UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA *ex rel.* *Paul J. Solomon,* Plaintiffs,	)	CIVIL ACTION NO. 3:12-CV-4495-D
LOCKHEED MARTIN CORP. and NORTHROP GRUMMAN SYSTEMS CORP., Defendants.	)	

NORTHROP GRUMMAN SYSTEMS CORP.'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

LOCKE LORD LLP
George E. Bowles (SBN 02743300)
C. Scott Jones (SBN 24012922)
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
E: gbowles@lockelord.com; sjones@lockelord.com
T: (214) 740-8498 (direct)
F: (214) 756-8498 (direct)

ROGERS JOSEPH O'DONNELL
Neil H. O'Donnell (*Pro Hac Vice*)
California Bar No. 57928
Dennis J. Callahan (*Pro Hac Vice*)
California Bar No. 250854
Jeffery M. Chiow (*Pro Hac Vice*)
District of Columbia Bar No. 989802
311 California Street, 10th Floor
San Francisco, CA 94104
E: nho@rjo.com; djc@rjo.com; jmc@rjo.com
T: (415) 956-2828
F: (415) 956-6457

Attorneys for NORTHROP GRUMMAN SYSTEMS CORP.

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INTRODUCTION

Relator's Response apparently mistakes the purpose of this Motion. Defendant Northrop Grumman Corporation's Motion solely challenges Relator's right to invoke the jurisdiction of this Court in light of the public disclosure of the allegations or transactions underlying his claims. Nonetheless, Relator devotes much of his brief to arguing his position on the merits, often with heated rhetoric. Thus, he impugns Northrop Grumman because its Motion did not address Relator's claim that the company had engaged in unlawful activity (Response at 1-2) although disputing those claims is no part of the jurisdictional motion. Relator touts his EVMS expertise (*id.* at 10-12) and the importance of his role as the EVMS monitor on the F-35 (*id.* at 12-17), equally irrelevant here. And he describes at length his view of how Northrop Grumman violated EVMS rules and regulations (*id.* 3-7, 9-10), none of which is in dispute for purposes of this Motion.

These diversions are likely because Relator has no good answer on the two issues that are relevant here. The first question is whether there had been public disclosure of Relator's allegations of fraudulent inducement and award fee inflation before he brought this action. Relator does not have a convincing response as to the disclosure of the heart of his fraudulent inducement claim – that Defendants misled the government into continuing the F-35 Program by providing what the government believed was the EVMS-required "most likely" estimate when it was actually a more aggressive "should cost" estimate. Instead, Relator complicates even more his already multi-part application of the *Springfield* formula (*see id.* at 25), incorrectly claiming that elements of the scheme that are irrelevant to fraudulent inducement also had to have been publicly disclosed. As to the award fee claim, Relator unconvincingly claims to have discovered a hidden link between the publicly disclosed deficiencies in Defendants' EVM systems and inflated award fees when that connection was apparent to anyone who reviewed the public November 2007 DCMA EVMS Compliance Report and the equally available SDD Contract.

The second question is whether Relator is an original source of the information on which his allegations are based and voluntarily provided that information to the government before

filing suit, and so escapes the effect of their prior public disclosure. Relator joined the F-35 Program well after the events underlying his fraudulent inducement claim. And, for all of Mr. Solomon's touting of his role as the EVMS monitor on F-35, he does not counter the key point that he was required to report his findings directly to the government under Joint Northrop Grumman-DCMA EVMS Surveillance Plans. Relator, therefore, did not "voluntarily provide" the government his information, whether as to fraudulent inducement or award fee. Relator's supposed "smoking gun" Memorandum of Agreement (MOA) adds no compelling fact to either the fraudulent inducement or award fee claims, and so his disclosure of it to the government four years after it came into his possession does not bestow "original source" status.

I. THERE WAS PUBLIC DISCLOSURE THAT DEFENDANTS' EAC3 PROJECTIONS WERE NOT BASED ON "MOST LIKELY" ESTIMATES

A. Relator's Formulation Of The Fraudulent Inducement Is Needlessly Complex

In an attempt to rebut Northrop Grumman's evidence, Relator redefines his fraudulent inducement claim to include additional elements that are extraneous to the purported fraud. Resp. 24.[1] The result is a convoluted application of the *Springfield* formula that virtually no public disclosure could ever meet. *See* Resp. 25.[2] But the fraudulent inducement claim is simple to state: Rather than using required "most likely" projections for its 2005 Replan estimates, without saying so Defendants' EAC3 reflected an "unrealistic 'should cost' number." The government accepted this EAC as a most likely cost projection, and, therefore, issued a contract modification to increase the price and continue the contract that would it not have agreed to had the contractors used honest estimates. FAC ¶¶77, 82. This is the gist of Relator's statement of

[1] Northrop Grumman will cite Relator's brief in Response to the present Motion (Doc. 91) as "Resp." and Relator's Appendix (Docs. 92-97) as "Rel. Appx." Northrop Grumman's initial brief (Doc. 83) and Appendix (Docs. 84-85) will be "NG Mem." and "NG Appx." Lockheed Martin's initial brief (Doc. 79) and Appendix (Docs. 80-81) will be "LM Mem." and "LM Appx."

[2] The *Springfield* formula is from *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 654 (D.C. Cir. 1994). It is the formula Northrop Grumman and Relator have used in determining whether an alleged FCA fraud is "based upon" public disclosures. *See* NG Mem. 8-9; Resp. 23-24.

element (1) of his *Springfield* formula (Resp. 25), and it fairly matches Northrop Grumman's formulation. *See* NG Mem. 9.

Relator attempts to save his action from the public disclosure bar by recasting that basic fraud so that it has three additional pieces. But, Relator cannot elude the public disclosure bar by restating his fraudulent inducement claim to avoid the public statements identified by Defendants, because the inquiry focuses on the "essential elements" of the claim. *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009); *U.S. ex rel. Jamison v. McKesson Corp.*, 649 F.3d at 322, 329 (5th Cir. 2011) (observing that not every fact supporting the relator's allegations need be publicly disclosed to trigger the jurisdictional bar, so long as there is enough information to "alert[] the government to … the fraud").

Two of Relator's added *Springfield* formula elements have nothing to do with whether the government was fraudulently induced. Relator contends in his element (2) that Defendants falsely represented that they had realistic and reasonably achievable plans to meet the lower EAC3 projection, and in his element (4) that Defendants agreed to use management reserve funds for the improper purpose of covering up the inevitable cost overruns that would occur. Resp. 25.[3] But the question now before the Court is whether there had been public disclosures of the key facts as to fraudulent inducement. If Defendants had publicly disclosed that their EAC3 was an aggressive "should cost" estimate, then the government could not have been fraudulently induced based on a belief it was the "most likely" cost, as Relator so forcefully argues it should have been.

It does not matter to the fraudulent inducement theory whether Defendants had good, bad or no plans to make up the difference between the most likely and the more aggressive estimates. In any of these cases, the "should cost" EAC3 was not based on the most likely cost and,

[3] In his response, Relator has added a new allegation as element (3) – that Defendants' statements at the time at the time of the Replan persuaded the government to disregard the CAIG and GAO estimates – to his *Springfield* formulation. This element did not appear in his Response to Northrop Grumman's Motion to Dismiss. *Compare* Doc. 56 at 14, *with* Resp. 25. In any event, Northrop Grumman shows below in Section I.C. that this new found element does not withstand scrutiny.

therefore, in Relator's eyes was misleadingly low. Either the government was or was not enticed to issue the modification at the lower, "false" EAC3, when it would not have been at the true, higher number. The specifics of why that number was too low, *e.g.*, a purportedly secret MOA to misuse management reserve as Relator maintains, is of no relevance to whether Defendants fraudulently induced the government. The key allegation is that the government believed the contractors had provided a most likely cost and relied on that belief in going forward when, in fact, it had been presented a lower "should cost" estimate.

B. Relator Cannot Defeat The Public Disclosure Of Defendants' "Should-Cost" EAC3 Basis By Recounting Multiple Sources Of The "Most Likely" Requirement

Northrop Grumman's initial brief showed that public disclosures revealed the "should cost" nature of the contractors' EAC, and how Defendants reached it, in virtually identical language to that used in the MOA, as alleged in the FAC. *See* NG. Mem. 12 (chart), 13 (discussion of 2005 F-35 Year in Review). That comparison is as follows:

> **The FAC states**, [1] "[i]n recognition of the affordability considerations facing the JSF program," [2] Northrop Grumman's EAC3 was based on a "should perform target" [3] that incorporated "substantial efficiencies in a number of areas beyond otherwise normal expectations" [4] and thereby lowered its EAC3 by $233 million. FAC ¶¶71, 73, 77.
>
> **The public disclosures state** that [1] "to keep the F-35 affordable ," [2] the program's "top 14 suppliers used "'should cost' targets" [3] that incorporated "unprecedented efficiency factors" [4] and thereby "removed $700 million from original proposals." *See* NG Mem. 12-13 and sources cited therein.[4]

Relator acknowledges the publication of the contractors' use of "should cost" estimates in EAC3. Resp. 26; *see* Resp. 32 n. 22. But he argues that it was not a "public disclosure" under the FCA because published statements would not have put a reasonable government official on notice that Defendants would not adhere to the regulatory and contractual obligations to provide

[4] Northrop Grumman also showed that the total $700 million reduction from all F-35 subcontractors was in line with a $233 million reduction from Northrop Grumman alone. NG Mem. 14.

EVMS compliant "most likely" estimates. Resp. 28.[5] To make the point, Relator details many of the places the "most likely" standard appears, including in Lockheed Martin's "Command Media" (Resp. 26-27), the EVMS clause of DFARS 252.234-7001 in the SDD Contract (Resp. 31), the contract's cost performance report form that has separate "most likely" and "best" and "worst case" EAC blocks (Resp. 31), the DoD Replan guidelines in the Over the Target Baseline Handbook and in the EVM Implementation Guide (Resp. 32), and memoranda by then-Undersecretary and current Secretary of Defense Ashton Carter, one of which stated that "should cost" estimates are not to be used "'for official program reporting, to set acquisition baselines, or to set budgets'." Resp. 32-33 (quoting April 22, 2011 Carter memo at Rel. Appx. 682-693).

Relator errs in what he takes from this evidence. He argues that given all of the places the "most likely" requirement is stated "no reasonable government official would have assumed or imagined" that Defendants' EAC3 was based on a "should cost" target (which could only be met by diverting budget from management reserve) "rather than a realistic, EVMS-compliant 'most likely' calculation." Resp. 33. In fact, Relator's evidence supports the opposite conclusion. With the backdrop of the "most likely" estimating requirement stated in so many places, the announcement that the Defendants instead used "should cost" projections based on "unprecedented efficienc[ies]" in their EAC3 should have been particularly striking. The public description of a process so different from the norm would have alerted government officials familiar with all of the pronouncements on which Relator relies that something out of the ordinary was occurring.[6] As the Response illustrates,[7] "should cost" is a widely recognized cost

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[5] For example, Relator argues that the 2005 F-35 Year-in-Review statement that the subcontractors removed $700 million from their initial proposals would have been understood by government officials as indicating reductions made before the contractors reached their final "most likely" EAC. Resp. 30. Relator's "divide and conquer" approach ignores that the 2005 F-35 Year-in-Review would have been read in the context of previous announcements that the contractors used "should cost" estimates that incorporated "unprecedented efficiency factors."

[6] While it is a point the Court need not reach here, the reason there was no uproar upon the publication of the 2004 F-35 Year-in-Review is because Defendants had been briefing the JPO about their estimating methodology and assumptions throughout the Replan process. Happel Decl. ¶9, LM Appx. 508, 509 & 519. Thus, the publication of the contractors "should cost" EAC3 basis was no surprise to those JPO and contractor employees involved in the Replan.

estimating concept in government contracting that necessarily produces estimates that are lower than "most likely." The announced deviation from "most likely" is something no reasonable government official would have missed.

C. There Is No Evidence Defendants Persuaded The Government To Disregard The CAIG And GAO Replan Estimates

In what he considers the "most significant" indication that the government would have assumed that Defendants' EAC3 was a "most likely" estimate (Resp. 33), Relator asserts that public statements by Defendants persuaded the government to reject the higher cost estimates of GAO and the CAIG. Resp. 25 (element (3) of Relator's *Springfield* formulation). This argument fails legally and factually.

At Response page 37, Relator cites a single case, *U.S. ex rel. Heath v. Dallas/Fort Worth Intern. Airport Bd.,* 2004 WL 1197483 (N.D. Tex. May 28, 2004), which he argues holds that public statements by contractors that deny misconduct may cancel out public disclosures of the fraud alleged. *Heath* is not even close to the present case. There, the public disclosures were that small amounts of pollutants were escaping from the defendant, but that it was working with state and federal authorities to stop polluting altogether. *Id.* at *6. The complaint, by contrast, alleged that large amounts of pollutants were escaping and that the defendant lied to the government about its remedial efforts. *Id.* In terms of the much discussed *Springfield* formula, there was no public disclosure because the published state of facts (X) of minor polluting and strong remedial efforts did not match the alleged true state of facts (Y) of great polluting and false reports of remedial efforts. *Id.*

Here, unlike *Heath*, the published basis of the contractors' EAC3 estimating approach (X) – "'should cost' targets" using "unprecedented efficiency" assumptions – matched the

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[7] Both Carter memos cited by Relator describe the "should cost" methodology, and distinguish it from the "most likely" or "will cost" estimating approach. *See* Resp. 32 (citing Aug. 24, 2011, Carter memo at NG Appx. 34); Resp. 33 (citing April 22, 2011 Carter memo at Rel. Appx. 683). For example, the August 24, 2011, memo states: "The should-cost approach challenges us to do our best to find specific ways to beat … cost projections funded in our budgets (i.e. 'will-cost'), when we find sensible opportunities to do so."). NG Appx. 34.

estimating basis as reflected in the MOA which Relator alleges represented the true state of facts (Y). The match between the public disclosures and the allegations preclude jurisdiction. Whether the government could or could not properly waive these clear regulatory and contractual requirements (Resp. 5-6) does not change the result, however an ultimate deviation from EVMS rules is characterized.

Additionally, Relator's attempt to counter there being public disclosures misconstrues critical elements of the facts he cites. The Lockheed Martin statements on April 8, 2005, that it believed the project would come in "on budget," and on April 27, 2005, disagreeing with the GAO and CAIG estimates, were published *after* the DoD spokeswoman's criticism of the GAO estimate on March 7, 2005. Thus, those statements could not have contributed to the DoD criticism. *See* Resp. 8-9, 33.[8] As for the CAIG estimate, as Relator notes, Defense Undersecretary Wynne had it for months before he approved the Replan in June 2005. Resp. 9.[9] Wynne's memo to Secretary of Defense Rumsfeld on April 22, 2005, illustrates that Wynne did not disregard the CAIG estimate and that he could not have been persuaded one way or another by Lockheed Martin statements about it to the press. *See* Resp. 25. Wynne noted that the JPO and CAIG estimates diverged, informed Rumsfeld that he had asked JPO and CAIG to work through the differences, and would have CAIG update their estimate after a February 2006 Critical Design Review, *i.e.* about 10 months later. NG Appx. 67. Wynne stated that he would follow the CAIG estimating updates "closely." NG Appx. 67. This memo makes clear that the ultimate DoD decision maker on the Replan believed that there was a significant chance the much higher CAIG estimate would prove correct, but that he was committed to the F-35 program even if that were so. *See* NG Appx. 68 (noting that the Replan award was scheduled for award in July 2005).

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[8] Likewise, the November 7, 2005, statement from a Lockheed Martin spokesman could not have induced the government to approve the Replan, because this statement came *after* the October 5, 2005, modification. *See* Resp. 8-9, 33-34.

[9] According to Relator, while the administrative task of modifying the contract came later, the sign-off by Undersecretary of Defense Wynn in June 2005 was the last substantive approval of the Replan. FAC ¶79.

D. The MOA Does Not Rescue Relator's Fraudulent Inducement Claim

Relator contends that the MOA reveals "critical facts" about the fraudulent inducement that do not appear in the public disclosures identified by Northrop Grumman. Resp. 34. But those supposed "critical facts" offer nothing new to the claim. Relator's first supposed MOA critical facts are that Northrop Grumman's EAC was a "should perform" target, lower than the "most likely" projected cost, as found in the MOA. Resp. 34 (first and second bullets of list). These are not new. As already addressed, six years before Relator provided the MOA to the government, Defendants publicly disclosed that they used "should cost" estimates, not "most likely" ones, and that the "should cost" projections incorporated "unprecedented efficiency factors." *See* NG Mem. 10-12 and sources cited therein (showing that the 2004 F-35 Year-in-Review was posted to the JPO website no later than Nov. 2, 2005); Solomon Decl. ¶91, Rel. Appx. 36 (Relator first provided the MOA to the government on Nov. 22, 2011).

Relator next argues that the MOA contains the "critical fact" that Defendants agreed in the MOA to cover with management reserve the overruns that would result from the "highly optimistic" efficiency assumptions that produced the "should cost" projection. Resp. 35 (third and fourth bullets of list). But none of these items address the key premise of the fraudulent inducement claim – that Defendants falsely enticed the government to modify the SDD Contract through EAC3 projections that were lower than the required "most likely" estimates. They only address the mechanics of how Defendants would address those efficiency assumptions Northrop Grumman did not attain.

The management reserve provision in the MOA also does not rescue Relator's fraudulent inducement claim for the independent and additional reason that this plan to cover overruns with management reserve was also publicly disclosed in the 2007 DCMA EVMS Compliance Report. This Report, which was based largely on Relator's surveillance reports to DCMA (Solomon

Decl. ¶¶80-81, Rel. Appx. 33-34), was issued four years before Relator first provided the MOA to the government. *See* Solomon Decl. ¶91, Rel. Appx. 36.[10]

Relator proudly admits that many of his surveillance reports to DCMA documented the misuse of management reserve to cover cost overruns – the approach planned in the MOA. Relator states that during his surveillance reviews, and soon after the Replan was approved, "Defendants began implementing the scheme described in the MOA." Resp. 35. Relator contends that at management's behest or indifference, cost account managers (CAMs) began to artificially match their cost estimates to the "official EAC." Resp. 35. And when the "substantial performance efficiencies" underlying the "should cost" estimate in the MOA did not materialize, Relator continues, Defendants diverted management reserve to reduce the overruns. Resp. 35. Relator included all of these EVMS violations, which he terms "accounting tricks" (Resp. 36), in his EVMS surveillance reports to DCMA. *See* Resp. 35-36 and sources cited in notes 25, 26, 28. So by the time Relator turned over the MOA to the government in 2011, he had long since provided documentation of the actual use of management reserve in a manner that had only been agreed to in the MOA.

Unsurprisingly, since the DCMA team clearly had the joint EVMS surveillance reports that Relator authored, the DCMA EVMS Compliance Report found the "same patterns of Management Reserve abuse, cost report falsification, and other EVMS violations throughout the JSF program that were very similar to the violations" Relator had previously reported to DCMA. Solomon Decl. ¶81, Rel. Appx. 33. In other words, these violations were publicly disclosed in DCMA's Report. For example, DCMA found Lockheed Martin had inappropriately stored management reserve in empty work packages, and had used the resulting underruns to offset supplier overruns. NG Appx. 89. The result was that as of Lockheed Martin's June 2007 Cost Performance Report (CPR), its suppliers projected overruns of $130 million, but only $5 million

[10] Relator's last supposed MOA point does not concern the MOA at all. Resp. 35 (fifth bullet of list). It refers to a published Lockheed Martin statement that Relator argued caused the government to disregard the CAIG and GAO estimates in favor of Defendants' estimate. *See* Resp. 8, 25, 28.

of it was reflected in the CPR. NG Appx. 89. This is the same behavior that Relator touts the MOA as showing the Defendants planned – using management reserve to cover costs not included in Northrop Grumman's EAC3. FAC ¶77.

Relator is also wrong to the extent he argues that his provision of the MOA to the government first revealed that "Defendants had agreed from the outset to understate their cost estimates and cover the expected overruns by diverting funds from Management Reserve." Resp. 36-37 (citing Solomon Decl. ¶¶83, 91).[11] This *planned* misuse of management reserve was also reported by DCMA. DCMA found that during the "Over-Target-Baseline-Process," a.k.a. the Replan that included EAC 3 (*see* Resp. 6), Lockheed Martin identified $300 million of work scope that it initially stated was held in management reserve. NG Appx. 88. During the DCMA compliance review, Lockheed Martin could not substantiate how this work was incorporated or controlled in the Performance Measurement Baseline, and it could not locate the work in a cost account, or Work Breakdown Structure (WBS). NG Appx. 88; *see* FAC ¶ 107 (describing WBS). NG Appx. 88. This DCMA finding – that in the Replan Lockheed Martin planned to use management reserve to cover work in cost accounts whose budgets were understated for the anticipated amount of work needed – mirrors the management reserve scheme Relator wrongly contends he first brought to light by giving the MOA to the government in 2011.

In sum, Northrop Grumman's proffered public disclosures contain the allegations or transactions on which the fraudulent inducement claim is based, which shift the burden to Relator to produce evidence raising a genuine issue of material fact as to either the public disclosure of Defendants' EAC3 estimating basis or as to whether Relator qualifies as an original source of the fraudulent inducement claim. *See* Doc. 74, Order at 4 (citing *Jamison* 649 F.3d at 327). Relator's attempted addition of other elements to the key components of the fraudulent

[11] The "understated estimates" portion of this assertion is the "should cost" versus "most likely" issue.

inducement claim are beside the point, and, in any event, were themselves publicly disclosed before Relator brought the MOA to the government's attention.

Nor is Relator an "original source" of his fraudulent inducement claim. Relator pins his "original source" status as to fraudulent inducement to his "discovery" of the MOA, unspecified "related documents," and on observations he made as Northrop Grumman's F-35 surveillance monitor. Resp. 43. Because the MOA does not provide any new, undisclosed "critical fact," it follows that the MOA cannot be the means of becoming an "original source." And, as Northrop Grumman explained in its initial brief (NG Mem. 34-47) and further discusses *infra* Section II.B, Relator is not an "original source" by virtue of his work as Northrop Grumman's F-35 EVMS surveillance monitor under joint Northrop Grumman-DCMA EVMS Surveillance Plans. Because Relator was obliged to investigate Northrop Grumman's EVMS practices and to report his findings directly to the DCMA under those Plans, his EVMS surveillance reports were not "voluntarily provided" to the government under the controlling FCA "original source" definition.

II. THE AWARD FEE CLAIMS FAIL THE PUBLIC DISCLOSURE JURISDICTIONAL BAR

Relator does not seriously dispute that his award fee allegations were publicly disclosed in the 2007 DCMA EVMS Compliance Report. He merely asserts, in about half a page, that if the link between management reserve misuse and award fee were obvious, DCMA would have made the connection. Resp. 40. In this Section, Northrop Grumman demonstrates that, contrary to Relator's assertions, the claimed missing link could not have been lost on DCMA, and that it was provided by the SDD Contract that the JPO published on its public information website.

The real dispute between Northrop Grumman and Relator as to his award fee claims concerns whether Relator may be deemed an "original source" of his award fee allegations. More specifically, the issue is whether Relator "voluntarily provided" to the government the information on which his allegations are based – his EVMS surveillance reports. The key to Northrop Grumman's argument that Relator did not "voluntarily provide" the reports to the government is that throughout his tenure on the F-35 program Relator operated pursuant to Joint

Northrop Grumman-DCMA EVMS Surveillance Plans (Joint EVMS Plans).[12] Under these Joint EVMS Plans Relator occupied a special and unusual position. He was required to investigate with DCMA and to report directly to DCMA on Northrop Grumman's EVMS practices and compliance, including on any actual or potential problem areas and concerns. *See, e.g.,* NG Appx. 124 (2006 Plan), NG Appx. 153 (2007 Plan). Relator did so in the form of numerous "EVMS surveillance reports" that both he and his DCMA counterpart signed. *See* NG Appx. 182-312; Rel. Appx. 257-271.

Northrop Grumman's opening brief (NG Mem. 35-41) set forth the details of the Joint EVMS Plans requiring Relator to coordinate with DCAA and DCMA officials to "jointly conduct the EVMS surveillance sessions." NG Mem. 38; NG Appx. 145 (2006 Plan), NG Appx. 172 (2007 Plan). Based on these investigations, Relator and his DCMA counterpart were to issue reports to Northrop Grumman and DCMA "to outline findings and areas of concern" in Northrop Grumman's EVMS practices. NG Mem. at 38; NG Appx. 145 (2006 Plan), NG Appx. 172 (2007 Plan). Moreover, the 2007 Plan required Relator to focus his efforts on the issues that are central to his award fee claims, such as misuse of management reserve, improper retroactive changes to scopes of work and budgets, and other EVMS practices that could distort Northrop Grumman's true cost performance. *See* NG Mem. 38-40; NG Appx. 172-176 (2007 Plan).

Relator's Response does not dispute that he was required to investigate Northrop Grumman's EVMS practices and to report his findings to the government. Instead, Relator touts how superbly he did his job by, among other things, setting the Joint EVMS Plans' agenda and surveillance priorities, identifying potential problems on his own, and drafting findings. Resp. 12-13; Rel. Decl. ¶38, Rel. Appx. 13.

Relator misses the point of the voluntariness inquiry. So what if the "joint" nature of the Northrop Grumman-DCMA EVMS surveillance was "largely a formality" (Resp. at 13) and Solomon did the lion's share of the work, and did it expertly? Nothing Relator has argued, much

[12] The 2006 and 2007 Plans (NG Appx. 121, 150) were appended to the Declaration of Relator's former supervisor, then-EVMS Manager Billie Finn (NG Appx. 116-120).

less put forth as evidence, undermines the critical fact to the voluntariness determination – that his EVMS investigations and reports to DCMA were required of him under Northrop Grumman's Joint EVMS Plans with the government.

A. The Link Between Defendants' EVMS Practices, Including Their Misuse Of Management Reserve, And Their Entitlement To Award Fees Was Publicly Disclosed

Relator unsuccessfully attempts to avoid the public disclosure of the connection between the contractors' reported cost performance information, including information about their use of management reserve, and their entitlement to award fees. *See* Resp. 40. As an initial matter, there is no dispute that the 2007 DCMA EVMS Compliance Report disclosed the EVMS violations that comprise a main element of Relator's award fee claim. The DCMA Compliance Report announced that Lockheed Martin failed to follow and apply EVMS standards to such a degree that the contractor's EVMS did not serve its intended purpose of providing useful program performance data that would allow the government to anticipate and mitigate program risks. NG Appx. 77; *see* NG Appx. 93, 95-96. Among a host of EVMS non-compliances, DCMA found that Lockheed Martin "[u]sed management reserve to alter internal and subcontract performance levels and overruns." NG Appx. 77. This is the crux of Relator's award fee claim. *See* FAC ¶2 (alleging that the contractors improperly diverted management reserve to cover cost overruns, and thereby "present[ed] a misleadingly rosy picture of their performance on measures of cost control" to obtain higher performance-based award fees to which they were entitled).

Relator's response is that he "uncovered" a nonobvious link between management reserve misuse and award fee entitlement, and he notes that the 2007 DCMA Compliance Report did not make the connection. Resp. 40. As shown below, the public version of the SDD Contract disclosed the link Relator wrongly asserts he provided. This is so with respect to both EVMS cost performance reports generally, and misuse of management reserve in particular.

1. Under the SDD Contract Award Fee Schedule, EVMS Practices and Cost Performance Are Factors in Determining Award Fees

The JPO public information website contains a model SDD Contract that states, at Section H-3, the criteria for earning award fee. *See* NG Mem. at 33, and contract excerpts at NG Appx. 107-115. This provision states that the government "will evaluate and provided a rating" for each of four Award Fee Categories, and will then determine a single rating "which will be related to the percent of award fee paid." NG. Appx. 109.

Northrop Grumman previously explained that the Award Fee Schedule includes several criteria that directly depend on Lockheed Martin's success in providing accurate cost performance information and in maintaining a compliant EVMS that is integrated with other management systems. NG Mem. at 33-34; *see* NG Appx. 111-115 (Award Fee Schedule adjectival definitions for each of the four award fee categories). For example, the "Award Fee Category" of "Developmental Cost Control" emphasizes "EVMS Implementation" and includes in the adjectival definition of this Category "cost control and reporting," "cost performance reports," and "seamless[] integrat[ion] of an EVMS with other management systems." NG Appx. 109, 115; Rel. Appx. 198.[13] All of these areas were identified in the DCMA Compliance Report as having serious problems. *See e.g.*, NG Appx. 77, 78, 90-91, 95-96.

Tellingly, in his Declaration, Relator states his review of the SDD Contract led him to understand that cost performance was a "significant factor" in determining award fees. Solomon Decl. ¶76, Rel. Appx. 31. Specifically, Relator states that he relied on the SDD Contract award fee provisions at Section H-3 to make this connection.[14] *See id.;* Rel. Appx. 197-199, 213. But, as shown, those provisions and the adjectival definitions were publicly available, and they are

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[13] Except for the irrelevant markings in the margins, the JPO-published Section H-3 (NG Appx. 108-110) appears to be identical to Relator's version (Rel. Appx. 197-199). And the one page of adjectival definitions Relator appends (Rel. Appx. 213) is also the same as the one posted on the JPO website (NG Appx. 111).

[14] Simply bringing one's expertise to bear on public information, such as the DCMA and SDD Contract, does not undo a public disclosure. *Fried*, 527 F.3d at 443.

explicit and clear that EVMS practices and cost performance are factors in determining the contractors' entitlement to award fee.

2. The SDD Contract Links Management Reserve Practices to Award Fees

The publicly available SDD Contract also disclosed how the contractors' use of management reserve could impact their entitlement to award fees. Thus, it did not take an "insider" to deduce from DCMA's findings that the contractors may have claimed award fees to which they were not entitled through their misuse of management reserve.

First, the SDD Contract establishes as an award fee criterion "surveillance and monitoring of the compliance and maintenance of key subcontractors' EVMS." NG Appx. 113. Given the centrality of the proper use of management reserve to a compliant EVMS, as revealed through DCMA's many management reserve-related findings, this description alone is sufficient to link management reserve use to award fee entitlement.

Second, the public SDD Contract links management reserve use to award fee entitlement through the required "cost control and reporting system," including Cost Performance Reports (CPRs). NG Appx. 115. In this regard, the FAC states that under the SDD Contract's Contract Data Requirements List (CDRL), Lockheed Martin is required to submit monthly CPRs to the JPO. FAC ¶44. One of the required CPRs incorporates Data Item Description DI-MGMT-81466,[15] which directs contractors as to the proper uses and reporting of management reserve, and states that management reserve "shall not be used to offset cumulative cost variances." FAC ¶48; *see* Rel. Appx. 205 (DI-MGMT-81466, Section 2.2.4.6). Citing multiple provisions of the Award Fee Schedule, the FAC then shows that the SDD Contract ties award fee in part to the

[15] The Data Item Descriptions, such as DI-MGMT-81466, are published Department of Defense standards that define contractors' data reporting requirements. *See* Defense Standardization Program, Frequently Asked Questions about Data Item Descriptions, *available at* https://www.dsp.dla.mil/APP_UIL/displayPage.aspx?action=content&accounttype=displayHTML&contentid=22. The CDRL that incorporates DI-MGMT-81446 is appended to the Response at Rel. Appx. 174-175 and is available on the JPO website at http://www.jsf.mil/downloads ("Program Documents/Call for Improvement/Model_Contract_Exhibit_A.pdf," pp. J-A-2, 3 (PDF pages 2-3 of 14)).

contractors' reported cost performance information, as contained in the CPRs. FAC ¶¶53-59; *see* FAC Section V.A.4 at 17 ("Defendants' Award Fee Was Substantially Based on Cost Performance Information that Lockheed Reported to the Government").

In sum, the DCMA EVMS Compliance Report detailed many of the contractors' failures to meet the SDD Contract's management reserve requirements. That these failures would be reflected in erroneous or misleading CPRs, and might wrongly increase the contractors' award fees, is evident in the SDD Contract published by the JPO. *See* NG Appx. 115.

3. The DCMA EVMS Compliance Report's Failure to Discuss Award Fees Is Irrelevant to the Public Disclosure Analysis

Relator's conjecture as to why the DCMA EVMS Compliance Report did not discuss the potential impact of the misuse of management reserve on award fee (*see* Resp. 40) has no bearing on the public disclosure analysis here. What matters is whether the findings in combination with the SDD Contract revealed the award fee fraud alleged in the FAC. *Jamison*, 649 F.3d at 331 (public disclosure occurred where one could have fashioned the complaint allegations by "synthesizing" the disclosures into allegations of a fraudulent scheme). Nor does Relator's suppositions as to why a Northrop Grumman manager would deny a link between management reserve misuse and award fees in a private conversation inform whether his lawsuit is based upon information in the public domain. *See* Resp. 40; Solomon Decl. ¶76, Rel. Appx. 31.[16]

Relator wrongly argues that he has raised a material factual dispute as to whether the link between management reserve misuse and award fees was obvious enough to be considered disclosed in the published SDD Contract. The reason the DCMA EVMS Compliance Report did not explicitly make the connection cannot have been because the connection was lost on the

[16] As discussed above with respect to fraudulent inducement (*see* Section I.D. *supra*), here too the MOA adds nothing of substance to Relator's award fee claims. Assume Relator were correct that the MOA shows Defendants' intention to commit award fee fraud by misusing management reserve to improve their cost performance measures. *See* Resp. 39-40. That would not change that the fact it had been disclosed well before both this suit and Relator's disclosure of the MOA that Defendants had actually engaged in the conduct Relator alleges constitutes the fraud.

auditors, as Relator suggests. Resp. 40. The DCMA compliance review team had several members from the JPO. *See* NG Appx. 81. And, as shown in Relator's own evidence, shortly before DCMA conducted the audit the JPO had raised specific concerns about how the misuse of management reserve might distort the contractors' entitlement to award fees. Rel. Appx. 550, 552.[17] Relator's supposition that the link was not known cannot overcome the evidence of record that it was.

It makes sense that DCMA's compliance review of Lockheed Martin's EVMS would not address the potential effect on award fees of the misuse of management reserve found on the F-35 SDD Contract. DCMA had the larger concern of ensuring that Lockheed Martin's EVMS practices be useful in "managing large, complex DoD acquisition programs." NG Appx. 83. Those included not just the alleged overall $1.5 trillion F-35 program (*see* FAC ¶4), but also the F-16 and F-22 programs. *See* NG Appx. 83. The myriad potential implications of DCMA's findings were the direct concern of the various contracting agencies of the programs under review, not of DCMA. But Relator's speculation that only he understood the link between management reserve and award fee cannot stand in the face of clear evidence that the link was both publicly disclosed and well understood by the JPO.

B. Relator's EVMS Surveillance Reports Were Not "Voluntarily Provided" To The Government Under The Original Source Analysis

As Northrop Grumman and Relator both have recognized, most cases that have barred FCA actions because the relator's provision of his claim information to the government was determined to be non-voluntary have involved federal employees who are required to report suspected contractor wrongdoing. *See* NG Mem. at 42-43; Resp. at 46-47. No case has addressed the factual scenario presented here, where under the terms of his employer's agreement with the government, a contractor's employee was required to investigate his

[17] In the November 29, 2006 JPO Award Fee Period 11 Focus Letter to Lockheed Martin regarding the "ground rules" for the JPO's award fee evaluation, the JPO specified that the uses of management reserve would be in accordance with Lockheed Martin's approved EVMS and the intent of the EVMS standard used by DCMA. Rel. Appx. 550, 552.

employer's practices and to provide his findings directly to the government. The unique facts here compel the conclusion that Relator's EVMS surveillance reports to DCMA – the information on which his fraud allegations are based – were not provided to the government voluntarily under the original source definition. This application of the voluntariness inquiry is limited to the circumstances here, and will have no far-reaching implications for future cases.[18]

1. Relator Was Employed to Detect, and Report to the Government, EVMS Non-Compliance, Including Acts that Could Constitute Fraud

Relator asserts that the Fifth Circuit "has denied original-source status based on non-voluntariness only to government-employed relators who were 'employed specifically' to investigate and report fraud." Resp. 44 (quoting *U.S. ex rel. Little v. Shell Exp. & Prod. Co.,* 690 F.3d 282, 294 (5th Cir. 2012)). The would-be relators in *Little* were auditors for an agency of the Department of the Interior, "[p]art of [whose] mission was to uncover theft or fraud" under government royalty programs. *Id.* at 284. There was no dispute that relators raised their allegations that Shell shorted the government on its royalty obligations "during the course of their official duties" and that reporting these findings was a job requirement. *Id.*

From *Little,* Relator argues that his provision of EVMS surveillance reports to the government must be deemed voluntary because "the detection and investigation of fraud was not the purpose" of his employment as Northrop Grumman's F-35 EVMS monitor. Resp. 45. To establish that his duties did not include detecting and reporting fraud, Relator relies on a Northrop Grumman "Sector Procedure" that describes his duties as monitoring the EVMS for compliance and "planning and conducting EVM surveillance." Resp. 45 (quoting Rel. Appx. 285). But this document also provides that where (as here) a "Joint NGC/DCMA EVM Surveillance Agreement is in place, EVMS surveillance is conducted as a teaming effort between" the government and the contractor, and that the surveillance "results are documented

[18] The "original source" definition has been in effect since the 1986 FCA amendments, and no party to this action has identified a court decision that considers the "voluntarily provided" language in a situation of a private sector relator who operated under a duty to make findings about and to report on his employer's cost reporting compliance directly to the government.

and shared in a statement of adequacy, concerns, findings, actions and resolutions." Rel. Appx. 284. As Northrop Grumman has shown (NG Mem. 36-38), the Northrop Grumman/DCMA Joint EVMS Surveillance Plans appointed Relator to be Northrop Grumman's EVMS Focal Point during the relevant period, and were the basis on which his EVMS surveillance investigations were conducted. They required Relator to detect and report Northrop Grumman's EVMS non-compliances, including those he suspected involved fraud, directly to the government. NG Mem. 36; Finn Decl. ¶6, NG Appx. 118.

Without evidence Relator disputes his former manager, Ms. Finn, who testified that the Joint EVMS Surveillance Plans required Relator to identify and report to the government actual or potential fraud he found while conducting EVMS surveillance. Resp. 45; Finn Decl. ¶6, NG Appx. 118. Relator wrongly asserts, "Even assuming Relator would have been required to report fraud if he happened to discover it in the course of his duties, Northrop offers no evidence to suggest that he was 'employed specifically' to look for fraud." Resp. 45.

Relator's argument is belied by his Declaration, his surveillance reports and other documents he appends to his Response, and, indeed, the very premise of his award fee fraud allegations. Relator does not deny that his EVMS compliance investigations and surveillance reports to the DCMA were required by his role as Northrop Grumman's EVMS Focal Point under Joint EVMS Surveillance Plans. He touts his EVMS expertise (Rel. Decl. ¶¶8-13, Rel. Appx. 3-4), and describes at great length his leadership role and autonomy in planning and conducting his EVMS surveillance. Rel. Decl. ¶¶34-39, Rel. Appx. 11-13. But the important takeaway from Relator's Declaration is that his EVMS investigations and reports to the government always accorded with his responsibilities under the Joint Surveillance Plans.

Moreover, Relator does not contest Ms. Finn's statement that Relator's role as "Northrop Grumman's F-35 EVMS Monitor was his full-time job, and was the entire reason he was on the F-35 Program." Finn Decl. ¶7, NG Appx. 118. Thus, there is no question that Relator was "employed specifically" to investigate and report on Northrop Grumman's EVMS practices and

compliance to Northrop Grumman and DCMA. Did Relator's duties include "detecting fraud"? Emphatically, yes.

It is impossible for Relator to maintain that he was not employed to detect fraud, on the one hand, while on the other contending that the core output of his job – his EVMS surveillance reports – details chapter and verse of the award fee fraud alleged in the FAC. In page after page of his Declaration Relator marches through his EVMS reports that recount how Northrop Grumman misused management reserve in Award Fee Periods 10, 11, and 12 to artificially improve their cost performance. Solomon Decl. ¶¶54-73, Rel. Appx. 20-30. In setting up this chronicle, Relator states, "In the course of my surveillance duties on the JSF program, I uncovered numerous instances in which Lockheed and Northrop misused Management Reserve budget to falsely improve Northrop's cost performance numbers, and, in turn, Lockheed's program-wide cost performance." Solomon Decl. ¶54, Rel. Appx. 20-21. Simply put, findings of repeated misuse of budgets to "falsely improve cost performance" is an allegation of fraud.[19]

Finally, Relator's internal ethics complaint, submitted years before he understood that his job duties jeopardized the voluntariness with which he provided his EVMS reports to the government, reported, among other things, that Northrop Grumman's EVMS "inaccuracies were the result of a persistent, *intentional* pattern of behavior to circumvent the company's system of internal controls"; that the "*amount of award fee was based on the misleading information* in the [Cost Performance Reports]" where "overruns were understated"; that the contractors "distorted cost performance" through misuse of management reserve and other non-compliant EVMS practices; and that Defendants' F-35 program managers "collude[ed]" to "*knowingly suppress[] the most likely EAC* by many techniques that were non-compliant with the EVMS." Rel. Appx.

[19] Indeed, the 2007 Joint Plan required Relator and his DCMA counterpart to investigate the purported management reserve fraud that is at the core of Relator's claims. *See* NG Mem. 38-40; NG Appx. 174 (2007 Joint Plan requiring Relator and DCMA to determine "if there [were] recurring problems in applying" program procedures in the area of management reserve). The absence of the word "fraud" in describing the "recurring problems" did not undercut his obligation to report the very conduct on which this *qui tam* action now relies.

564-565 (emphasis added). Relator made no mistake that he detected and reported this fraud as part of his role in the Joint DCMA/Northrop Grumman EVMS Monitoring Plan:

> *I have evidence of these ethical violations because I perform an internal audit function called Joint EVMS Surveillance.* The surveillance is *jointly conducted with the Defense Contract Management Agency (DCMA).* One purpose of the surveillance is to determine if the contractor is compliant with EVMS policies, procedures, and internal controls.

Rel. Appx. 565 (emphasis added). Relator's support for his ethics complaint's allegation that the contractors "intentionally" provided the government "misleading information" to boost award fees included approximately 20 findings excerpted in the Joint EVMS surveillance reports he provided to DCMA. Rel. Appx. 565, 570-598 (appendices to ethics complaint). Relator's own evidence thus shows that, as required by the Joint Northrop Grumman-DCMA agreements, he investigated Northrop Grumman's EVMS practices and compliance, and reported his findings, including those that allegedly amounted to fraud, to DCMA.

In short, under the Joint Plans, Relator was required to provide to the government the information on which he bases his FCA complaint.

2. That Relator Was Employed by the Contractor and Not by the Government Makes No Difference in these Circumstances

Although he was employed by the contractor, in all relevant respects Relator's obligations were identical to those of his DCMA counterpart with whom he conducted joint EVMS surveillance and reporting to the government.[20]

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[20] Relator greatly overstates the impact of a determination that his EVMS surveillance reports were not voluntarily provided to the government by arguing that such a finding "would make a mockery of the purpose behind the False Claims Act" and would "immunize [Northrop Grumman] against any potential whistleblower action." Resp. 47. Both of the cases that Relator contends stand for the proposition that private employees with fraud detection and reporting obligations to the government may be original sources under the FCA (*see* Resp. 48) are easily distinguishable, and provide no support for a person in Solomon's unusual joint position. To the extent the claims adjusters in *U.S. ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457 (5th Cir. 2015), were obliged to detect and report insurance fraud (the case does not mention this duty), that duty to report was to State Farm, not to the government. In the original source discussion in *Heath*, 2004 WL 1197483, the court explicitly stated that because the parties did not dispute voluntariness, its "inquiry [was] limited to whether Relator ha[d] 'direct and independent' knowledge. …". *Id.* at *7. Thus, *Heath* had nothing to say about the issue here.

Due to his obligations under the Joint Surveillance Plans to investigate and report to the government on Northrop Grumman's EVMS practices and compliance, Relator is more a *de facto* federal employee than a "paradigmatic whistleblowing insider," as argued in the Response. *See* Resp. 47. This observation is reinforced by DCMA's EVMS Standard Surveillance Instruction (DCMA SSI), which mandates, at Section 2.1, that Relator be insulated from Northrop Grumman's chain of command. *See* http://www.dcma.mil/policy/210/EVMS.pdf ("To ensure objective findings, contractor team members must be independent of the management chain of the programs they are responsible for surveying.").

This conclusion does not undermine the FCA or effect a widespread "immunization" of Northrop Grumman from potential whistleblower actions. *See* Resp. 47. On a nearly $4 billion portion of the F-35 SDD Program that employees hundreds, perhaps thousands, of Northrop Grumman personnel, the Joint Plans name a single Northrop Grumman Focal Point (Relator) who is required to provide his EVMS findings directly to the government. *See* NG Appx. 141, 170. Nothing about a determination by this Court that Relator's EVMS reports were not voluntarily provided to DCMA under the FCA will in any way prevent the remainder of the scores of Northrop Grumman engineers, technicians, cost account managers, internal accountants and auditors, and human resource personnel on the program from being recognized as original sources under the FCA.

3. The Policies that Animate Findings of Non-Voluntariness Apply Equally to Relator

There can be no legitimate dispute that Relator's EVMS surveillance investigation counterpart and report co-signer, the DCMA F-35 Program EVMS Monitor (*see* NG Appx. 141, 170), falls squarely within the class of federal employees to whom the settled case law denies original source status. It makes no sense that the same EVMS surveillance reports provided to DCMA under the same Joint Plans would be deemed voluntarily provided by the contractor's EVMS monitor, but not voluntarily provided by his federal counterpart.

First, the cases reason that employees who are already compensated for investigating and reporting potential fraud to the government should not need the prospect of a share of FCA lawsuit proceeds as an incentive to their jobs. *See U.S. ex rel. Fine v. Chevron*, 72 F.3d 740, 743-44 (9th Cir. 1995) (en banc); *id.* at 746 (Kozinski, J., concurring); *U.S. ex rel. Foust v. Group Hosp'n and Med. Servs.*, 26 F. Supp. 2d 60, 73 (D. D.C. 1998); *Wercinski v. IBM Corp.*, 982 F. Supp. 449, 462 (S.D. Tex. 1997) (noting that allowing those who have a pre-existing duty to provide to the government the information on which their FCA claims are based to be original sources "would allow them to be paid twice for the same work"). Here, Relator does not dispute that his sole purpose on the F-35 program was to serve as Northrop Grumman's EVMS Monitor under the Joint Surveillance Plans, which included an obligation to report findings on his employer's EVMS compliance, including use of management reserve, directly to DCMA.

Second, the cases scrupulously avoid endorsing situations where one who is required to investigate and report suspected fraud to the government would have a temptation "to keep information of contractor misconduct to themselves, rather than provide it to the government, so that they may pursue a qui tam action and obtain a percentage of the government's recovery." *Wercinski*, 982 F. Supp. at 462; *see Fine*, 72 F.3d at 748 (Trott, J., concurring); *id.* at 749 (Hawkins, J., concurring). By Relator's account, DCMA relied heavily on Relator to provide honest, unvarnished reports on Northrop Grumman's EVMS practices, cost performance measures, and proper use and recording of budget information (including management reserve).[21]

4. Relator's Post-Employment Disclosures Do Not Rescue His Claims

Relator attempts to salvage his claims by arguing that he provided his information to the government after he was no longer the F-35 EVMS monitor, and thus had no duty to report EVMS violations to the government. Resp. 48-49. Relator points to his internal ethics

[21] The need for objectivity is why DCMA DCMA SSI Standard 2.1 protected Relator from the influence of Northrop Grumman's F-35 management. Eliminating the prospect of a relator's recovery in a *qui tam* suit further ensures that his findings provide the government notice of any actual or potential problems, without holding such notice back. NG. Appx. 124, 153.

complaint (Resp. 48), his letters to Congress, and to submissions he made to GAO's FraudNet hotline. Resp. 19. In the leading case of *Fine*, however, the would-be Relator similarly tried, but failed, to save his claims by noting that after he resigned from the position that required him to report fraud to the government he reported his allegations to GAO and to U.S. Senators and Representatives. *See* Br. of Appellant Fine, 1993 WL 13103214, at *5 (9th Cir.,Aug. 17, 1993).[22] In any event, Relator's ethics complaint was an *internal* report, not one to the government, and his March 2008 letter to Congressman Waxman occurred when Relator was still an EVMS monitor, albeit on another program. *See* Solomon Decl. ¶7, Rel. Appx. 2.[23]

Similarly, it was not until November 22, 2011 that Relator first provided the MOA – the supposed "smoking gun" (Resp. 34) – to the government. Solomon Decl. ¶91, Rel. Appx. 36. That is *over four years* after Relator claims that Mr. Baker gave him a copy of it. Solomon Decl. ¶85, Rel. Appx. 34-35. *See U.S. ex rel. Babalola v. Sharma*, 746 F.3d 157, 166 (5th Cir. 2014) (Dennis, J., concurring) (stating that the intent of the FCA is to encourage those "'who are aware of fraud against the government to bring such information forward *at the earliest possible time* and to discourage persons with relevant information from remaining silent'") (quoting *United States v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999) (emphasis in *Babalola*). In any event, just as the MOA fails to add anything essential to the fraudulent inducement claim, the MOA adds nothing to the award fee claims that had not been publicly disclosed four years before. By November 2011, it had long been revealed that Defendants were allegedly non-compliant with EVMS standards in many respects, including by misusing management reserve, and that these EVMS violations improperly could have increased their award fees.

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[22] The Court should not follow the unreported case upon which Relator relies (Resp. 39), *U.S. ex rel. Griffith v. Conn*, 2015 WL 779047 (E.D. Ky. Feb. 24, 2015). The reasoning of *Fine* and its progeny – that the government in effect "owns" the information of persons who are required to report fraud to it, and that denying original source status to such people eliminates the temptation not to disclose information of fraud for later use in a *qui tam* suit – apply equally to someone who repeats after his resignation the same information he was required to provide to the government during his employment.

[23] Relator's other reports to the government occurred in late 2011 (Resp. 19), or at least four years after the complained-of award fee fraud occurred, and long after the 2007 DCMA EVMS Compliance Report had been issued. *See* Solomon Decl. ¶54, Rel. Appx. 20-21.

III. THE CONSPIRACY COUNT CANNOT SURVIVE DISMISSAL OF THE UNDERLYING COUNTS

Relator does not dispute that the FAC's Conspiracy Count IV is derivative of the fraudulent inducement (Count I) and award fee (Counts II and III) allegations, and cannot survive the failure of those claims under *U.S. ex rel. Coppock v. Northrop Grumman Corp.*, 2003 WL 21730668 at *8 n.17 (N.D. Tex., July 22, 2003) (Fitzwater, J.). *See* NG Mem. 48; Resp. 49. Thus, if Northrop Grumman's Motion is granted as to Counts I – III, summary judgment must be granted as to Conspiracy as well.

CONCLUSION

Northrop Grumman respectfully requests that its Motion for Summary Judgment be granted in its entirety.

Dated: March 21, 2015

Respectfully submitted,

/s/ Neil H. O'Donnell

Neil H. O'Donnell (*Pro Hac Vice*)
California Bar No. 57928
Dennis J. Callahan (*Pro Hac Vice*)
California Bar No. 250854
Jeffery M. Chiow (*Pro Hac Vice*)
District of Columbia Bar No. 989802
ROGERS JOSEPH O'DONNELL
311 California Street, 10th Floor
San Francisco, CA 94104
E: nho@rjo.com; djc@rjo.com; jmc@rjo.com
T: (415) 956-2828
F: (415) 956-6457

George E. Bowles (SBN 02743300)
C. Scott Jones (SBN 24012922)
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
E: gbowles@lockelord.com; sjones@lockelord.com
T: (214) 740-8498 (direct)
F: (214) 756-8498 (direct)

Attorneys for NORTHROP GRUMMAN SYSTEMS CORP.

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, I electronically filed the foregoing document with the Clerk of the court for the Northern District of Texas, Dallas Division, by using the CM/ECF system which will send notification of such filing to all CM/ECF participants and counsel of record.

/s/ Neil H. O'Donnell
NEIL H. O'DONNELL