

Xe Whistleblowers Tell 4th Circ. Omission Of Proof Sank Case

By Lana Birbrair

Law360, New York (May 01, 2012, 7:20 PM ET) -- Former employees of a Xe Services LLC subsidiary advanced their bid to overturn a lower court ruling Monday, telling the Fourth Circuit that a district court erroneously excluded evidence in a suit alleging the company overbilled the U.S. under a \$1.2 billion security services contract.

Relators Brad and Melan Davis, who launched the suit in 2008, argued that the district court had erred by excluding evidence of U.S. Training Center Inc.'s intent to defraud, including a handwritten note alluding to 15 years of records, which the company once known as Blackwater Lodge & Training Center Inc. claimed did not exist

During trial, Blackwater had argued that Dakkak Tours International, a foreign travel agency used by the company, kept shoddy records and did not keep electronic itineraries for travelers, a defense the company allegedly relied on to hide the fact that it had made up itineraries to avoid alerting the U.S. Department of State that it was billing for men who had not yet arrived in Iraq, according to the brief.

The relators said that district court was wrong to exclude the evidence, which Blackwater had challenged as inauthentic, because even if the note in question was inadmissible, the underlying itinerary had already been accepted as evidence during trial.

"This court, in case law wholly ignored by Blackwater, has time and again ruled that district courts need to be careful about excluding evidence relating to intent, a concept that is difficult to prove and requires admission of a broad range of evidence to establish intent," the brief said. "The nonfabricated Dakkak electronic itinerary and the handwritten note establishing 15 years worth of past records put Blackwater on notice that Dakkak kept actual records of travel. These documents prove Blackwater's intent."

The brief cited additional pieces of excluded evidence, including an alleged death threat made by a top Blackwater official and an email admitting that the company billed the U.S. for bribes it made to Afghan officials, that the relators claimed the district court should have admitted.

The relators also renewed their argument that the alleged perjury of former Chief Operating Officer Danielle Esposito had wrongly convinced a jury that Blackwater had merely made honest billing mistakes, rather than defrauded the government. The lower court had ruled, however, that the relators had failed to prove that Esposito had committed perjury.

The Davises claimed Esposito's allegedly perjured testimony might have influenced the jury, which was given directions to make a decision based on evidence that the State Department knew about certain material facts relating to labor and travel invoices.

In its own appellate brief, Blackwater had argued that the relators could not establish that the district court had erred in excluding evidence, claiming the Davises had mischaracterized the rulings in order to argue for new bases for admission.

Blackwater also responded to the perjury allegations, arguing that the evidence showed only an inconsistency in the memories of two witnesses, not perjury, and that nevertheless the testimony in question was not central to the jury's verdict.

U.S. District Judge T.S. Ellis III ruled in favor of U.S. Training in August, shortly after the jury returned its verdict denying the relators' claims the company submitted false records and travel invoices to the State Department for security services in Iraq and Afghanistan.

Representatives for the parties declined to comment on the case Tuesday.

The relators are represented by Susan Burke and Susan M. Sajadi of Burke PLLC.

Blackwater is represented by Richard Beizer, David O'Brien and Brian McLaughlin of Crowell & Moring LLP.

The case is U.S. ex rel. Davis v. U.S. Training Center Inc., case number 11-2180, in the U.S. Court of Appeals for the Fourth Circuit.

--Additional reporting by Carolina Bolado, Greg Ryan and Kaitlin Ugolik. Editing by Andrew Park.

All Content © 2003-2013, Portfolio Media, Inc.