 2014. ECF Doc. # 56. During this time, Chase had the opportunity to explain to the government why it was not in violation of the Consent Judgment. Therefore, as a practical matter, the Monitoring Committee and Chase received all of the notice required by the Consent Judgment before Schneider was able to commence litigation.

III. SCHNEIDER ALLEGED SERVICING PRACTICES BY CHASE THAT VIOLATED THE HOME AFFORDABLE MODIFICATION PROGRAM PRIOR TO 2010.

The concluding sentence of the Home Affordable Modification Program section of the district court's opinion states: "Without facts specific to HAMP and allegations regarding the materiality of any misrepresentations concerning Chase's HAMP-specific compliance obligation, Relator's FCA claims under HAMP must be dismissed." Opinion at 19, JA 19. Schneider alleged that Chase made two false

certifications in September 2010. 2nd Am. Compl. ¶¶ 303-304, JA 94. The court stated:

> In light of the terms set by Treasury, noncompliance with HAMP would be shown only if Chase's nonsolicitation of RCV1 loans for HAMP modification had a material effect on Chase's "ability to comply" with the Making Home Affordable program requirements. Relator makes no such allegations. His arguments concerning RCV1 loans eligible for modification focus on their eligibility under the National Mortgage Settlement, not HAMP.
>
> * * *
>
> Both of these instances of alleged false claims occurred in 2010, before the National Mortgage Settlement in 2012 and, therefore, any data about RCV1 loans discharged and reported to the Monitor as a result of the National Mortgage Settlement in 2012 or later are irrelevant to the falsity of the alleged claims made under HAMP in 2010. Relator's Complaint focuses on actions during the 3-year compliance period of the National Mortgage Settlement period and provides no allegations identifying the "fact misrepresented" to the HAMP compliance monitor in 2010.

Opinion at 18-19, JA 18-19.

The district court's decision is both legally and factually erroneous. First, the district court violated the rule that if there is any question regarding a pleading issue, it must be resolved in favor of the plaintiff. "Ambiguities must be resolved in favor of Plaintiff, giving him the benefit of every reasonable inference drawn from the well-pleaded facts and allegations in the complaint." *Leftwich v. Gallaudet Univ.*, 878 F. Supp. 2d 81, 90 (D.D.C. 2012).

Second, the district court's narrow reading of the Second Amended Complaint ignores a number of paragraphs in the Second Amended Complaint that

allege, when read together, that the violations of the HAMP long predated September 2010. For example:

> 10. Before the Consent Judgment was entered into, Chase sold a significant amount of its mortgage obligations to individual investors. Between 2006 and 2010, the Relator bought the rights to thousands of mortgages owned and serviced by Chase. Unbeknownst to the Relator, these mortgages were saturated with violations of past and present regulations, statutes and other governmental requirements for first and second federally related home mortgage loans. JA 30.
>
> 39. As explained in more detail below, Chase must certify that it is in compliance with the [Servicer Participation Agreement] and the [Making Home Affordable] program and must strictly adhere to the guidelines and procedures issued by the Treasury with respect to the programs outlined in the Service Schedules ("Program Guidelines"). The Program Guidelines pursuant to the Treasury Directives are cataloged in the Making Home Affordable Handbook ("Handbook"). None of the loans that Chase and EMC identified and submitted for payment against their respective Participation Caps were eligible for the incentive payment, because neither Chase nor EMC complied with the [Servicer Program Agreement] and Handbook guidelines. Specifically, all loan modification programs must be made available to all borrowers, who must then apply to determine eligibility. Hundreds of thousands of borrowers' mortgage loan accounts in the RCV1 system of records were not offered and thereby unable to be considered for all eligible loss mitigation options (even though they likely could have qualified). Due to the omission of the RCV1 population for any loss mitigation options, none of the modifications that Chase provided qualified for HAMP incentives. Thus, Chase does not qualify for any of the HAMP incentives for which it applied and received funds. JA 37.
>
> 173. In short, the RCV1-SOR is a loose collection of once compliant loans that Chase has relegated to the No Man's Land of the bank where these mortgage loans and the associated borrowers are ignored to the point where compliance with any regulatory body is impossible. JA 70.

> 188. The practice of porting loans out of the primary [system of records] and into the RCV1 [system of records] began as early as 2000 when JP Morgan & Company merged with Chase Manhattan Corporation. JA 72.
>
> 194. Internal documents of Chase demonstrate that the RCV1 contains mortgage loans whose borrowers have had no contact with Chase since as far back as 2000, more than a decade before such loans were then vetted for potential inclusion within the Consumer Relief portions of the Consent Judgment. JA 194.
>
> These paragraphs and others demonstrate that the Second Amended

Complaint alleged that material violations of the HAMP occurred before 2010. Indeed, the whole discussion of the defective servicing practices of the loans in RCV-1 at Paragraphs 172-199 of the Second Amended Complaint [JA 70-75] indicates that those practices were longstanding, dating back to the year 2000. Chase's practice of not servicing the loans contained RCV1, including the failure to offer loan modifications to those borrowers, made it impossible for Chase to comply with the requirements of the HAMP from that date.

> As stated in the Second Amended Complaint at Paragraph 20:
>
> The mere existence of RCV1 makes all claims by Chase that it complied with the Servicing Standards and the Consumer Relief Requirements of the Consent Judgment false. Likewise, the existence of RCV1 makes all claims by Chase that it complied with the SPA of the MHA program false. JA 34.

Thus, Schneider's allegations that the certifications Chase made in 2010 were false were sufficiently pled so that the district court should have given Schneider the benefit of the inference that Chase was in violation of the HAMP prior to that date.

Schneider filed the First Amended Complaint and Second Amended Complaint specifically because he realized that the fraud he discovered related the Chase's servicing practices affected the loans that he purchased between 2006 and 2010, and therefore, were in violation of the HAMP prior to the time when Chase filed its false certifications of compliance. This allegation is contained in paragraph 10 of the Second Amended Complaint, set out above. This allegation alone should satisfy the court that Schneider alleged violations of the HAMP that would have made the certifications filed in 2010 false.

CONCLUSION

For the foregoing reasons, Appellant Laurence Schneider, respectfully requests that the Court:

1. Reverse and remand the district court's decision that Schneider was required to exhaust the pre-litigation procedures of Exhibit E of the Consent Judgment before he filed his FCA action;

2. Reverse and remand the district court's finding that Schneider failed to allege material violations of the Home Affordable Modification Program occurring before 2010. Alternatively, Schneider requests that the Court remand with instructions permitting him to amend his complaint to clarify his allegations regarding violations of the Home Affordable Modification Program occurring before 2010.

Dated: May 22, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32 (1) in that the brief contains **8,348** words excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: May 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2017 an electronic copy of *Appellant's Opening Brief*, was served via CM/ECF system to all parties of record.

Dated: May 22, 2017

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