

**COMMENTARY BY SPIRIT LAKE TRIBE AND SIOUX
MANUFACTURING CORPORATION CONCERNING NEW YORK TIMES
ARTICLE OF FEBRUARY 6, 2008***

1. *A North Dakota manufacturer has agreed to pay \$2 million to settle a suit saying it had repeatedly shortchanged the armor in up to 2.2 million helmets for the military, including those for the first troops sent to Iraq and Afghanistan.*

The lead sentence deliberately conveys the impression that as part of the settlement Sioux Manufacturing Corporation (“SMC”) admitted it had shortchanged armor in up to 2.2 million helmets. In the underlying case, the Complaint was filed under court ordered seal (which means neither party may make public comment about the matter) by two former employees 18 months before the settlement occurred. The Answer filed by SMC as part of the settlement package vehemently denied every substantive allegation in the Complaint, including all allegations it had ever sold substandard cloth that was utilized in helmets. This Answer, along with other documents, became accessible to the public after the settlement and was available for the *New York Times* reporter to read. SMC’s press release issued as part of the settlement also denied all such allegations.

SMC does not make PASGT helmets. SMC weaves cloth with Kevlar yarns suitable to be used in helmets, pursuant to Military Specifications MIL-H-44099A (used for helmets) and MIL-C-44050A (used for helmet cloth). After the fabric is woven and coated with resin, SMC’s staff uses state of the art Lectra knife cutters to cut long rolls of cloth into separate pieces of varying sizes as required by its military contracts. These pattern pieces are boxed by SMC with 50 sets of pattern pieces per box, and are shipped to a factory operated by UNICOR, a prison industries unit operated by the U.S. Department of Justice, which then assembles the pieces in the proper orientation and manufactures the helmets. Neither the former employees, nor the U.S. Attorney, nor the military have ever publically provided a single piece of SMC woven Kevlar cloth sent to UNICOR that did not exactly meet military and contract specifications.

2. *Jeff Kenner and Tamra Elshaug, former managers, filed a whistle-blower suit accusing Sioux Manufacturing of fraud and safety violations. Twelve days before the settlement with the Justice Department was announced, the company, Sioux Manufacturing of Fort Totten, was given a new contract of up to \$74 million to make more armor for helmets to replace the old ones, which were made from the late 1980s to last year.*

SMC does not have any helmet-related contract for up to \$74,000,000. This purported contract is pure invention and it is surprising that the *New York Times* fact checkers were unable to determine the falsehood of this statement. SMC was not given a contract (in any amount) to replace the “old” helmets. The PASGT helmets which have been made by UNICOR for many years are not defective in any way. A new type of helmet, ACH (Advanced Combat Helmet), is gradually supplanting the use of PASGT helmets because it is designed to support the various high tech visual and communications gear that soldiers now wear on their face and head.

**The complete article is attached at the end of this Commentary, at page 22.*

The innuendo of this paragraph is that SMC paid a settlement after having made bad armor and got a sweetheart deal to make more armor for helmets. This assertion is patently false. Recently, UNICOR, the long time maker of the PASGT helmet, obtained a contract from the Department of Defense to make ACH helmets and as part of this contract has asked SMC to weave and make pattern pieces for the ACH helmet. This contract, signed in January, 2008, is for less than \$10,000,000 (gross).

3. *Sioux upgraded its looms in 2006, company executives say, and the government says it has started inspections at the plant.*

This sentence implies that SMC's upgrading of looms was in some way connected to the lawsuit or the accusations against it. This is not the case. SMC was furnished with a copy of the Complaint of Kenner and Elshaug in February, 2007. The first wave of new looms (Dornier looms) were ordered and installed in 2005. The purchase of the new looms was part of SMC's long term capital improvement plan and was necessary to replace the older looms for which it was difficult to obtain parts and also to increase capacity and efficiency. Each Dornier loom is specially designed for SMC's needs and it takes about 4-6 months from receipt of the order to delivery. Each loom costs approximately \$150,000.00 in US dollars. The transition to all new computerized looms wrapped up with the delivery of the final two looms in late 2007.

The government has had a full time Department of Defense quality control inspector housed within the SMC quality control office for over 20 years. In recent years, although the quality control inspector maintained his offices at the plant, the government chose not to assign an on-site quality inspector. SMC assumes that this decision was because of the high quality of the SMC production over the years. SMC's facility has always been wide open to inspection by this inspector or any other inspector sent by the government. With SMC's full support, the resident inspector has been asked by the Department of Defense to resume inspections. After six months or more of inspections, no substantive suggestions have been made to SMC's long standing manufacturing processes by this inspector.

4. *The United States attorney for North Dakota, Drew H. Wrigley, called the accord "an appropriate resolution" because the Defense Department had said that 200 sample helmets passed ballistic tests and that it "has no information of injuries or deaths due to inadequate Pasgt helmet protection."*

The recent testing of helmets (whether 200 or some other number) does not represent the whole of the ballistic testing done on the fabric, the ballistic testing on the helmets, or the other safety monitoring steps that are fully integrated into every phase of the manufacturing process leading up to manufacture of a completed PASGT helmet.

One means of ensuring safety is mandatory reporting of defects up the manufacturing channels. The Department of Defense requires that every product failure be reported back through all contractors and subcontractors that played any role at any stage in the manufacturing process. Thus, if there were any safety failures, deaths or injuries as a result of a helmet made from cloth woven at SMC, SMC as well as every other manufacturer of component parts would receive

timely notice within days of any such event. However, no such notices of defect have ever been received by SMC during the decades that it has made helmet pattern sets.

Another means of ensuring safety is the requirement that every “lot” of cloth woven by SMC undergo rigorous ballistics testing. SMC has conducted many thousands of ballistics tests of fabric during the period covered by the allegations in the Complaint. These tests have been conducted not only at SMC’s own ballistics lab but also at outside laboratories operated by the U.S. government and other private firms. The results of these tests are irrefutable. NOT ONE BALLISTIC TEST OF SMC WOVEN FABRIC HAS EVER FAILED TO MEET THE BALLISTIC STANDARDS SET BY THE MILITARY SPECIFICATIONS FOR HELMET CLOTH. This fact is not in the *New York Times* story, even though it was in the SMC press release.

Safety is also ensured by the requirement that UNICOR (the unit of the Department of Justice that actually makes the helmets) must conduct ballistics tests on helmets prior to shipping helmets to the Department of Defense. SMC staff has checked with their counterparts at UNICOR and were told there were no failures of ballistics tests ever on helmets made from SMC helmet pattern pieces. (And, as noted above, if there were a failure, UNICOR would have been required to notify SMC and this has never happened.)

While SMC cannot speak for Mr. Wrigley, it would appear that the government considered the full range of ballistics and safety data before concluding that there were no problems with soldier safety, not just the “extra” 200 ballistics tests of helmets conducted after the accusations were made.

5. *Pasgt, pronounced “pass-get,” stands for the Personal Armor System for Ground Troops, which includes the helmet model being replaced.*

PASGT is the name of the helmet for which SMC makes fabric and pattern pieces. The use of the word “replacement” in this context implies that there has been a recall of PASGT helmets. This is certainly not the case. The fact that the military is turning to the use of ACH helmets is driven by design considerations irrelevant to the issues raised in this lawsuit. The ACH helmet is lighter-weight and is able to hold modern communications devices while also providing ballistic protection. These design considerations have been widely publicized long before this suit was filed and have nothing to do with the issues raised by Kenner and Elshaug.

6. *At the core of the investigation was the contention by two former plant managers that Kevlar woven at Sioux failed to meet the government’s “critical” minimum standard of 35 by 35 threads a square inch.*

Neither Ms. Elshaug nor Mr. Kenner was ever a plant manager. For most of his career at SMC, Mr. Kenner was a laborer working on an hourly basis (production technician), setting up machines, repairing machines and running forklifts and similar manual labor. After 16 years of experience at the plant, Mr. Kenner’s hourly wage was less than \$12.00 per hour, commensurate with his skill level. In December 2001, he was promoted to a “lead” in the weaving Department over one shift. Less than a year later, in October 2002, he bid for and was promoted to a clerk

position under Ms. Elshaug, who ran the purchasing and materials department. He received a temporary 30-60 day assignment to Supervisor in the weaving department in July 2003 which was extended through October 2004. During this assignment, he remained an hourly employee under Ms. Elshaug's division. In October 2004, he resumed his clerk duties under Ms. Elshaug's supervision until they both were fired after being observed together by the rural fire department in a wooded area off the plant premises in the back seat of a company truck during office hours.

The "core" allegation that there is a *critical* defect if a helmet cloth piece does not have a 35 x 35 yarn count is not true. SMC denied this allegation repeatedly in its Answer. A 35 x 35 yarn count is simply not a "critical" minimum standard of the cloth that goes into helmets. It is a *minimum* standard that was always followed by SMC, but a *minimum standard* does not convey the same meaning as a "critical" standard. In military parlance, a "critical" defect means a defect that is likely to cause death or serious injury. Currently the military has proposed a revised minimum standard for Kevlar weave of 34 x 34 yarns per square inch.

The basis for the relators' false assertion that this is a "critical" requirement for cloth was made by erroneously applying a section of a different military specification from the helmet specification having to do with the molding process used by UNICOR later in the helmet manufacturing process. The purpose of calling such a weaving defect (if there were a defect) a "critical" defect appears to be to needlessly frighten and terrify the reader and the armed service members using the helmets. The *New York Times* would have understood that a 35 x 35 weave is a minimum requirement of the contract, but that it is not a "critical" minimum requirement, if it had read the Answer in the public record of this case.

7. *When properly woven, Kevlar, a polymer thread made by DuPont, is stronger than steel, and able to deflect shrapnel and some bullets. Government regulations call for rejecting Kevlar below the 35-by-35 standard.*

Kevlar is not a thread, but rather is an aramid yarn made of many hundreds of tiny filaments. There are a number of types of fabric woven from Kevlar used for different purposes. The type of fabric woven by SMC for eventual use in the PASGT helmet was Type II, Class A Aramid ballistic cloth woven in a basket weave pattern. A basket weave is a style of weaving in which two-yarn groups are used both lengthwise and across in an over/under pattern. In addition to this type of fabric used in helmets, SMC also weaves other Kevlar fabrics suitable for other uses such as shrapnel resistant panels used in military vehicles.

Each type of Kevlar fabric has different requirements. Among the various requirements applicable to the "helmet cloth" was a weight requirement. It is uncontested that every test conducted of fabric woven by SMC contained the proper weight of Kevlar. Since the weight of the cloth (which is weighed under strict conditions with all moisture removed and on a calibrated scale) contains only Kevlar, the cloth contained the proper amount of Kevlar as measured by weight. SMC's fabric met the Kevlar content requirement of the contract with UNICOR as measured by weight.

Another requirement of the military requirements is a yarn (or thread) count per inch. For the helmet cloth, there is a minimum of 35 yarns per inch lengthwise and 35 yarns per inch across, as

determined by taking various samples on an ongoing basis and testing them in a laboratory. As noted above, the current military recommendation is to revise the applicable regulation to a minimum of 34 x 34 yarns per square inch. Because this is a basket weave (woven with multiple intersecting two yarn groupings with each yarn composed of multiple filaments) and because the demarcation between the two-yarn grouping that lies on the one inch line is invisible to the naked eye, this test is done under magnification in the SMC lab. Unlike the weight measurement, which is by machine, this requirement is done by people who can occasionally see things differently. Thus, there are multiple samples and multiple reviews followed by a supervisor's review, prior to certification of the yarn count. For lots in the sizes woven by SMC, three different samples from various rolls are taken and five counts are made for each sample. SMC's quality assurance personnel and floor staff accordingly take random samples of a specified size from each lot. After suitable conditioning for final testing, the yarn count is taken under controlled conditions in the laboratory. The five counts are made, the total values in each sample are added, divided by five, and the value (if it is not an even number) is rounded to the nearest whole number as required by the testing methodology specified in the military specifications. (As discussed below, contrary to the assertions later in the article, rounding to the nearest whole number is required in the applicable military specification.) After the laboratory employees make their preliminary counts, the samples used for yarn counting are labeled and bagged and saved for approximately a year, should any questions arise. These samples are used as verification by the supervisor, if there are any questions or discrepancies (for example, a high weight but a lower thread count). Every single final laboratory test submitted by SMC to UNICOR showed 35 x 35 minimum requirements.

It should be noted that because the final value is an average drawn from five different counts, a fabric that is in fact 35 x 35 can have up to two 34 counts per direction if there are also three 35 counts in each direction. This is because the total, divided by five, is more than 34.5 and must be rounded to the nearest whole number, or 35. Thus, the presence of a 34 thread count in a particular sample, standing alone, does not mean that the fabric does not meet military specifications. It is the average of the numbers in the sample that comprise the final count.

In addition to this, SMC meets the contract specifications by undertaking a yard by yard examination for certain weaving defects (e.g., broken thread, missing thread, etc.) If a defect occurs, it is marked with red string and a certain number of such defects are allowed by the military contract. SMC was not accused of having excessive weaving defects. Such defects rarely occurred and when they were found, they were well within the contract requirements. No allegation is made that these tests were inaccurate.

The origin of the so-called "evidence" of under weaving by the relators discussed in the *New York Times* is as follows: In addition to the foregoing contractually required tests, SMC also conducted a supplemental in-process loom monitoring by having its weaving and quality control staff check the thread count on the looms and record it for review by management to ensure that any problems were caught on a timely basis before the error caused an expensive rejection of vast amounts of cloth. The need for this monitoring is simply prudent. SMC didn't want to find out about defects after a roll of costly fabric was completed or a "lot" of fabric, consisting of multiple rolls, was tested prior to shipment. Defects discovered at a late stage lead to costly rejections; defects discovered at an early stage prevent a majority of these costly rejections.

The supplemental loom tests are different in kind and nature and purpose than the final tests in the lab. Loom tests are not taken under controlled humidity and heat conditions, are taken on a fabric that was moving through the loom during the weaving process, and are taken on a fabric being stretched tightly in both directions. Accordingly the values in these loom counts are slightly different than the results that will be found in the lab. The principle difference is that a loom count will be slightly less than a lab count, because the fabric is stretched on the loom and the threads are separated to a greater degree than they would be in the lab, where the fabric is not stretched or under tension.

SMC has considerable “hands on” experience in weaving. Over several decades, SMC found that when fabric was tightly stretched on a loom and had a count of 34, the same fabric, in a relaxed state, under controlled heat and humidity conditions in the laboratory, would usually count at 35. Further, as noted above, when there is an occasional 34 on the loom there is no real cause for alarm or rejection of the roll because the method of using averages to reach the final 35 x 35 count necessarily allows the presence of up to 40% of 34 yarn counts. In fact, however, the vast majority of all thread counts, even on the looms, was 35 in each direction.

The selections submitted by the relators as “evidence” of under weaving were all loom counts and were selected carefully to omit the vast majority of loom counts that had “perfect” 35 x 35 thread counts or 35 x 36.

The NY Times story says that SMC wove as low as 32 and implies that such fabric was used in helmets. This is absolutely not the case. On the very rare occasion where there was an error in weaving, the quality control division caught the error, rejected the sub-standard cloth, segregated it in a hold cage (where it remains today), and kept it from use in the helmet program. Ironically, this is shown by reference to the Federal Fraud website created by the attorney for the whistleblowers. On page two, there is a circled reference to 34 x 32. Next to it is the word “Rejected,” which means that Quality Assurance would not permit the defective cloth to be sold to UNICOR.

The whole substance of Mr. Kenner and Ms. Elshaugs’ purported “evidence” rests on the false premise that because there were some 34 x 34 thread counts taken on a loom, the 35 x 35 thread counts taken in the lab were falsified, altered and forged. When it was revealed to SMC what the government’s concerns were (some seven months after 30 armed federal agents raided its plant and removed virtually all its records) it was at last able to explain to the government the false and baseless “evidence” on which the raid and investigation was premised. SMC sent a letter from a weaving expert to the U.S. Attorney regarding the influence of tension on thread counts. Without exception, the documents “proving” the violations in weaving were records of yarn counts that were taken while the fabric was stretched under tension on the looms on the factory floor. The official tests require that final yarn counts be taken in a relaxed state.

During the entire course of the investigation, the investigators were unable to come up with one example of a fabric shipped to UNICOR that did not meet the 35 x 35 requirement. SMC’s expert went through every retained sample of helmet cloth in the factory and could find no fabric that did not meet requirements.

8. *The company “was underweaving,” Mr. Wrigley said.
“That is undebatable,” he said.*

As an advocate for the government that had conducted the raid and investigation, Mr. Wrigley’s opinion as to what is or is not “debatable” is not credible. In the Answer, as well as in many letters and meetings with members of his staff, SMC disputed, debated, and disagreed with all allegations that it had under woven cloth. Mr. Wrigley’s assertion is further impeached by the fact that during the entire course of the investigation the government did not locate one piece of non-compliant cloth. The only non-compliant cloth reviewed by the government had already been rejected by SMC, was segregated, and held in a locked part of the plant where no one had access to it and it could not be shipped to UNICOR.

At various times, the US investigators made preposterous claims regarding technical matters on which they were ill-informed such as claims that certain equipment could “never” weave compliant cloth or that the quality assurance director “never” personally inspected cloth prior to issuing her reports. At every turn, SMC answered and rebutted these claims by physically demonstrating the inaccuracy of the allegations or showing that the claims were based on legal errors in understanding the contract requirements (e.g. that a loom count was equivalent to a final count) or factual misapprehensions (e.g. the QA director did examine all products being shipped and prepared documents recording her findings). SMC repeatedly asked to have the government’s experts visit the plant to observe the manufacturing process with SMC’s experts, engineers and weaving staff, but these offers were not accepted. In 18 months, not one weaving expert employed or retained by the government came to the plant.

The quotation from Mr. Wrigley, who had little or no personal involvement in this matter, reflects a significant ignorance of the actual facts.

9. *The factory’s own inspection records often showed weaves of 34 by 34 threads or as low as 32 by 34 and 33 by 34.*

As can be shown by any review of SMC’s final inspection records, all final inspections were 35 x 35. Loom counts were also most often 35 x 35, but the presence of a 34 x 34 count on the loom is in fact indicative of a 35 x 35 when fabric from the same lot is counted under controlled conditions and in a relaxed state in the laboratory. The very rare counts that were lower than required were caught by SMC’s staff, segregated, and not used in the helmet program. The website of Mr. Campanelli purports to provide an illustration of the evidence of underweaving. The second page of the illustration Mr. Campanelli uses has a count of 34 x 32. This is apparently the source of accusation in the *New York Times* that there were weaves “as low as 32 x 34.” Mr. Campanelli and the *New York Times* do not address the fact that the inspector also notes: “REJECTED.” If a fabric is rejected, the loom is stopped, recalibrated, the fabric is isolated and does not go into the helmet program! Such fabric remains under lock and key at the plant today.

10. *Looms were “always set for 34 by 34, always,” said Jeff Kenner, who operated and repaired the looms and oversaw crews on all three shifts.*

This accusation is simply untrue. The looms were always set for 35 x 35. The lack of credibility of the accusation is shown by the many, many thousands of yarn counts on the loom and in the lab that were 35 x 35. Further, if the looms were “always” set at 34, how could the forms used to show “evidence” of underweaving on Mr. Campanelli’s website have so many 35s and so many perfect 35 x 35s? Why would the form used by SMC staff to record on-loom inspections be captioned “35 x 35 D[enier] Kevlar”? SMC has thousands of inspection reports going back for years that show that 35 x 35 fabric has been woven consistently since 1987. In the Answer filed by SMC (this document was unsealed and the New York Times had full access to it) Paragraph 73 denied the accusation that the looms were ever or always set for 34 and affirmatively stated that for 20 years the manufacturing specification was always 35 x 35: “For the past 20 years, MPS KH - 033, Revisions B – G, provided in identical language that the Kevlar cloth woven by SMC for use in PASGT helmets “**must be ... 35 (min) warp yarns per inch of cloth width**” and “**must be 35 (min) fill yarns per inch of cloth.**” Had the matter gone to trial, SMC would have been able to impeach Mr. Kenner’s credibility and honesty in making this absurd claim.

During the investigation, after it realized that it could not use the “evidence” of on-the-loom counts to show that the final lab counts were falsified, the United States gave SMC a sampling of final inspections that it believed had been altered by Rhea Crane, the head of SMC’s Quality Assurance department. In some of these, the subordinate had observed a 34 count, but Ms. Crane observed a 35 (the reverse also happened). The premise (likely provided by Mr. Kenner and Ms. Elshaug) was that although Ms. Crane wrote down a number different than the subordinate’s number, she had never independently reviewed the fabric and therefore she and SMC had committed fraud. SMC counsel and weaving expert pointed out that a thread count is not an exact science and a supervisor with greater experience is expected to correct errors by subordinates, as was the case here. The government investigators then insisted that that scenario was impossible as there were no retained samples from which the supervisor could make an independent determination. SMC counsel investigated this serious accusation and found it to be wholly and completely baseless. On the next visit to the plant, the government investigators were given an explanation of SMC’s QA procedure, and given a tour of the process of labeling and bagging samples, and shown where there was short term storage for several months in the lab, and long term storage of samples for a year or more in a locked area right outside the lab. This procedure (which the government initially insisted did not exist) had been in use for approximately 20 years. This accusation was typical of the wild and false assertions made by Mr. Kenner and Ms. Elshaug, neither of whom had ever worked in quality control, and the blind acceptance of these accusations by the government investigators.

It is true that Mr. Kenner both operated and repaired the looms. As such, he was required by SMC procedures and processes to know and follow the Manufacturing Specifications for the Kevlar Helmet cloth program (MPS KH-033). He knew or should have known that the Manufacturing Specifications for the manufacture of the helmet cloth had been specifically and directly written for a 35 x 35 minimum, and every version of the manufacturing process since 1987 had required 35 x 35 minimum thread count.

Purportedly, Mr. Kenner “discovered” that the standards were 35 x 35 shortly before he was fired. This is simply ludicrous.

The New York Times should have been aware that SMC did not weave at 34 x 34. The Answer filed by SMC in November 2007 was unsealed at the same time the Complaint was unsealed. Paragraph 73 of the Answer denied the accusation that the looms were set for 34 and affirmatively stated that for 20 years the manufacturing specification was always 35 x 35: “For the past 20 years, MPS KH - 0333, Revisions B – G, provided in identical language that the Kevlar cloth woven by SMC for use in PASGT helmets **“must be ... 35 (min) warp yarns per inch of cloth width”** and **“must be 35 (min) fill yarns per inch of cloth.”**”

Another factor that proves Mr. Kenner’s statement is false is that many hundreds of thousands of pieces of fabric were sent to UNICOR over the years. Each shipment was inspected upon receipt by UNICOR. It is important to note that even after the fabric is coated with resin, the threads per inch can still be counted. UNICOR has never notified SMC that UNICOR received SMC cloth pieces woven at less than 35 x 35.

UNICOR was provided elaborate materials and samples to review before every new contract (this is called a “First Article.”) If there were 34 x 34 fabric, it certainly would have been discovered in one or more of the First Article reviews.

Finally, UNICOR and other customers routinely visited the plant and had the ability to audit production, quality control, and other manufacturing process and they did so from time to time. It is simply inconceivable that over a 20 year period SMC would have been weaving a non-compliant cloth at 34 x 34 and its failure would not have been detected.

11. *In a statement, the company president, Carl R. McKay, denied “any and all of the allegations originally brought to the attention of the Department of Justice by disgruntled ex-employees.”*

Settling the case, United States v. Spirit Lake Tribe, filed in Federal District Court in Fargo, Mr. McKay said, was “a prudent business decision” to avoid legal costs and “should not be construed as an admission of wrongdoing.”

This statement is completely true.

SMC is not a large company (relative to defense contractors) and is owned by an economically challenged Indian Tribe in North Dakota. Its assets belong to the Tribe, and any income over and above the needs of the plant is dedicated to alleviating the crushing poverty on the reservation. Employment at the plant is the economic bedrock of the reservation and virtually every household depends on the income of a plant worker. The health insurance provided by SMC alone is a mainstay of the reservation. Because of the critical importance of the future of the plant to the Tribe and reservation society, neither the Tribal Council nor the management of SMC was willing to “bet” the future of the plant on the vicissitudes of litigation.

SMC and its owner the Tribe believed that they had strong defenses. They had already filed a motion to dismiss the False Claims Act law suit filed by Mr. Kenner and Ms. Elshaug (the “relators”), and a decision was expected shortly. Their review of other False Claims Act litigation, however, showed that such litigation is long, drawn out and very expensive, even

when the accused party wins. While SMC believed that it had an absolute jurisdictional defense to the whistleblowers' complaint because the Federal Tort Claims Act cannot be used against Tribes, it knew the process could be long-drawn out especially in the event of an appeal. Further, SMC believed that it had an absolute defense against the United States (if the United States intervened) because the United States did not use the mandatory contract disputes resolution process provided in the contract. Finally, on the merits, SMC had factual and legal defenses to all of the accusations made in the relators' Complaint. While the United States never drafted a False Claims Act complaint prior to the settlement, SMC was somewhat aware of the potential claims that might have been made against it if the United States had intervened. The United States repeatedly stated that it would not utilize the relators' Complaint as the core of its suit. The conviction of SMC that it would prevail against these theoretical U.S. claims was tempered by the knowledge that the cost of mounting these defenses (which might have arisen in three sequential legal proceedings and multiple appeals) could well have exceeded the cost of the \$2,000,000 settlement it was offered by the United States. Another advantage of settlement was to free up management's time for manufacturing critically needed for protection for the armed services.

In December 2007, after SMC had filed a series of motions, including a motion to dismiss, and participated in two mediation sessions before the Honorable Karen Klein, U.S. Magistrate Judge, the United States reduced its settlement demand from \$7,000,000.00 to \$2,000,000 and was unwilling to compromise further. This offer, while excessive, was still a prudent business decision for SMC. Copies of the motions filed by SMC are in the court file, and were accessible to the *New York Times*. A copy of SMC's Answer was also accessible to the *New York Times*. Oddly, there was no discussion of these defenses in the *New York Times*.

12. *The potential harm is difficult to judge. Helmet damage depends on the projectile. Whether a damaged helmet would hold up better with a tighter weave is hard to calculate, experts said.*
"You must have a certain amount of protection, and you can't go below that," said Gwynedd A. Thomas, associate professor of ballistics and protective fabrics at Auburn University.
Although the difference between 34 and 35 threads a square inch seems modest, the cumulative loss in layers of fabric is significant, Dr. Thomas said.
"Every time that you're losing some mass, you're losing some integrity," she said.
The strength comes from crossed yarns, the points that disperse projectile impact.
"The fewer crossovers, the less energy dissipation you're going to have," she added.
A 34-by-34 weave results in 5 percent fewer crossovers than 35 by 35, a difference Dr. Thomas called "quite a lot."
"I'm surprised somebody is not pursuing that more vigorously from the government," she added. Were she a soldier's parent, she said, "I would want to give my son a better helmet."

The foregoing discussion by Professor Thomas is predicated on the assumption that Mr. Kenner's false accusations that the cloth woven by SMC was "always" at 34 x 34 were true.

However, since Mr. Kenner's accusations are not accurate, the conclusion does not apply. The vast majority of SMC's yarn counts were 35 x 35, even when they were taken on the loom under extreme tension. (Indeed, even Mr. Kenner's carefully selected reports designed to show low thread counts show a considerable number of 35 x 35 on loom counts.). An accurate review of all on loom counts show the vast majority were 35 x 35, and all final loom counts were 35 x 35 and met weight requirements.

From her quotations, it is apparent that Professor Thomas was not provided with the many thousands of perfect ballistics tests conducted on fabric (by SMC and outside laboratories it had hired) without one single failure of a ballistics test on cloth. Nor was she provided with ballistics tests on manufactured helmets that were routinely conducted by UNICOR over the years without one failure. Nor was she provided with the results of the supplementary ballistics tests of the helmets recently conducted by the Department of Defense which were satisfactory to the Department. Nor was she provided with thousands of SMC's weight measurements that invariably showed the proper amount of Kevlar was in the fabric.

If Professor Thomas knew that SMC had always manufactured to a 35 x 35 specification and that the United States after 18 months of investigation was unable to come up with one scrap of deficient cloth that went into a helmet, or one bad ballistics test, SMC and *New York Times* readers might reasonably believe that she might have not expressed the opinion quoted by the *New York Times*. While one cannot expect Professor Thomas to have reviewed SMC's Answer, the reporter for the *New York Times* should have done so and shared those facts with Professor Thomas.

13. *The \$2 million settlement is far short of what the two former managers, Mr. Kenner and Tamra Elshaug, hoped for in 2006 when they filed a whistle-blower suit. The suit, for \$159 million in damages, accused the company of defrauding the government and violating safety standards.*

It is quite clear that the relators had high hopes for an enormous recovery. The basis for the reduction in the potential recovery is simple. After SMC spent considerable time and expense responding to the inaccurate claims made by the relators, the posture of the federal government moved from a potential criminal action to a potential civil action. The claims for civil sanctions also moved from more than \$250,000,000 to \$50,000,000, to \$17,000,000, to \$7,000,000, to \$5,000,000 and finally the sum of \$2,000,000 which was ultimately accepted.

This gradual diminishment was predicated on the government's recognition that many of the asserted "facts" and "claims" presented by the "whistleblowers" were not founded on fact or law.

14. *"I think they got away with it," said Mr. Kenner, who worked at Sioux for 20 years and was the weaving supervisor. "Sioux Manufacturing basically got a slap on the wrist," he said. "The Justice Department did a really good job, but the Department of Defense is really just downplaying this. They're embarrassed and want it to go away and would not admit to anybody's getting hurt or even killed."*

From SMC's perspective, the entire process was hardly a "slap on the wrist" and the settlement amount was exorbitant. The cost, anguish, time to respond, and injury to reputation to SMC simply cannot be restored. The abysmal treatment of SMC throughout is summarized as follows:

The most disturbing element of this matter is that fact that the Departments of Justice and Defense accepted the allegations of two ex-employees, fired for inappropriate conduct on company time in a company vehicle, as gospel without any skepticism of their motivations or a careful review the solidity of their legal theories or facts. Within a month of receiving the complaint, the U.S., apparently placing great credibility on the accusations of the Relators, organized a massive raid of the plant with 32 armed federal agents gathered from all over the country, threatened the company and several of its employees with federal crimes, and went into homes throughout the reservation talking to and intimidating SMC's present and former employees.

In addition, under the auspices of an accusation of a federal crime, the federal government seized many hundreds of boxes of records in June 2006 which it refused to return until January 2008 after the settlement. The rationale for this seizure is still under seal but was drawn virtually verbatim from the relators' complaint. After putting many good people through considerable anxiety, and the company to considerable expense over an 18 month period, the United States wrote letters -- after the settlement -- saying that no criminal charges would be made.

In December, 2006 (before SMC or the Tribe were even informally aware of the accusations being made against them) the Tribe had distributed some of SMC's retained earnings to its members (as was its right). A week or so earlier, the United States Attorney objected to any potential distribution, but his objection was not sent to the Counsel for the Tribe (it was mailed only to SMC's criminal counsel, who did not immediately forward it). Notice of the request was received too late to stop the distribution. In retaliation for the asserted disregard of its demand, the United States went to the court and told the court that this distribution was intended to defraud the government and prevent recovery of a potential criminal fine. The remedy sought and obtained by the US (without notice to SMC or the Tribe) was a freeze on payments of all outstanding checks previously written by SMC (including payroll and to its suppliers) coupled with government control of all future expenditures from any SMC bank account. This action crippled the company overnight and checks for critical suppliers were being dishonored, unless prior written approval of the United States Attorney was provided to the bank. Under extreme duress, SMC agreed to a substitute court order whereby the federal government had control over its expenditures and funds for a full year but that allowed SMC to pay for payroll and its ordinary business expenses. This federal control was lifted only in December of 2007 -- roughly at the time of the settlement. SMC is aware of no white-owned business that was ever subjected to similar treatment in a False Claims Act case, especially where the accused company was never served with either a civil or a criminal complaint.

Even though SMC was prohibited from discussing the case, the seizure of records, the seizure of its bank accounts, or its defenses, the United States "leaked" a damaging memo containing false accusations during the investigation. No investigation or discipline of the federal agents involved in the illegal leak was ever undertaken to SMC's knowledge.

The use of various tactics – seizure of vital business records, seizure of bank accounts, threats of criminal activity, selective leaks of sealed material, and the specter of the legal costs of protracted litigation – forced SMC to agree to a settlement.

Throughout this ordeal, SMC’s managers had an open door policy and welcomed government investigators and attorneys to the plant. They begged the United States to send a true weaving expert (as opposed to relying on Mr. Kenner) or to request that representatives of UNICOR accompany the attorneys to the plant to review the weaving process and manufacturing specifications. The United States only sent criminal investigators and attorneys, none of whom had any background in the technical areas of weaving. In SMC’s view, the entire investigation could have been averted had the United States initially sent a technical expert to SMC to review its processes and procedures.

The one bright spot is the loyalty that SMC’s many customers have shown throughout this ordeal. SMC’s customer relations are predicated on 100% satisfaction, 100% timeliness and 100% compliance. Over the years, it has received numerous awards and recognition for the caliber of its work. Mr. Kenner and Ms. Elshaug’s accusations of widespread fraud and cover-ups are completely at odds with SMC’s customers’ experiences over the years. Among the customers that were loyal to SMC and skeptical of the accusations were UNICOR (ironically, UNICOR is a unit of the Department of Justice that manufactures products in prisons). SMC presumes that this loyalty was due to the fact that UNICOR and other SMC customers had actual knowledge of SMC’s manufacturing processes and quality control. Thankfully, they did not abandon SMC and continued to place orders based on superior quality from SMC.

15. *Mr. Kenner and Ms. Elshaug’s lawyer, Andrew J. Campanelli, challenged Defense Department contentions that it was unaware of injuries from defective helmets. “There are tons of injuries with shrapnel and bullets going through helmets,” he said. “My clients documented that American soldiers did not get the protection that the government paid for, that the taxpayers paid for.”*

Mr. Campanelli’s outrageous claims that there are “tons” of injuries being covered up by the Defense Department defy credibility. When SMC managers first heard of these accusations during the raid, they were incredulous because (as noted above) every product failure requires immediate reporting back to all suppliers of the defective product and no such report had ever been received at that time (June 2006). Indeed, no such reports have ever been sent to SMC. If there were defects and serious injuries or death, there is a standard protocol for review by all levels of the supply chain so that the defect can be immediately identified and corrected. If any complaints were to come in, SMC would diligently work to address the problem along with all other suppliers to the helmet program.

The claims of death and injury in the complaint comprise one paragraph in the May 2006 Complaint. No “evidence” supportive of these claims was submitted as an attachment to the complaint.

There is some irony in these accusations by Mr. Campanelli against the Department of Defense. Because the Department of Defense does not accept Mr. Campanelli's view of the "facts" about the purported danger of the helmets or whether the helmets are "defective", it is being subjected to treatment similar to the treatment of SMC by Mr. Campanelli – baseless and scurrilous accusations hurled at the entity that disagrees with Mr. Campanelli. His tactic is to gain publicity at the expense of members of the military and their families being frightened. The McCarthy-esque assertions of "tons" of evidence being covered up by the Department of Defense is ludicrous and is as baseless as the accusations in the complaint that SMC engaged in a decades long conspiracy to weave substandard cloth. It simply is not true. The *New York Times* has compromised its objectivity and has fallen victim to a publicity stunt by a lawyer.

Mr. Campanelli is an attorney who advertises on the web that he can get plaintiffs "huge monetary awards." His web site lists dozens of fraud cases against government contractors, which resulted in money being paid to whistleblowers, and he implies those cases were brought by his firm, which is not true. He attempts to make money by receiving a cut of the bounty received by persons who sue entities accused (rightly or wrongly) of defrauding the federal government. He is not a ballistics or safety expert. There is certainly no basis to believe Mr. Campanelli with his unsubstantiated assertion of "tons" of evidence over the Department of Defense personnel who exhaustively investigated the allegations made by his clients and found no danger to the troops.

At prior Congressional hearings on helmet safety in 2006, the principal problem identified with the helmet program is that the PASGT helmet is very good at what it is designed to do, namely to protect soldiers from the impact of bullets or shrapnel, but it is not designed to protect soldiers from blasts and explosions in which the shock wave enters from under the helmet. A partial solution has already been identified: insertion of helmet liners that provide some measure of protection against the concussive force of blasts. This simple and affordable modification to the PASGT helmet is one that SMC favors. However, the fact that use of a special liner to the existing PASGT helmet shell would improve soldier safety does not mean that the PASGT helmet shell is defective. It does what it is intended to do: provide ballistic protection.

16. *In the evidence in the suit were hundreds of daily inspection records showing repeated violations of the weaving standards, as well as tape recordings of six managers and employees' admitting covering up violations.*

We have already discussed the "on loom" inspection records which do not show violations of any military specification at all. These records were carefully selected from many hundreds of records that showed all 35 x 35's, and these records include many instances of 35 x 35 weaving. In any event, even if the ones selected by the Relators were representative (and they are not), thread counts on the loom do not present the precision of final inspection of yarn counts.

The reference to the tape recordings of six managers and employees admitting covering up violations is frankly surprising to SMC, which first learned of this claim by reading the *New York Times*. Until this time, SMC had become aware of only one taped conversation of Ms. Rhea Crane, which is discussed at length below.

SMC has no idea whether five other employees were taped, and cannot imagine why during the investigation this accusation was never even shared with its counsel.

SMC has reviewed the website of Mr. Campanelli, and there is reference to two taped conversations between Mr. Kenner and Ms. Crane. There is no reference to six taped conversations and they are not disclosed.

Frankly, we do not believe that former managers or employees (other than the Relators) suggested to federal investigators that there was or is an SMC cover-up. SMC did its best in making all current and former employees available for interviews, though SMC had no input at to what they said.

17. *In a conversation Mr. Kenner secretly taped, Rhea Crane, quality assurance officer, worried “if we ever had someone get killed, and they decided to investigate because they thought maybe the helmet wasn’t any good.” “If we ever got audited,” she said, “you know what they would do to us. Shut us down and fine us big time. Probably never see another government contract.”*

This surreptitious tape was made shortly before the complaint was filed, likely at the instigation of Mr. Campanelli. This and another damning quotation from Ms. Crane were excerpted in the Complaint. After SMC first saw the complaint in February 2007, they asked for the complete transcript. Review of the complete transcript shows that these excerpts were taken out of context to mean the exact opposite of what Ms. Crane was saying. The entire tenor of the multiple page transcript of Ms. Crane’s side of the conversation was that the requirement for helmet cloth for UNICOR was 35 x 35 and that is exactly the standard that she insisted on in the course of her duties. The assertions that SMC wove fabric with less than a 35 x 35 count were made by Mr. Kenner, and were denied by Ms. Crane. The excerpted portion is damning – but only if it is viewed totally out of context. Had the *New York Times* reporter reviewed the entire transcript or troubled to read SMC’s Answer at Par. 237 to 238 (at which significant portions of the lengthy transcript are quoted) he would see the remarks quoted in the article were made by Ms. Crane to show why it was necessary to have strict quality control and strict manufacturing processes and the potential consequences (fines, cancellation of contracts) that could occur if errors were made.

To indicate how irresponsible this quotation is, Ms. Crane stated six times during the taped conversation (despite Kenner’s attempts to lead her to say otherwise) that the minimum thread count under the UNICOR contract was 35 x 35, that the requirement had always been that way and anything less than 35 x 35 would not be tolerated, that undercount cloth was segregated and rejected, and that there was no tolerance for less than a 35 x 35 count during her tenure as head of quality control. For example, she said in response to Mr. Kenner’s suggestion that the requirement was less than 35 x 35 in 2002, she replied: **“It’s always been 35 x 35 per Unicor. ...We have a contract with them and it calls out what their requirements are, and the requirements in there are 35 by 35 picks per inch minimum.”**

Mr. Kenner asserted several times that there had been problems in the past on machines he had been asked to repair and that “we’ve been weaving 34 by 34 or 34 by 35”, Ms. Crane without

debating him as to whether it had ever happened except on machines needing repair said several times “**well we shouldn’t have been**” and “**“we’re not going to do it now.”**” In the fall of 2005, there had been errors in weaving that were caught by Ms. Crane and she said “I put all that stuff [with 33 or 34 counts] in the hold cage.” Ms Crane stated that the recently installed Dornier looms are “all 35 by 35” and discussed how one appeared to be 34.5, but in fact this count was under tension on the loom and in fact it was “**35 by 35** unless you mess with the settings, and nobody’s got that card key”

After Mr. Kenner repeatedly stated that there were problems in the past prior to her becoming director of quality control, Ms. Crane found the conversation non-productive and quite sensibly said: “I really don’t care what they were running at back then ... because I want them to run at 35 x 35 now. I don’t care what happened back then [before she became head of quality control], I can’t fix that. But I can make sure that we are complying to their requirements from here on out.” She also stated: “and that’s all I’m looking for, I’m not going to sign my name on something knowing that what we’re not putting into there what should be.

Eventually, Mr. Kenner steered the conversation to the distant past and Ms. Crane was uncertain as to whether the company had done anything wrong **prior to 1987** when the plant now known as SMC made helmets, as opposed to helmet pattern sets. As a long time employee whose deceased husband had been head of weaving while the plant was owned by Brunswick Corporation, she was aware that the cloth used prior to 1987 (prior to incorporation of SMC and prior to purchase of the plant by the Tribe) was not 35 x 35, because the military specifications at that time did not require 35 x 35. She stated that **if** the requirements were the same, then SMC would not have been in compliance with a 35 x 35 standard and would have been “cheating” or “lying”. However, a simple review of the military standards for helmet cloth shows that the 35 x 35 standard was first put into place in 1987 and that prior to 1987 it was variously 33 x 34, 34 x 34, or 34 x 35. Thus her comment “when we [Brunswick] used to make helmets, I am sure our cloth was plus or minus a pick, **and if we were certifying to that [35 x 35 military specification] back then**, we were in violation; we were cheating, we were lying. Well I can’t do that. I won’t do that.”

In sum, the attempt by the Relators to vilify SMC and Ms. Crane is dishonest and should be repudiated. To take quotations out of context is ethically and morally bankrupt, and the rote acquiescence by the *New York Times* to material appearing on the Campanelli website is simply gullible and falls far short of accepted journalistic standards.

18. *Ms. Crane did not return repeated calls for comment.*

This is true. On the advice of Ms. Crane’s personal lawyer, Ms Crane did not return calls to the *New York Times*. Ms. Crane however assumed that the New York Times would *at a minimum* read the Answer that SMC filed and that it referenced in its Press Statement that had been furnished to the *New York Times*. Further, she assumed that the *New York Times* would never accept a statement taken wholly out of context and present such as proof that she was “worried” about defective helmets.

19. *Justice Department officials said some Sioux records listed looms with 35-by-35 counts, with a few at 36.*

In fact, all final inspections indicated 35 x 35 on all looms. All looms weaving helmet cloth are set to result in a 35 x 35 weave, and have been so set since 1987. Because manufacturing processes are not without mechanical or human error, the quality control division continuously monitored for errors and rejected and segregated fabric in the rare circumstance that less than a 35 x 35 weave was found. The vast majority of loom inspections also indicated 35 x 35. About 5 percent of yarn counts were 36. Further, the presence of a 34 does not indicate non-compliant fabric due to the averaging of the samples and rounding to the nearest whole number.

20. *Dr. Thomas agreed looms could be adjusted to do so.*

Looms can be set to weave various fabrics and various styles.

21. *Mr. Kenner and Ms. Elshaug, who worked at the plant for 26 years and was in charge of buying Kevlar, say thread counts were routinely rounded up to reach the 35-by-35 minimum.*

Neither of these individuals ever worked in quality control and these comments betray their ignorance of the contractual requirements and company procedures regarding thread counting. SMC followed an industry-wide method of counting thread (Standard Method 5050) as it was required to do in the contract. This method requires that five yarn counts be taken for each roll in each direction; that the five be totaled, divided by 5, and the resultant number be rounded to the nearest whole number. In other words, if a fabric had 35, 35, 35, 34, 34, the total of threads is 173. The total is divided by 5 to reach an average 34.6. This value is then to be reported as the nearest whole number or 35. If the counts were 34, 34, 34, 35, 35, however, the total would be 172, and if divided by five, the result is 34.4, which is rounded down to the nearest whole number.

This is fully explained in SMC's Answer and was available to the *New York Times* as well.

In addition, SMC used a similar rounding method in counting the five samples, of rounding down to the nearest whole number, or rounding up to the nearest whole yarn if it appeared the inch line intersected a single yarn. (Because of two yarns are grouped, the demarcation between one yarn and the next is very difficult to determine.) This methodology had been developed and approved by Brunswick Corporation in the 1980's with assistance of military experts and its use was continued by SMC from 1987 into 2007. This method was shared with UNICOR on numerous occasions since 1987. During the investigation, claims were made by the United States that because this rounding methodology was not specifically addressed in Standard Method 5050 (which was silent on this point) that the method was improper even though it is in widespread commercial use in many weaving applications. The United States Attorney (significantly, this was not a claim presented by UNICOR) suggested that this alleged "breach of contract" was an indication of "reckless disregard" and might be deemed fraud. SMC strongly disagreed with this claim. If the United States wanted to change the mutually accepted interpretation of the contract after 30 years, SMC argued that it should have used the standard

contract resolution procedures, not a fraud case. SMC is confident that as a matter of contract law, when a particular interpretation is jointly developed by the parties and used for over 30 years with full knowledge of both parties, that no court or jury in the land would find its use improper.

Because the fabric cannot exceed a certain weight (or else the helmets are too heavy), the method chosen by SMC of counting and rounding up or down is suited to accurately monitor the fabric weave, rather than ignoring portions of yarns. The weight measurements conducted as part of the final inspection, before resin is added, show that the fabric always met contract requirements and was a failsafe method to ensure that the proper amount of thread was in the helmet cloth.

22. *The papers in the suit showed a Kevlar surplus of up to 30,000 pounds and a resin shortage. Extra resin was applied to the Kevlar to bring it up to a specified weight, the former employees said.*

These allegations are simply false. There is no substantiation of this claim whatsoever. The weight of the fabric is taken in the QA laboratory on uncoated cloth (before any resin is applied) so this accusation is completely spurious and again demonstrates the inaccuracies endemic in the complaint. The “papers” referenced in the first page is simply the relator’s 59 page complaint, which is rife with inaccuracies and falsehoods. The Answer filed by SMC addresses and denied the claim of additional resin or errors in weighing fabric. There is and has been no Kevlar surplus, and no resin shortage.

23. *Extra resin also poses a hazard to soldiers, Dr. Thomas said, adding, “If they were putting more resin in, they were doing something that will hurt soldiers, because it reduces elasticity and increases brittleness.”*

As with Dr. Thomas’ prior opinions, this is clearly a supposition: “if they were putting more resin in ...” But SMC never put more or less resin on cloth than was required by the military specifications.

24. *Mr. Kenner said, according to the suit, that when he asked Mr. McKay about the violations, he responded: “That is the way we are going to weave it. Don’t you worry about it.”*

The Answer filed by SMC and Mr. McKay flatly denies that this alleged conversation occurred.

25. *Mr. McKay did not respond to e-mail and phone messages.*

After 18 months of chaos caused by the investigation, Mr. McKay rightly believed his time would be used more productively in rebuilding the company, rather than responding to accusations he believed had already been refuted. In retrospect he should have referred media inquiries to legal counsel. At the time, Mr. McKay was concerned some of the question areas the Times reporter might inquire about involved issues that influenced the settlement (such as the seizure or control over bank accounts) that were and remain under seal. In any event, Mr. McKay did send the reporter the press release which referenced SMC’s Answer. If a reporter from a

major newspaper such as the New York Times is calling about litigation, it is reasonable to assume (as did Mr. McKay) that the reporter would not just include accusations in a complaint, but also read and reference the Answer filed by the defendant. This is basic journalism practice that was not followed by the *New York Times*. The best source of information on litigation is court records. Here, the reporter does not reference one document filed in the public record by SMC.

26. *Despite excellent job ratings, Mr. Kenner and Ms. Elshaug were fired after protesting the violations.*

The circumstances of the firing of Mr. Kenner and Ms. Elshaug are set out at Par. 42 of SMC's Answer. It provides as follows:

Neither Mr. Kenner nor Ms. Elshaug "objected" to SMC, the Tribe, Mr. McKay or Mr. Dauphinais about any allegations or suspicions that they had of "fraud" prior to their being terminated. The only reason SMC terminated both Mr. Kenner and Ms. Elshaug was because they had violated company policy. Although both were married, they appeared to have an inappropriate relationship with each other, rather than a business relationship. This conduct was tolerated, although they were advised that this conduct was not proper. The culminating reason that the two were fired by SMC is that on a weekday afternoon at approximately 3 p.m. in early October, 2005, the two were discovered in a remote woody area of the Reservation by two members of the Fort Totten Rural Fire Department. The fire department members observed two vehicles (one was an extended cab pickup truck with an SMC decal on it, marked for official use only; the other was a sedan). Mr. Kenner was observed leaving the back seat of this extended cab pickup, and entering the front seat of the pickup on the driver's side. Mr. Kenner drove out along the road and stopped by the Fire Department vehicle and told the two members of the Rural Fire Department that "You caught us. It's OK. We are on our lunch break." (It was 3 p.m.) Shortly thereafter, a sedan with a license plate registered to Ms. Elshaug rapidly left the area. The firemen reported this information to the fire department, and the news of this "tryst" rapidly became common knowledge throughout the Spirit Lake Reservation. The use of the SMC vehicle and the fact that Ms. Elshaug was Mr. Kenner's direct supervisor at the time was detrimental to morale at the SMC plant. Both Ms. Elshaug and Mr. Kenner were fired by SMC for violating SMC Policy Nos. 40 and 45 of the employee handbook.

At or about this time, Mr. Kenner advised Mr. McKay at a meeting about Mr. Kenner's termination that he loved Ms. Elshaug. After the departure of the two, it has been learned that Ms. Elshaug authorized significant amounts of SMC overtime pay for Mr. Kenner (little overtime was authorized for other employees that she supervised) and that she had authorized unusual reimbursements for him. Had this conduct been discovered in a timely fashion, it alone would have been a basis to fire Ms. Elshaug and Mr. Kenner.

27. *Mr. Campanelli will share part of the settlement totaling \$406,350. There is no further legal recourse, he added.*

Mr. Campanelli voluntarily signed the settlement agreement and he and his clients are bound by it, as is the United States and SMC and the Tribe. SMC is not aware of the percentages or amounts of recovery by Campanelli or his clients. Had Mr. Campanelli not settled, he would have faced numerous defenses by SMC and it is SMC's belief that he would have recovered nothing at all.

28. *Soldiers generally cannot sue the government.*

Long standing federal law generally prohibits soldiers from filing suit against the federal government.

29. *And Sioux is owned by an Indian tribe, the Spirit Lake Nation, that can, he said, assert sovereign immunity against private suits.*

Both SMC and its owner, the Spirit Lake Nation, have sovereign immunity which may be waived in certain instances. In the UNICOR contract, SMC and UNICOR agreed to resolve any disputes pursuant to a contracts disputes clause, barring both parties from using the courts. If the federal government had sued SMC, SMC would have moved for dismissal of the case for the purpose of exhaustion of this administrative remedy.

30. *The company also benefits from a 5 percent federal incentive program for Indian contractors and preferences for disadvantaged small businesses.*

There is no 5% federal incentive program applicable to SMC. This is yet another of the false assertions by the Relators. SMC is not deemed an Indian Contractor under federal law, since it is owned by a government and is not owned by individual Indians.

SMC, together with any white-owned small businesses on the reservation, is in a federal HUB Zone. In order to encourage employment on the reservations and other areas of deep poverty, the federal government has provided certain advantages in government contracting in HUB Zones.

31. *Ms. Elshaug and Mr. Kenner said they did not regret suing. "It was never about the money," he said. "It was about the soldiers. I'm still shocked. I wouldn't be wearing one of those helmets."*

SMC believes that it was about the money. During early settlement discussions, SMC offered to invest in additional quality control methods, to become and remain certified under certain standards, and to expend moneys on constructive projects that would in fact provide additional assurance to SMC's customers and the end users of the products made by SMC, in lieu of a sanction paid to the federal treasury and from which a bounty would be paid to the relators. This win-win approach was flatly rejected. If it were about the soldiers, the offer to constructively spend moneys to provide further assurance of safety would have been accepted.

At various points, SMC also offered settlement amounts less than \$2,000,000 but such offers were rejected. Once, the U.S. Attorney said that a certain monetary offer by SMC was rejected because “Andrew [Campanelli] would never accept that.”

Further, if it were about the soldiers, there are process and procedures at SMC to make complaints and suggestions to correct any problems. Here, apart from the April 2006 taped conversation with Ms. Crane for purposes of shoring up the lawsuit, no management of SMC was made aware that the relators believed SMC was underweaving cloth, falsifying records, or otherwise violating contracts. Had management of SMC been approached in a reasonable way with these concerns, their questions and concerns would have been resolved. Instead, the Relators went to an attorney, apparently because he advertised on the web that he can get “huge monetary rewards” for his clients.

THE ARTICLE

Manufacturer in \$2 Million Accord With U.S. on Deficient Kevlar in Military Helmets

By: BRUCE LAMBERT

Published: February 6, 2008

A North Dakota manufacturer has agreed to pay \$2 million to settle a suit saying it had repeatedly shortchanged the armor in up to 2.2 million helmets for the military, including those for the first troops sent to Iraq and Afghanistan.

Jeff Kenner and Tamra Elshaug, former managers, filed a whistle-blower suit accusing Sioux Manufacturing of fraud and safety violations.

Twelve days before the settlement with the Justice Department was announced, the company, Sioux Manufacturing of Fort Totten, was given a new contract of up to \$74 million to make more armor for helmets to replace the old ones, which were made from the late 1980s to last year. Sioux upgraded its looms in 2006, company executives say, and the government says it has started inspections at the plant.

The United States attorney for North Dakota, Drew H. Wrigley, called the accord “an appropriate resolution” because the Defense Department had said that 200 sample helmets passed ballistic tests and that it “has no information of injuries or deaths due to inadequate Pasgt helmet protection.”

Pasgt, pronounced “pass-get,” stands for the Personal Armor System for Ground Troops, which includes the helmet model being replaced.

At the core of the investigation was the contention by two former plant managers that Kevlar woven at Sioux failed to meet the government’s “critical” minimum standard of 35 by 35 threads a square inch.

When properly woven, Kevlar, a polymer thread made by Dupont, is stronger than steel, and able to deflect shrapnel and some bullets. Government regulations call for rejecting Kevlar below the 35-by-35 standard.

The company “was underweaving,” Mr. Wrigley said.

“That is undebatable,” he said.

The factory’s own inspection records often showed weaves of 34 by 34 threads or as low as 32 by 34 and 33 by 34. Looms were “always set for 34 by 34, always,” said Jeff Kenner, who operated and repaired the looms and oversaw crews on all three shifts.

In a statement, the company president, Carl R. McKay, denied “any and all of the allegations originally brought to the attention of the Department of Justice by disgruntled ex-employees.” Settling the case, *United States v. Spirit Lake Tribe*, filed in Federal District Court in Fargo, Mr. McKay said, was “a prudent business decision” to avoid legal costs and “should not be construed as an admission of wrongdoing.”

The potential harm is difficult to judge. Helmet damage depends on the projectile. Whether a damaged helmet would hold up better with a tighter weave is hard to calculate, experts said.

“You must have a certain amount of protection, and you can’t go below that,” said Gwynedd A. Thomas, associate professor of ballistics and protective fabrics at Auburn University.

Although the difference between 34 and 35 threads a square inch seems modest, the cumulative loss in layers of fabric is significant, Dr. Thomas said.

“Every time that you’re losing some mass, you’re losing some integrity,” she said.

The strength comes from crossed yarns, the points that disperse projectile impact. “The fewer crossovers, the less energy dissipation you’re going to have,” she added.

A 34-by-34 weave results in 5 percent fewer crossovers than 35 by 35, a difference Dr. Thomas called “quite a lot.”

“I’m surprised somebody is not pursuing that more vigorously from the government,” she added. Were she a soldier’s parent, she said, “I would want to give my son a better helmet.”

The \$2 million settlement is far short of what the two former managers, Mr. Kenner and Tamra Elshaug, hoped for in 2006 when they filed a whistle-blower suit. The suit, for \$159 million in damages, accused the company of defrauding the government and violating safety standards.

“I think they got away with it,” said Mr. Kenner, who worked at Sioux for 20 years and was the weaving supervisor. “Sioux Manufacturing basically got a slap on the wrist,” he said. “The Justice Department did a really good job, but the Department of Defense is really just downplaying this. They’re embarrassed and want it to go away and would not admit to anybody’s getting hurt or even killed.”

Mr. Kenner and Ms. Elshaug’s lawyer, Andrew J. Campanelli, challenged Defense Department contentions that it was unaware of injuries from defective helmets. “There are tons of injuries with shrapnel and bullets going through helmets,” he said. “My clients documented that American soldiers did not get the protection that the government paid for, that the taxpayers paid for.”

In the evidence in the suit were hundreds of daily inspection records showing repeated violations of the weaving standards, as well as tape recordings of six managers and employees’ admitting covering up violations.

In a conversation Mr. Kenner secretly taped, Rhea Crane, quality assurance officer, worried “if we ever had someone get killed, and they decided to investigate because they thought maybe the helmet wasn’t any good.”

“If we ever got audited,” she said, “you know what they would do to us. Shut us down and fine us big time. Probably never see another government contract.”

Ms. Crane did not return repeated calls for comment.

Justice Department officials said some Sioux records listed looms with 35-by-35 counts, with a few at 36. Dr. Thomas agreed looms could be adjusted to do so.

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Mr. Kenner said, according to the suit, that when he asked Mr. McKay about the violations, he responded: “That is the way we are going to weave it. Don’t you worry about it.”

Mr. McKay did not respond to e-mail and phone messages.

Despite excellent job ratings, Mr. Kenner and Ms. Elshaug were fired after protesting the violations. Mr. Campanelli will share part of the settlement totaling \$406,350. There is no further legal recourse, he added.

Soldiers generally cannot sue the government. And Sioux is owned by an Indian tribe, the Spirit Lake Nation, that can, he said, assert sovereign immunity against private suits.

The company also benefits from a 5 percent federal incentive program for Indian contractors and preferences for disadvantaged small businesses.

Ms. Elshaug and Mr. Kenner said they did not regret suing. "It was never about the money," he said. "It was about the soldiers. I'm still shocked. I wouldn't be wearing one of those helmets."

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