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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

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## Advocacy Group Warns 5th Circ. Not To Dissuade FCA Suits

By Bryan Koenig

Law360, Washington (March 23, 2017, 8:40 PM EDT) -- Taxpayers Against Fraud's nonprofit arm urged the Fifth Circuit Wednesday to revive a would-be whistleblower's False Claims Act suit accusing Lockheed Martin and Northrop Grumman of concealing the true cost of the hugely expensive F-35 fighter program, arguing relators like these need to be incentivized, not discouraged.

Former Northrop Grumman Systems Corp. employee Paul J. Solomon is precisely the type of whistleblower Congress had in mind when carving out an exception to the rule prohibiting FCA suits based on already-disclosed information, the Taxpayers Against Fraud Education Fund said Wednesday.

The cost-performance analyst had been deemed a government employee barred from suing under the FCA because the judge held him obliged to disclose the cost-overruns he discovered based on his employer's mandate to report issues and his own reporting duties. But TAFEF argued that the lower court misconstrued the "voluntary" nature of disclosure: original sources of publicly disclosed information are able to bring suit under the FCA, provided they came forward voluntarily, according to the amicus brief, rather than having been compelled under government subpoena or interrogation.

"To regard an employee reporting fraud pursuant to a company's contractual obligation as an 'involuntary act' is to suggest that the qui tam financial incentives in the FCA are unnecessary. Yet virtually all companies who do business with the government have employees like Solomon who are in a position to detect and to report false claims," the nonprofit said. "If the contractual obligations imposed on such employees to report fraud were sufficient such that they were highly likely to report fraud without any qui tam incentive, then Congress might as well do away with the incentives for relators under the FCA."

Solomon is looking to upend the summary judgment granted to Northrop Grumman and Lockheed Martin Corp. by a Texas federal judge in December that nixed his suit alleging the contractors were mismanaging aspects of the budget for the F-35 Joint Strike Fighter program to hide the cost-overruns.

In asking the Fifth Circuit to reverse and remand U.S. District Judge Sidney A. Fitzwater's decision, **Solomon contended last week** that the FCA's voluntary disclosure requirement was meant to deny original source status only to two kinds of whistleblowers: government employees who are paid to detect fraud and private employees who make a disclosure only after being questioned or investigated by the government.

TAFEF backed those arguments Wednesday, warning of far-reach consequences if the Fifth

Circuit holds that the government employee prohibition on original FCA sources applies to private contractor employees, something the group said no appeals court has ever held. It further assailed Northrop for contending a finding against the suit could be confined to the "unique facts here," while arguing the nature of the disclosure, voluntary or not, is a factual rather than legal question for a jury to decide, not a judge.

"The government cannot afford to rely simply on contractors' contractual obligations to be honest," the group said. "This court should reject an interpretation of 'voluntarily provided' that is divorced not only from the reality of human behavior as typified by Solomon, but also from the FCA's statutory purpose."

The dispute stems from Lockheed's work as a contractor and Northrop's work as a subcontractor on the Joint Strike Fighter program, which involves F-35 jets designed for the U.S. Air Force, Navy and Marines, according to court documents. Solomon worked as a compliance monitor for the Earned Value Management System standard that governed the program, the most expensive in U.S. Department of Defense history.

While conducting audits for Northrop, Solomon discovered that Lockheed was shifting money from its management reserve budget — funds set aside for unanticipated work — to reduce cost overruns, which resulted in misrepresented cost estimates and performance reports filed with the government, according to Judge Fitzwater's summary judgment order.

Solomon reported his findings to the Defense Contract Management Agency, which led to a review of Lockheed's Fort Worth, Texas, facility and eventually a compliance report, published in 2007, which found that Lockheed misapplied reserved funds to cover cost overruns. The U.S. Government Accountability Office issued a report in March 2008 that reached similar conclusions, the order said.

After retiring from Northrop later that year, Solomon continued to alert government officials about his findings regarding the program, according to the order, before filing his FCA suit in November 2012. The government later declined to intervene.

In siding with the contractors in December, Judge Fitzwater cited the government reports, ruling that Solomon's allegations were based on information that was publicly available and thus blocked by the FCA's pre-2010 public disclosure bar.

Solomon contends he added greatly to those reports, which made no mention of a fraudulent scheme or that the contractors knowingly submitted false statements regarding estimates at completion or that the companies knowingly misused the management reserve.

An attorney for Solomon, Bruce Howard of Siprut PC, welcomed TAFEF's amicus brief Thursday. A ruling against the suit could have a severe "chilling effect" against other FCA whistleblowers, Howard told Law360.

Counsel for the companies did not immediately respond late Thursday to a request for comment.

Solomon is represented by David J. Healey of Fish & Richardson PC, Bruce Howard of Siprut PC, Robert J Hill of Hill & Hill Attorneys and Counselors PLLC, Michael I Behn of Behn & Wytznier Chartered and Seth Berenzweig of Berenzweig Leonard LLP.

Lockheed Martin is represented by Michael James Bronson and Joseph William Harper of Dinsmore & Shohl LLP, Tony Campiti of Thompson & Knight and Glenn V. Whitaker and Jacob D. Mahle of Vorys Sater Seymour and Pease LLP.

Northrop is represented by C. Scott Jones and George E. Bowles of Locke Lord LLP and Dennis Joseph Callahan III, Neil Hall O'Donnell, Jeffery Mitchell Chiow and Katherine Leigh Pohl of Rogers Joseph O'Donnell.

TAFEF is represented by in-house counsel Jacklyn DeMar and by David J. Chizewer, Frederic R. Klein and Matthew K. Organ with Goldberg Kohn Ltd.

The case is Paul Solomon v. Lockheed Martin Corporation, et al., case number 17-10046, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Natalie Olivo. Editing by Jill Coffey.

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