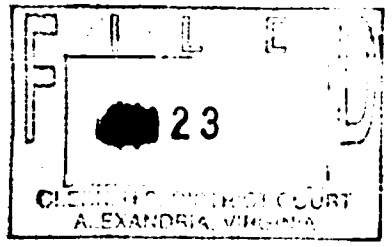
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



UNITED STATES OF AMERICA ex rel. MELAN DAVIS and BRAD DAVIS, Plaintiffs,	)	
v.	)	**Case No. 1:08cv1244**
ERIK PRINCE, et al., Defendants.	)	

ORDER

At issue on summary judgment in this False Claims Act case is whether the current record discloses a triable issue of fact as to relators' contention that Erik Prince, USTC's CEO, acted in reckless disregard, or was willfully blind to, whether USTC submitted false musters and travel invoices to the Department of State.

I.

In the Second Amended Complaint ("SAC"), relators allege that defendants,[1] including Prince, made false claims and statements in connection with two government contracts for private security services: (1) a Federal Protective Service ("FPS") contract to provide armed guard services in the aftermath of Hurricane Katrina ("Katrina contract"); and (2) a Department of State contract to provide security services for government officials in Iraq and Afghanistan ("WPPS II contract"). After the close of discovery, Prince moved for summary judgment on all allegations in the SAC. Prince's motion was granted as to all allegations relating to the Katrina

[1] The SAC named the following six defendants: (1) Blackwater Security Consulting, LLC ("BSC"); (2) Xe Services, LLC ("Xe Services"); (3) U.S. Training Center, Inc., ("USTC"); (4) Greystone Limited ("Greystone"); (5) The Prince Group LLC ("Prince Group"); and (6) Erik Prince. By Order dated May 20, 2011, four of the entity defendants—BSC, Xe Services, Greystone, and Prince Group—were granted summary judgment on all allegations in the SAC. *See United States ex rel. Davis v. Prince*, 1:08cv1244 (E.D. Va. May 20, 2011) (Order) (Doc. No. 365). Thus, the only remaining defendants in this litigation are USTC and Prince.

contract. *See United States ex rel. Davis v. Prince*, 1:08cv1244 (E.D. Va. May 20, 2011) (Order) (Doc. No. 365). With respect to the WPPS II contract, Prince's motion for summary judgment was granted in part[2] and deferred in part. *Id.* It was deferred with respect to the allegations that Prince knowingly submitted false musters and travel invoices to the Department of State. *Id.* This Order addresses the deferred allegations.

II.

In the First Amended Complaint ("FAC"), relators alleged that Prince "wholly-owned and controlled" the entity defendants and that he "enjoyed substantial personal financial benefits from the fraudulent schemes [alleged in the complaint]." FAC ¶ 12. Because these allegations did not demonstrate that relators had "substantial prediscovery evidence" of Prince's involvement in the fraud, Prince was dismissed from the lawsuit. *See United States ex rel. Davis v. Prince*, No. 1:08cv1244, 2010 WL 2679761, at *4 (E.D. Va. July 2, 2010) (quoting *Harrison*, 176 F.3d at 784). Thereafter, relators filed a motion to amend the FAC, which was granted. *See United States ex rel. Davis v. Prince*, No. 1:08cv1244 (E.D. Va. July 22, 2010) (Order) (Doc. No. 31). In the SAC, relators allege that Prince "personally participated" in the fraudulent schemes relating to the WPPS II contract.[3]

During the discovery period, relators were given ample opportunity to obtain evidence creating a genuine issue of fact regarding their allegation that Prince "personally participated" in the alleged WPPS II fraud. Relators deposed many of the people alleged to have participated in

[2] All of the defendants, including Prince, were granted summary judgment on the allegations relating to Greystone, Carlson Wagonlit, Presidential Airways, and Sargon Heinrich. *See United States ex rel. Davis v. Prince*, 1:08cv1244 (E.D. Va. May 20, 2011) (Order) (Doc. No. 365); *United States ex rel. Davis v. Prince*, 1:08cv1244 (E.D. Va. June 13, 2011) (Order) (Doc. No. 443).

[3] SAC ¶¶ 12, 49-66. The SAC does not allege that Prince was involved in the fraudulent schemes relating to the Katrina contract.

the fraud, including Prince, and they obtained millions of documents from defendants. In their summary judgment briefs, relators include numerous citations to the record purporting to establish Prince's direct involvement in the fraud. The evidence cited by relators reveals, in pertinent part, that:

- Prince was the sole owner[4] and Chief Executive Officer ("CEO")[5] of his companies, including USTC, during the time period covered by the SAC.
- Prince hired some of his friends from the Navy SEALs.[6]
- Prince would generally touch base with one of the senior executives in his companies once per day during the work week.[7]
- Gary Jackson, the President of USTC, would give Prince updates regarding government contracts that USTC was either bidding on or performing. Jackson would also inform Prince of any cash flow issues involving significant amounts of money.[8]
- Prince emailed one of his executives asking why an aircraft that received hostile fire in Iraq was not flying its missions at night.[9]

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[4] Jackson Tr. at 39:17-19.

[5] Relators repeatedly state that Prince was the CEO of his wholly-owned corporate entities, including USTC. Relators support this assertion by citing to the deposition testimony of Gary Jackson, the President of USTC. *See* Jackson Tr. at 42. Yet, this citation establishes only that Prince promoted Jackson to President of USTC in October 2001. Nowhere on the cited page, or the surrounding pages, does Jackson testify that Prince served as USTC's CEO. Defendants, however, do not dispute that Prince was the CEO of his companies, and Prince admits in portions of his deposition testimony that he served as the CEO. *See* Prince Tr. at 43, 115.

[6] Jackson Tr. at 69:5-10.

[7] Prince Tr. at 91:19-22.

[8] Jackson Tr. at 65:17-67:22.

[9] Pl. Ex. 34.

- Prince received a monthly report on WPPS training.[10]
- Prince paid himself an annual salary from the profits earned by his companies.[11]
- Prince directed that some of his companies' profits be used to make charitable donations.[12]
- Prince met with Department of State officials on approximately 2 to 4 occasions.[13]
- A Department of State official testified during his deposition that Prince "was very active in his company" and "active in how his people were performing on the contract."[14]
- Prince visited security contractors working in Iraq 3 or 4 times per year, and during his visits he would check in with the Department of State's Regional Security Officer ("RSO").[15]

These facts do not support holding Prince liable for USTC's alleged fraud on a piercing-the-corporate-veil theory, nor are they sufficient for a reasonable jury to find that Prince was directly involved in the alleged scheme to defraud the Department of State by submitting false musters and travel invoices.[16] Thus, summary judgment must be granted in favor of Prince on all remaining allegations involving the WPPS II contract.

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[10] Pl. Ex. 41.

[11] Jackson Tr. at 150:22-151:1.

[12] Jackson Tr. at 150:7-153:5.

[13] Prince Tr. at 220.

[14] Desilets Tr. at 35.

[15] Prince Tr. at 220-21.

[16] After the summary judgment hearing, relators filed a motion seeking leave to file supplemental information regarding Prince. The supplemental information consisted of twenty-eight documents that relators asserted "clearly indicate Mr. Prince's direct involvement in the fraud at

As the sole owner of USTC, Prince may be held personally liable for USTC's alleged FCA violations if circumstances justify piercing the corporate veil. Under federal law,[17] it is appropriate to pierce the corporate veil when "(i) [there is] such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct, and (ii) [] adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *See Nat'l Labor Relations Bd. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993); *see also Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982) (establishing a similar two-pronged test). Here, relators have neither alleged nor established a reasonable basis for piercing the corporate veil, and they do not argue otherwise.

Prince may also be held personally liable under the FCA if he was directly involved in the fraudulent schemes relating to the WPPS II contract. In other words, Prince may be held liable if his own conduct satisfies the elements of an FCA claim. In this regard, relators have alleged that all the defendants, including Prince, are liable for violating subsections (a)(1), (a)(1)(B), and (a)(7) of the FCA. *See* 31 U.S.C. § 3729(a). Under each of these subsections,

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issue in this litigation." *See* Relators' Motion for Leave to File Supplemental Information (Doc. No. 379) at 2. By Order dated June 7, 2011, relators' motion to file this supplemental information was granted. *See United States ex rel. Davis v. Prince*, 1:08cv1244 (E.D. Va. June 7, 2011) (Order). A close review of each of the twenty-eight additional documents submitted by relators, which consist of email and letter correspondence involving Prince, reveals that the additional documents, contrary to relators' assertion, do not come anywhere close to establishing Prince's "direct involvement" in the fraudulent schemes at issue in this litigation. To the contrary, the documents are most aptly characterized as a mish-mash of routine business correspondence establishing only that Prince was generally involved in the management of his companies.

[17] In an FCA suit, federal law governs the veil-piercing question. *See, e.g., United States ex rel. Kneepkins v. Gambro Healthcare, Inc.*, 115 F. Supp. 2d 35, 39 (D. Mass. 2000) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979)).

relators must show that Prince had *knowledge*—as that term is defined in the FCA—that musters and travel invoices submitted to the Department of State were false.[18]

Before 1986, there was a circuit split over the proper interpretation of the FCA's knowledge standard. *See* 1 John T. Boese, *Civil False Claims and Qui Tam Actions*, § 2.06[A], at 289-90 (4th ed. 2011) [hereinafter *Civil False Claims*]. Some courts required a specific intent to defraud, while others held that negligent or careless conduct was sufficient to impose liability. *Id.* In 1986, Congress amended the FCA, expressly defining "knowing" and "knowingly" to include any person that:

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b). The post-1986 version of the FCA makes clear that "specific intent to defraud" is not necessary to establish liability. *Id.*

The legislative history reveals that Congress added "deliberate ignorance" and "reckless disregard" to the statutory definition of "knowing" and "knowingly," in part, to prevent senior-level executives from insulating themselves from fraud carried out by lower-level subordinates:

> By adopting this definition of knowledge, the Committee intends not only to cover those individuals who file a claim with actual knowledge that the information is false, but also to confer liability upon those individuals who deliberately ignore or act in reckless disregard of the falsity of the information contained in the claim. It is intended that persons who ignore "red flags" that the information may not be accurate or those persons who deliberately

[18] Defendants, citing *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 714 (10th Cir. 2006), argue that summary judgment must be granted in favor of Prince because there is no evidence that Prince engaged in any affirmative action that *caused* false claims or statements to be made to the Department of State. Given that there is no evidence that Prince *knew* false claims or statements were made, the causation issue is neither reached nor decided here.

> choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act. This definition, therefore, enables the Government not only to effectively prosecute those persons who have actual knowledge, but also those who play "ostrich."

Civil False Claims, § 2.06[B], at 291 (quoting H. Rep. No. 99-660 (June 26, 1986)); *see also* S. Rep. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272 (stating that the amendment to the FCA's knowledge standard was designed "to hold responsible those corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates").

Here, relators correctly concede that there is no record evidence that Prince had actual knowledge of the alleged WPPS II billing fraud. *See* May 20, 2011 Tr. at 84:12-13 ("Your Honor, we are not claiming that Mr. Prince had actual knowledge."). After conducting extensive discovery in this case, relators cannot point to any evidence that Prince directed his subordinates to submit false musters or travel invoices to the Department of State. Moreover, there is no record evidence from which a reasonable jury could infer that Prince was told by anyone involved in the WPPS II billing process that USTC was submitting false musters or travel invoices.

Instead, relators argue that the record evidence shows that Prince deliberately or recklessly ignored whether false claims were being submitted to the Department of State. Neither the Supreme Court nor the Fourth Circuit has defined "deliberate ignorance" in the context of the FCA, but the Supreme Court has recently discussed the "willful blindness" standard in a civil lawsuit involving induced patent infringement. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011). There, the Supreme Court explained that the doctrine of "willful blindness" has two basic requirements: "(1) the defendant must subjectively

believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* The Supreme Court's interpretation of "willful blindness" is consistent with the Fourth Circuit's interpretation of that standard in the criminal context. *See, e.g.*, *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991) ("The willful blindness instruction allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he *purposely* closed his eyes to avoid knowing what was taking place around him.") (emphasis added).

The Supreme Court and the Fourth Circuit have also not addressed the meaning of "reckless disregard" under the FCA. However, in an action brought under the Fair Credit Reporting Act ("FCRA"), the Supreme Court defined recklessness as "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007) (quoting *Famer v. Brennan*, 511 U.S. 825, 836 (1994)); *see also Global-Tech Appliances*, 131 S. Ct. at 2071 ("[A] reckless defendant is one who . . . knows of a substantial and unjustified risk . . . of wrongdoing."). Moreover, other circuits have defined "reckless disregard" in the FCA context, and these circuits generally agree that "reckless disregard" means an "aggravated form of gross negligence." *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 945 (10th Cir. 2008); *see also United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997) (noting that "reckless disregard" is "an extension of gross negligence"). As one court has further explained, "[t]he standard of reckless disregard . . . was designed to address the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered." *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Secs. Group, Inc.*, 370 F. Supp. 2d 18, 42 (D.D.C. 2005).

Here, the record evidence relating to Prince shows that Prince was the sole owner[19] of multiple corporate entities that had contracts with various government agencies.[20] Prince gave himself the title of CEO,[21] earned a salary,[22] and was generally involved in the management of his companies. With respect to his level of involvement in USTC's operations, the evidence shows that Prince met with officials from the Department of State on at least two to four occasions,[23] he received a monthly report on WPPS training,[24] and he knew when one of the company's helicopters received hostile fire in Iraq.[25] Prince was also aware that USTC stopped using Presidential Airways for flights between Amman, Jordan and Baghdad, Iraq around April 2007 because it was cheaper to purchase tickets on Royal Jordanian Airlines.[26] Further, Prince was kept informed of major cash flow issues involving USTC's government contracts.[27] For example, in August 2007, Prince was forwarded an email informing him that the accounts

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[19] Jackson Tr. at 39:17-19.

[20] For example, BSC had a contract to provide armed guard services for FPS in the aftermath of Hurricane Katrina, while USTC had a contract with the Department of State to provide security services for government officials in Iraq and Afghanistan.

[21] Prince Tr. at 115:5-13.

[22] Jackson Tr. at 150:22-151:1.

[23] Prince Tr. at 220-21.

[24] Pl. Ex. 41.

[25] Pl. Ex. 34.

[26] Relator's Motion for Leave to File Supplemental Information (Doc. No. 379) at PG03240829.

[27] Jackson Tr. at 66:22-67:22.

receivable balance for WPPS was $90 million,[28] and in February 2008, Prince was sent an email stating that USTC received a DSS payment of $20 million dollars.[29]

On this record, no reasonable juror could infer that Prince "subjectively believe[d] that there [was] a high probability" that USTC was submitting false musters and travel invoices to the Department of State, or that he took "deliberate actions" to remain ignorant of that fact to avoid potential FCA liability. *Global-Tech Appliances*, 131 S. Ct. at 2070. Likewise, no reasonable juror could infer from this evidence that Prince disregarded an unjustifiably high risk that USTC was submitting false musters and travel invoices, or that he otherwise acted with "aggravated . . . gross negligence." *Burlbaw*, 548 F.3d at 945. Put simply, evidence establishing that Prince was a CEO, earned a salary, and was generally involved in USTC's operations does not create a jury issue on whether Prince deliberately or recklessly ignored whether USTC was submitting false claims on the WPPS II contract.[30] Although the "deliberate ignorance" and "reckless disregard" standards are intended to prevent senior executives from insulating themselves from the fraudulent activity of subordinates, the FCA does not make senior executives strictly liable for all false claims submitted by a company. *Cf. United States ex rel. DeCesare v. Americare in Home Nursing*, 757 F. Supp. 2d 573, 587 (E.D. Va. 2010) (alleging that person was the CEO of a

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[28] Relator's Motion for Leave to File Supplemental Information (Doc. No. 379) at PG03240812.

[29] Relator's Motion for Leave to File Supplemental Information (Doc. No. 379) at PG03240841.

[30] In *United States v. Rachel*, No. 04-2276, 2006 WL 3522228, at *4 (4th Cir. Dec. 7, 2006), the Fourth Circuit held that a reasonable jury could find that a wife who was as on the board of directors of an entity created by her husband acted in reckless disregard of the truth or falsity of claims submitted by her husband. Although the wife had no direct involvement in the alleged fraud, she allowed her husband to sign her name freely and to conduct business in her name. *Id.* at *3. Moreover, the underlying district court opinion reveals that the husband drafted false claims using a typewriter in the family's kitchen. *See United States v. Rachel*, 289 F. Supp. 2d 688, 695 (D. Md. 2003), *vacated*, 2006 WL 3522228. These facts are so far removed from the instant facts that *Rachel* is not persuasive, and, in any event, it is not controlling because it is unpublished.

company that acted illegally is insufficient to support FCA liability). To conclude that Prince could be found liable on this record is tantamount to imposing FCA liability on the basis of strict liability or negligence, neither of which is appropriate.[31]

In their summary judgment briefs, relators cite—without any analysis—a number of FCA cases holding that doctors acted with reckless disregard by failing to personally review Medicare or Medicaid claims submitted on their behalf.[32] Yet, these cases are not persuasive here because Prince, unlike the doctors, did not delegate responsibility to subordinates for submitting claims on his behalf for services he personally performed. It is undisputed that USTC, not Prince, contracted with the Department of State to provide security services in Iraq and Afghanistan. Thus, USTC, not Prince, was responsible for reviewing the musters and travel invoices presented to the Department of State. Moreover, no reasonable juror could conclude by a preponderance of the evidence that Prince, merely because he was USTC's CEO, acted with reckless disregard because he did not personally review the musters and travel invoices. In the absence of anything to alert Prince to the falsity of USTC's musters and travel invoices for WPPS II, and given that Prince's companies had multiple government contracts, there is no basis on which a reasonable

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[31] *See United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 338 (5th Cir. 2008) (holding that the FCA's "*mens rea* requirement is not met by mere negligence or even gross negligence"); *United States ex rel. Crenshaw v. Degayner*, 622 F. Supp. 2d 1258, 1274 (M.D. Fla. 2008) ("The False Claims Act is not a strict liability statute.").

[32] *See Krizek*, 111 F.3d at 942 (holding defendant liable under the FCA where he delegated to his wife authority to submit claims on his behalf and did not review them); *United States ex rel. Stevens*, 605 F. Supp. 2d 863, 869 (W.D. Ky. 2008) (holding that doctor acted with reckless disregard because he took no steps to make sure that his father-in-law submitted accurate billings); *United States v. Mack*, No. Civ.H-98-1488, 2000 WL 33993336, at *7 (S.D. Tex. May 16, 2000) (holding that defendant showed reckless disregard because he failed to review and carefully consider his billing submissions, even though he was aware of his staff's past deviant billings); *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234, 238 (D.P.R. 2000) (holding that anesthesiologist had sufficient knowledge of FCA violations because he purposefully turned a "blind eye" to his billing secretary's conduct).

jury could conclude that Prince was reckless or willfully blind by not personally scrutinizing or involving himself in the claim submission process for the WPPS II contract.

Relators also argue that Prince was reckless for relying on unqualified personnel to administer the WPPS II contract. In this regard, relators argue that Jackson was unqualified to serve as USTC's President because he testified during his deposition that it was unlikely that he read an email that had the subject line "March invoice and muster."[33] But, of course, the fact that Jackson did not read a particular email, or "boring"[34] emails in general, does not come anywhere close to establishing that Jackson was unqualified to serve as USTC's President. As President, Jackson undoubtedly had significant demands on his time and was forced to prioritize which issues merited greater attention. As a result, it is entirely understandable that Jackson would not have read every single email that he received. This certainly does not mean that Jackson was unqualified or reckless. Moreover, the fact that Jackson did not read a specific email *after* he was hired does not mean that Prince was reckless in promoting him to President of USTC in the first place. *Cf. Stevens*, 605 F. Supp. 2d at 869 (holding that doctor acted in reckless disregard because he gave total and complete control of his billing to a person with absolutely no prior experience with medical billing and took no steps to ensure that bills were accurate).

Finally, relators argue that there were warning signs, or "red flags," that USTC was submitting false claims and yet Prince failed to take reasonable steps to investigate the matter. Relators support this argument by citing *United States ex rel. DeCesare v. Americare in Home Nursing*, No. 1:05cv696, 2011 WL 607390 (E.D. Va. Feb. 10, 2011). There, the court held that the complaint adequately alleged reckless disregard because, according to the allegations, the

[33] Jackson Tr. at 295.

[34] Jackson Tr. at 296:6-10.

defendant continued to submit false Medicare certifications after receiving a letter explaining that its payments for healthcare referrals violated the Anti-Kickback statute. *Id.* at *6. Here, relators argue that "Mr. Prince knew from Mr. Jackson and his other subordinates that the company's auditors as well as governmental [sic] auditors questioned the company's failure to maintain contemporaneous time records." Pl.'s Reply to Defs.' Mot. for Summary Judgment (Doc. No. 348) at 17.

On this issue, the record evidence shows that Prince's companies were audited on at least four different occasions. Importantly, however, relators do not point to a single piece of evidence establishing that Prince's subordinates told him about the details of the pertinent audits. Relators appear to rely on Jackson's testimony that he discussed USTC's operations with Prince,[35] and Prince's testimony that he tried to make contact with his executives once per day during the work week.[36] Although it may be reasonable to infer that Prince, as USTC's CEO, was notified by his subordinates of the fact that audits were being performed, no reasonable juror could infer from Prince's or Jackson's vague deposition testimony that Jackson, or anyone else, told Prince about the details of the audits, including the fact that the auditors "questioned the company's failure to maintain contemporaneous time records." This lack of evidence is especially glaring given that relators had an opportunity to depose Prince and Jackson, and they apparently chose not to ask specific questions about Prince's knowledge of the pertinent audit reports.

In any event, even assuming Prince was made aware of the details of the audit reports, these reports were not "red flags"; they would not have put Prince on notice that USTC was

[35] Jackson Tr. at 65:17-67:22.

[36] Prince Tr. at 91:19-22.

submitting false musters or travel invoices for the WPPS II contract. The first audit report, dated January 2005, was prepared by an outside accounting firm on behalf of the Department of State's Office of Inspector General ("2005 OIG Audit Report"). The 2005 OIG Audit Report reviewed, among other things, the timekeeping procedures used by BSC, not USTC, on a government contract that antedated the WPPS II contract. In their review of BSC's timekeeping procedures, the auditors did not determine that BSC was submitting false labor invoices to the Department of State; rather, the auditors simply recommended that BSC bolster its timekeeping procedures by using individualized time cards.[37] Thus, the 2005 OIG Audit Report would not have served as a "red flag" to Prince that USTC was overbilling the Department of State for labor and travel on the WPPS II contract.[38]

Relators also note that USTC's accounting firm, BDO Seidman, submitted an internal audit report on March 30, 2008. Yet, this audit report does not provide notice that USTC was submitting false musters or travel invoices. Indeed, the portion of the audit report cited by relators says nothing about timekeeping procedures. To the contrary, it simply notes that USTC was not requiring one of its agents in Amman to provide invoices for services he was providing,

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[37] Multiple officials from the Department of State have submitted sworn declarations stating that USTC was not required to use time sheets on the WPPS II contract. *See* Def. Ex. 5 (Bohac Decl.) ¶ 20 ("The Base Contract and awarded task orders did not require USTC to use or implement timesheets or any other method of recording time other than the muster sheet."); Def. Ex. 7 (Desilets Decl.) ¶ 23 ("[T]ime sheets were not necessary to validate muster sheets and I questioned whether traditional paper time cards were practical in a war zone."); Def. Ex. 13 (Isaac Decl.) ¶ 20 ("The Base Contact and task orders issued thereunder it did not require USTC to use or implement time sheets or any other method of recording time other than the muster sheet."); Def. Ex. 17 (Rogers Decl.) ¶ 23 ("The Base Contract did not require time sheets.").

[38] It is worth noting that at the motion to dismiss stage, relators argued that the 2005 OIG Audit Report was not a "public disclosure" of fraud under 31 U.S.C. § 3729(e)(4)(A). Relators do not acknowledge or explain how the 2005 OIG Audit Report failed to put the government on notice that USTC was submitting false musters, yet the exact same audit report was sufficient to put Prince on notice that USTC was submitting false musters and travel invoices.

and that some of those services might be reimbursable if USTC obtained better documentation. This was not a "red flag" that USTC was submitting false musters or travel invoices. Similarly, relators' citations to deposition testimony regarding USTC's failure to obtain a "DCAA certification of its financial system"[39] are not sufficient to establish by a preponderance of the evidence that Prince was alerted to the possibility that USTC was submitting false claims on the WPPS II contract.

Finally, the record evidence establishes that the Department of State requested that an independent accounting firm, Cotton & Co., examine USTC's billings on Task Order 6[40] for the period from May 8, 2006 to Mary 31, 2008.[41] After reviewing USTC's records, Cotton & Co. concluded that there were discrepancies between the musters submitted to the Department of State and USTC's personnel status reports, or PERSTATs, which were used by USTC to track the daily attendance of its security contractors.[42] For example, a muster sheet would list a security contractor as being in Iraq on a given date while the PERSTAT would list the same security contractor as being in a travel status.[43] As a result, Cotton & Co. questioned some of USTC's labor billings.

USTC objected to Cotton & Co.'s findings, arguing that it was improper to rely exclusively on PERSTATs to validate the musters. According to USTC, the musters could be

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[39] Pl.'s Mot. for Summary Judgment (Doc. No. 319) ¶ 28.

[40] Task Order No. 6 was one of the task orders falling under the WPPS II contract.

[41] Pl. Ex. 101; Def. Ex. 35.

[42] Pl. Ex. 101, at 14.

[43] *Id.*

validated only by looking at a range of documents, including travel and pay records.[44] In other words, USTC argued that some of the discrepancies between the musters and PERSTATs could be explained by other documents, but Cotton & Co. refused to consider those documents. Importantly, there is no record evidence that the Department of State ever published or adopted the audit report submitted by Cotton & Co., nor is there any evidence that the Department of State sought repayment of labor charges not supported by the PERSTATs. As relators concede,[45] this strongly suggests that the Department of State did not agree with Cotton & Co.'s findings. Given that the Department of State did not view the audit report prepared by Cotton & Co. as a "red flag" that USTC was overbilling for labor and travel, it would be unreasonable for a jury to infer that Prince should have read the same report and concluded otherwise.[46]

In sum, despite a muscular and aggressive discovery effort, relators concede, as they must, that Prince, as USTC's CEO, had no actual knowledge of, or participation in, USTC's submission of allegedly false claims to the Department of State. Moreover, despite a voluminous discovery record, relators can point to no record evidence sufficient to create a triable issue of fact that Prince acted in "deliberate ignorance" or "reckless disregard" of USTC's submission of allegedly false claims to the Department of State. To be sure, the record reflects that Prince, as USTC's CEO, did involve himself in certain aspects of USTC's business, but the record equally

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[44] Pl. Ex. 237.

[45] Pl. Mot. for Summary Judgment (Doc. No. 319) ¶ 72; Pls.' Reply to Def.'s Oppo. To Pls.' Mot. for Summary Judgment (Doc. No. 347) at 7.

[46] The fact that USTC's in-country manager in Iraq, and other personnel, rotated every few months was also not a "red flag" that USTC was submitting false or fraudulent musters. *See* Prince Tr. at 103:1-21. Given that Iraq was a war zone, it is completely reasonable that USTC's personnel would stay in Iraq for only a few months before rotating back to the United States, similar to the deployment cycle for the U.S. military. No reasonable jury could conclude that this personnel rotation was a "red flag" that should have alerted Prince to the possibility that USTC was submitting false musters and travel invoices to the Department of State.

reflects that he did not involve himself in all aspects of the business and certainly nothing shows any involvement by him in the preparation or submission of musters or travel invoices. That Prince would know about and involve himself in a non-routine, hostile-fire incident involving his company's helicopter is as understandable as is his lack of knowledge and involvement in more routine matters, including the preparation and submission of musters and travel invoices. Routine matters of this sort he delegated, as CEO's must do, to subordinates. Nor is there any evidence that he knew these subordinates were incompetent or dishonest.

Moreover, nothing in this record shows that Prince was alerted to the possibility of false or inaccurate musters or travel invoices, or that he suspected as much and deliberately or recklessly ignored that fact. Contrary to relators' claim, there were no "red flags" suggesting or pointing to false musters or travel invoices. Relators' reliance on audit reports is misplaced. Most of the audit reports do not identify any discrepancies in the musters or travel invoices submitted to the Department of State for the WPPS II contract. Although one of the audit reports questioned some of the USTC's labor billings on Task Order No. 6, there is no record evidence that the Department of State adopted the audit report or sought the return of suspected labor overbillings. If the Department of State did not find the audit report to be accurate or worth investigating further, a jury could not reasonably conclude that Prince should have arrived at a different conclusion. Thus, the "red flag" status of the audit reports, like a mirage, disappears when closely examined. Similarly, although relators provide a string cite of cases dealing with "deliberate ignorance" and "reckless disregard," none of these cases are persuasive as to the facts presented here. As a result, there is simply insufficient evidence, on this record, to hold Prince personally liable for any alleged FCA violations committed by USTC.

Accordingly, and for good cause,

It is hereby **ORDERED** that Defendant Erik Prince's motion for summary judgment (Doc. No. 315) is **GRANTED**.

It is further **ORDERED** that the parties are **DIRECTED** to re-caption this case as *United States ex rel. Davis v. U.S. Training Center, Inc.* in all future pleadings.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
June 23, 2011

/s/
T. S. Ellis, III
United States District Judge