UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA ex rel. MELAN DAVIS and BRAD DAVIS,	)	**JURY DEMAND**
Plaintiffs,	)	
	)	Case No.1:08-cv-1244-TSE-TRJ
v.	)	
US TRAINING CENTER, INC.,	)	
Defendant.	)	

RELATORS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A NEW TRIAL

Relators respectfully move for a new trial pursuant to Federal Rule of Civil Procedure 59(a)(1). After the conclusion of the trial, Relators obtained a sworn declaration from Robert Farrell that conclusively establishes that Blackwater's former Chief Operating Officer, Danielle Esposito, committed perjury. Ms. Esposito lied to the jury and the Court by testifying without equivocation that Defendant provided to Robert Farrell, the State Department outside auditor, a report revealing potential fraud and operational deficiencies. See Exhibit A for the perjured testimony; see Exhibit B for the declaration establishing the fact of perjury.

This Court is permitted to grant a new trial pursuant to Rule 59(a)(1) for "any reason for which a new trial has heretofore been granted in an action at law in federal court. . ." As set forth in Section I, federal courts in the Fourth Circuit and elsewhere have repeatedly granted motions seeking new trials when the movant brings forward evidence establishing a witness committed perjury during a jury trial, and that perjury might have impacted the outcome.

As set forth in Section II, a new trial is merited when the decisional law is applied to the facts here. Ms. Esposito's perjury might have improperly influenced the outcome of the trial. The perjury permitted Blackwater to argue that Defendant lacked any intent to deceive and shared all facts with the State Department. (See 8/4/11 Trial Tr. at p. 186 for Court's instruction on government knowledge.) Defense counsel argued Blackwater was a "scrupulous" company working closely and cooperatively with the State Department. That defense is inconsistent with the fact that Ms. Esposito perjured herself in order to prevent the jury from learning that she and Chief Financial Officer Taylor intentionally withheld the report from the government auditors. The fact of perjury suggests that Ms. Esposito believed the truth may lead the jury to rule against her company.

STATEMENT OF FACTS

On August 1, 2011, Danielle Esposito, former Chief Operating Officer of the Defendant, testified under oath at trial. Ms. Esposito began working for the Defendant in 2001 selling target and range time at $25,000 per year. See August 1, 2011, Trial Transcript at p. 83, appended as Exhibit A. In 2006, she became the deputy local program manager under WPPS II. *Id*. at p. 91. She served as Blackwater's primary liaison with the State Department. *Id.* at p. 92. By February 2009, Defendant had promoted Ms. Esposito to Chief Operating Officer and increased her salary to $350,000 per year. In 2011, Ms. Esposito received $2 million for her role in building the company. *Id.* at pp. 89-90. Defendant continues to pay Ms. Esposito $350,000 per year. *Id.* at p. 91.

Ms. Esposito testified at trial that she gave a copy of the BDO Seidman evaluation of the Amman, Jordan operations to Robert Farrell, the Cotton & Company auditor, who was hired by the Department of State. *Id.* at pp. 122-3. Defendant had engaged BDO Seidman to evaluate its

Amman, Jordan operations See Plaintiffs' Exhibit 45, appended as Exhibit C, at pp. 2-3. The BDO Seidman audit team interviewed numerous individuals and reviewed documents *Id.* at 3. The BDO Seidman audit team concluded that prior to the March 2007 Blackwater failed to keep any records from which to determine how much the company had actually paid for travel on the WPPS II contract. *Id*. at p. 8. The BDO Seidman report also identified a high incidence of lost tickets, which the auditors described as "indicative of fraud. *Id*. at p. 8. The report detailed the complete absence of any records detailing the actual amounts expended on travel and criticized the "inadequate" procedures for maintaining and securing tickets in Amman at the Defendant's offices. *Id.* at pp. 8, 10. The report concluded that prior to March 2007 there were "insufficient procedures and controls in place to ensure the Operation was running in… [an] abuse-free manner." *Id.* at p. 20.

Cotton & Company was awarded the Blackwater audit from the State Department in February 2008 and began their fieldwork in May 2008. See 7/28/11 Trial Tr. at p. 230. The auditors asked for previous audits. According to an email produced by Defendant, Chief Financial Officer Mike Taylor and Ms. Esposito considered giving Cotton & Company (and therefore the State Department) the BDO Seidman evaluation of the Amman, Jordan operations. On May 19, 2008. Ms. Esposito asked Mr. Taylor, "do you have the BDO audit that was completed on the Amman operation in June or July, 2007. If so, may I have an electronic copy of it?" See Plaintiffs' Exhibit 279 (appended as Exhibit F). Mr. Taylor sent Ms. Esposito the report, but asked her to "please see me about this report before you deliver." *Id.* Ms. Esposito then provided the report to Mr. Roitz. *Id.*

Ms. Esposito stated that she did not recall Mr. Taylor questioning whether or not the audits should be provided to Cotton & Company, but that he requested that the audit should not

be provided electronically "[b]ecause documentation with Blackwater had a way of finding its way on the cover of the *New York Times*, so he preferred that it had it hard copy to protect proprietary information of the company." See Exhibit A at p. 123.

Ms. Esposito testified that she personally provided the audit report to Mr. Farrell in person, and not electronically, to prevent media coverage.

> Q: And did you provide a copy of Exhibit 45 [the draft audit report] to the audit team.
> A: Yes, I did.
> Q: And who did you provide it to?
> A: Mr. Farrell or one of his three reps, but I am pretty sure it was Mr. Farrell.
>
> Exhibit A at pp. 122-3.

The Court reiterated the question:

> Q: You said that you gave them [Cotton & Company] a copy of the BDO; is that correct?
> A: Yes, your Honor.
>
> Exhibit A at pp. 125-6.

Ms. Esposito further testified that she signed a management letter stating that she had provided to the auditors all the requested records and had revealed all known facts relating to fraud or suspected fraud. See Exhibit A at p. 128. See also Plaintiffs' Exhibit 267, appended as Exhibit D. The Court asked,

> Q: Was that statement true when you made it?
> A: Yes, your Honor."
>
> See Exhibit A at p. 128.

The management letter was signed by Ms. Esposito on November 3, 2008, *after* BDO Seidman had provided the report. See Exhibit C.

Ms. Esposito's perjury surprised Relators' counsel. Although Relators' counsel suspected Ms. Esposito was lying, they were not sure whether or not defense witness Farrell was

going to testify to like effect. Prior to and perhaps during trial, Mr. Farrell was assisting Defendant. Mr. Farrell provided a declaration to Defendant to assist Defendant's effort to exclude the testimony of Mr. Cotton. See Exhibit E. In that declaration, Mr. Farrell portrayed himself as the most knowledgeable person at Cotton & Company with respect to Defendant's audit. He stated that he "was the one principally responsible for interviewing USTC executives…for drafting the management letters." *Id.* at 8. Mr. Farrell minimized the weight of Mr. Cotton's testimony, claiming "Mr. Cotton did not 'observe[] the mechanics of [USTC]'s billing operations first-hand' but instead relied on me…" *Id.* at 9. Defendant included Robert Farrell as a witness it was going to call. See Dkt. No 586. On August 4, 2011, Defendant rested without calling Mr. Farrell.

As Relators' counsel learned subsequent to trial, although Mr. Farrell had been assisting Blackwater, he was not willing to support Ms. Esposito's perjury. Instead, he was willing to go on record to establish that Ms. Esposito committed perjury. On August 12, 2011, Robert Farrell executed a declaration that directly contradicting Ms. Esposito's trial testimony. See Exhibit B. Mr. Farrell stated under oath that "Ms. Esposito never gave me or any of the other Cotton & Company representatives a copy of the BDO Seidman evaluation of the Amman, Jordan operations." He further avers "Ms. Esposito never alerted me in any way to the facts learned during the BDO Seidman evaluation of the Amman, Jordan operations. Had she done so, I would have memorialized such facts in the audit records." See Exhibit B.

Had Ms. Esposito testified truthfully, Relators' counsel would have used that testimony and Plaintiffs' Exhibit 279 (appended as Exhibit F). Relators would have argued the deceptive conduct by Taylor and Esposito was inconsistent with a "scrupulous" company. The two top executive discussed turning over the report, but made an intentional decision to withhold

information, likely because they feared that turning over the report would have resulted in the State Department discovering the lack of support for the travel reimbursement claims. Had Relators' counsel learned during trial that Ms. Esposito committed perjury, they would have argued that Ms. Esposito's perjury proved Blackwater's intent to deceive not only the State Department but also the Court and the jury.

On August 4, 2011, the jury was read instructions regarding the government knowledge defense after hearing defense counsel argue that the State Department knew about issues with billing in the labor and travel musters. The Court said:

> You've heard evidence that the Department of State and its representative[s] (sic) knew of certain facts with respect to labor and travel invoices presented on the WPPS II contract. If you find that the Department of State either knew of, or was informed about, all material facts relating to the labor and travel invoices and acquiesced in or approved payments to the defendant on those invoices, this can negate the defendant's intent to present false or fraudulent invoices or to make or use false or fraudulent statements and records.
>
> See 8/4/11 Trial Tr. at p. 186.

The jury deliberated at length before reaching a defense verdict on August 5, 2011. As the Court noted, "I thought the arguments to the jury were really quite good…And as testimony [sic] to that, they spent two days attempting to resolve the case. 8/5/11 Trial Tr. at p. 18.

ARGUMENT

This Court should grant Relators a new trial because Ms. Esposito's perjured testimony might have influenced the jury verdict. Rule 59(a) of the Federal Rules of Civil Procedure provides that the court may, on motion, grant a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." As set forth in Section I, the Fourth Circuit has directed district courts to grant new trials when witnesses provide false testimony. These rulings are consistent with those across the nation, as federal

courts often grant new trials when a movant is able to demonstrate perjury. As set forth in Section II, the facts here establish beyond dispute that Ms. Esposito committed perjury, and that her perjured testimony might have influenced the jury's decision.

I. DISCOVERY OF PERJURY IS GROUNDS FOR A NEW TRIAL.

The Fourth Circuit jurisprudence on the grant of new trials makes clear that the district courts should grant a new trial whenever it is established (often after evidentiary hearings) that trial witnesses provided false testimony. Federal courts elsewhere have repeatedly ruled to the same effect.

A. Fourth Circuit Jurisprudence

The Court of Appeals for the Fourth Circuit has explained that on a Rule 59 motion, "the judge has a duty to set aside the verdict and grant a new trial, if he is of the opinion that [it] . . . is based upon evidence which is false . . ." *Atlas Food Sys. and Serv., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) (quoting *Aetna Cas. & Surety Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1991). *See also Poynter by Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989).

In *U.S. v. King*, 71 Fed.Appx. 192, 2003 WL 21730010 (4th Cir. July 25, 2003), defendants were convicted of drug conspiracy and misprision of felony. Defendants filed a successful motion for a new trial. When the government appealed, the Fourth Circuit Court of Appeals upheld the grant of a new trial on the following facts: King, a Virginia State trooper, and Crutchfield, a police officer, were charged in a multiple-count conspiracy. The government argued that they had provided protection for a drug operation run by King's nephew. The government called three witnesses (Lewis, Williams and Anchee) who testified that King and Crutchfield had accepted cash and sex for drugs. These three witnesses also testified that King

and Crutchfield revealed the identities of informants and undercover officers. The jury found King and Crutchfield guilty.

Two years later, King and Crutchfield filed a motion for a new trial. The two men—serving time in prison—obtained affidavits from two inmates (Hughes and Motley), who were not at trial. These two inmates claimed they were housed with the witnesses before the King/Crutchfield trial, and were told by the witnesses that they were going to perjure themselves in exchange for reduced sentences. The district court granted King and Crutchfield a new trial (despite the passage of time) based on the test set forth in *Mills v. United States*, 281 F.2d 736 (4th Cir.1960) (newly discovered evidence), and *Larrison v. United States*, 24 F.2d 82 (7th Cir.1928) (witness recantations.)

On appeal, the Fourth Circuit Court of Appeals upheld the grant of a new trial. The Court of Appeals noted that heard three days of testimony on the motion, and properly granted a new trial.

To like effect, in *United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1975), the Fourth Circuit found a new trial may be merited based on witness recantation. The defendant, Wallace, was convicted in district court of possessing a sawed-off shotgun in violation of federal statues, and he appealed. Wallace asserted that his conviction was improper, and that the district court also improperly denied his motion for a new trial supported by the affidavit of a government witness. The witness, Wallace's brother, testified at trial that Wallace had indicated to him knowledge of the gun in the back of the car. After the trial, however, the witness signed an affidavit stating that his original testimony was false. At the hearing on a motion for a new trial, the court asked the witness, "You mean to tell me in this court that you were willing to perjure yourself to get your brother convicted to save your own job? Witness: And my own family, sir. I

mean that is the truth…" *Id.* at 855. The district court denied the motion, asserting that "at a post-trial hearing grounded upon a recantation of testimony, the court is not to consider which version of the witness's story is true, but rather only to ensure that there had been no prosecutorial conduct by way of intimidation or threats to falsify." *Id*. at 865.

The district court denied the motion because the prosecutors had not engaged in any misconduct. The Fourth Circuit disagreed with the district court's analysis, and explained that new trials should be granted when (a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it, the jury *might* have reached a different conclusion; and (c) that the party seeking the trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. (The Fourth Circuit cited *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928).) The Fourth Circuit remanded the matter, and directed the district court to grant a new trial if it found that the "jury '***might***' have decided the case differently…that is, that there is ***more than a faint possibility of a different jury verdict but something less than a probability***." *Id*. (emphasis added).[1]

District courts in the Fourth Circuit have granted new trials on facts similar to those found here. In *Johnson v. Verisign, Inc.*, 2002 WL 1887527 at *12 (E.D.Va. 2002), plaintiff alleged he was the victim of racial discrimination and retaliatory termination for protected

[1] Relators found two Fourth Circuit cases upholding district court refusals to grant new trials. In both, the Court of Appeals found that the district courts had properly made factual findings that no perjury actually occurred. See *U.S. v. Jacobs*, 166 F.3d 335 (Table), 1998 WL 879015 (4th Cir. Aug 3, 1998) (new evidence did not actually contradict the trial evidence) and *U.S. v. Duty*, Slip Copy, 2011 WL 3262697 (4th Cir. Aug. 1, 2011) (trial testimony in question was not actually false.) *See also Hospira Inc. v. Alpha and Omega Transportation Svcs. Inc,*, 2007 WL 1825182 (W.D.N.C. Jun. 25, 2007) ("no evidence has been presented that [the witness] gave false testimony.")

activity he engaged in when opposing defendants' discriminatory practices. During pre-trial motions and at trial, the defendants presented testimony that the plaintiff was part of a larger, nondiscriminatory reduction in the workplace. Plaintiff filed a motion seeking a new trial, alleging Defendant made misrepresentations during summary judgment and trial. Defendants' witnesses testified repeatedly about a list of individuals affected by the layoff. The jury found in favor of the defendants. The Court also separately issued a *sua sponte* post-trial order seeking all documents relevant to the force reduction because witness testimony raised the issue about the credibility of Defendant's representations to the Court. After reviewing the production, the Court concluded that defendants presented false testimony regarding the existence of a tangible layoff list. *Id.* at *15. The Court concluded that the jury might have reached a different verdict without the false evidence. The Court noted, "Defendants' consistent testimony about a written, tangible layoff list including the Plaintiff unquestionably bolstered the credibility of Defendants in a case where credibility was key." *Id.* at *16.

In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority, Inc.*, Slip Copy, 2011 WL 1655810 (W.D.Va. 2011), the district court granted a new trial based on false testimony by a witness. Carnell, a construction company, contracted with Danville Redevelopment & Housing Authority to perform grading work on a project funded with government money. As the project progressed, Carnell's costs exceeded expectations and both parties accused the other of breaching the contract. After a jury trial, a verdict was returned in favor of Carnell. During the trial, a Carnell witness testified that 99% of Carnell's work had been public projects and that they had to be bonded. He stated that Danville's actions had put Carnell out of business. After the trial, Danville produced an affidavit from the Virginia Department of Transportation that directly contradicted the testimony from the Carnell witness. The affidavit

revealed that only four of Carnell's projects had been public and that those projects did not require a bond.

The district court granted a new trial. The court looked to the test set forth in *Davis v. Jellico Cmty. Hosp. Inc.*, 912 F.2d 129, 134 (6th Cir. 1990), which holds that a court should grant a new trial if (1) the court is reasonably well satisfied that the testimony given by a material witness is false; (2) that without it, a jury might have reached a different conclusion, and (3) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial. *Id.* The court concluded that a new trial was warranted because the false testimony from the Carnell witness may have impacted the jury verdict.

B. Other Circuits

The Fourth Circuit jurisprudence is consistent with other federal courts across the nation. In *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 733 F.2d 509 (8th Cir. 1984), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984), a Native American tribe brought action against a company called A&P. The tribe sought damages for fraud, conspiracy, breach of contract and breach of warranties arising out of a contract for the development of an irrigation system on tribal land. The jury returned a defense verdict for A&P on liability.

The Tribe sought relief from judgment under Rule 60(b) based on newly discovered evidence – namely, grand jury testimony from Richard Lone Dog, the chairperson of Tribal Land Enterprises. The Tribe argued during trial that he was conspiring with A&P by taking payments. The Tribe took Lone Dog's deposition testimony and he flatly denied any illicit pay-outs from A&P. The Tribe then subpoenaed Lone Dog as a witness at trial but he took the Fifth Amendment and did not answer any questions. After the trial, Lone Dog appeared as a witness

before a federal grand jury in a separate action, and he testified that he did, in fact, receive pay-outs from A&P.

The district court denied the motion for a new trial, but the Court of Appeals for the Eighth Circuit reversed. The Court of Appeals held that the Tribe was entitled to relief from judgment on grounds of newly discovered evidence that Lone Dog had perjured himself. The Eighth Circuit noted that the perjured deposition testimony, which was in existence at the time of the trial, was not inconsequential, but "tends to prove the Tribe's allegations." *Id.* at 517. The Court stated, "However, even if we make no assumptions about the truth of the testimony Lone Dog gave on three separate occasions, the inconsistent stories still are material evidence in this case. Lone Dog was a principal witness in A&P's case. At the very least, his inconsistent stories demonstrate that he is a liar and, as such, a witness whose testimony is to be discredited. The deposition testimony is significant enough to have swayed the jury to return a verdict for A & P. At a minimum, the Tribe is entitled to an opportunity to present *all* the relevant facts to a jury." *Id.* (emphasis in original).

In *U.S. v. Willis*, 257 F.3d 636 (6th Cir. 2001), the Sixth Circuit upheld the district court's decision to grant a new trial because new evidence established perjury during trial. There, defendant Willis was convicted on possession with intent to distribute crack cocaine. The police department conducted extensive surveillance of a home in Cleveland. After receiving a warrant to search the residence, officers found papers addressed to "Timothy Willis" and arrested the defendant. The defense called several witnesses who testified that Mr. Willis once lived in the residence but had moved out some time ago. Following the presentation of the defense witnesses, the government asked to call the defendant's brother to rebut testimony regarding Mr. Willis' residence. Willis's brother testified that the Willis did, in fact, live at the residence for as long as

he had known him, that Willis was the only person who lived there, and that the jacket in which heroin had been found was Willis's jacket. Two months after the jury's conviction, Willis filed a motion for a new trial in light of an affidavit submitted by his brother recanting significant portions of his trial testimony, and stating that he was scared to tell the truth. The district court granted the motion for a new trial and the government appealed.

On appeal, the Sixth Circuit applied the test set forth in *Gordon v. United States*, 178 F.2d 896 (6th Cir. 1949), which states that a new trial should be granted where the court is reasonably satisfied that the testimony given by a material witness is false; that, without it, the jury might have reached a different conclusion; that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet or did not know of its falsity until after the trial. The test requires only the *possibility* of a different outcome without the now-recanted testimony and the court held that that possibility was satisfied when a material witness recanted testimony.

In *Williams v. United Dairy Farmers*, 188 F.R.D. 266 (S.D. Ohio 1999), a new trial was granted based on perjury. In that case, the plaintiffs, a mother and son, were employed by defendant and were discharged for violating a cash handling policy. They subsequently brought a race discrimination action under Title VII. During a deposition, Patricia Munyan, a manager of the store where plaintiffs worked, testified that racially derogatory comments were frequently made by supervisors and cited numerous specific examples. Prior to trial, defendant produced a videotape showing Ms. Munyan recanting her testimony. The videotape, allegedly created with a hidden camcorder, purported to "catch" Ms. Munyan stating that she lied under oath because of an agreement she had with the plaintiffs for money. The jury was allowed to watch the tape, and Ms. Munyan was asked directly if she participated in its making. She denied any involvement in

making the tape, and the jury was led to believe that they were seeing defendant "catch" Ms. Munyan admitting to wrongdoing. The jury ruled in favor of the defendant.

A month later, plaintiffs' counsel learned from two other individuals that Ms. Munyan was involved in creating the videotape, directly contradicting her prior testimony. The court stated that while at first glance, there appeared to be sufficient evidence to support the jury's verdict, that verdict must be based on "legitimate, non-fabricated evidence…" *Id.* at 274. The court was "'reasonably well satisfied' that crucial evidence, evidence which *might* have led the jury to reach a different verdict, was fabricated." *Id.* at 274. "Thus, this Court must analyze the jury's verdict not in light of whether it was against the manifest weight of evidence, but in light of whether the jury's verdict was tainted by fabricated evidence as to deprive the Plaintiffs of a fair trial." *Id.* at 274-5, (emphasis in original), citing *Gordon v. United States,* 178 F.2d 896, 900 (6th Cir. 1949). The court relied on the testimony of the two individuals coming forward to state that Munyan was aware of the tape and was involved in making it. The court noted that these two people "have no apparent interest in this litigation, and thus have no reason to fabricate testimony. Munyan, on other hand, if the testimony of [the two individuals] is to be believed, had an economic incentive to participate in the creation of the videotape." *Williams* at 276. The court further stated that the "credibility of the witnesses was pivotal" in the case, and while Munyan offered several reasons for her videotaped conversation, the testimony of the two additional individuals provides another reason, namely a pay day. *Id.* "Had the jury been aware of this potential and probable motive, it is very likely that the jury *might* have reached a different conclusion." *Id*.

II. A NEW TRIAL SHOULD BE GRANTED

This Court should grant Relators a new trial because Ms. Esposito, a material witness, committed perjury. The perjury is clear. Mr. Farrell, a party with no financial stake in the litigation who had previously been assisting Defendant, squarely contradicted Ms. Esposito's testimony in a sworn declaration. Unlike Ms. Esposito, who recently received $2 million from Defendant, and who continues to receive $350,000 per year, Mr. Farrell has no incentive or motive to lie. See *Williams v. United Dairy Farmers*, 188 F.R.D. 266, 276 (S.D. Ohio 1999) (noting that witnesses who brought forth perjury had no financial motive to lie, unlike witness).

There is no ambiguity in the testimony. Ms. Esposito testified without equivocation that she personally gave the report to Robert Farrell or his team. Ms. Esposito repeated the testimony and directly lied to the Court when the Court asked her about the BDO Seidman report. See Exhibit A at pp. 123 and 125-6.

> The Court: You said that you gave them a copy of the BDO; is that correct?
> A: Yes, your Honor.
>
> See Exhibit A at pp. 125-6.

At the end of trial, the Court instructed the jury that if they found that the State Department "either knew of, or was informed about, all material facts relating to the labor and travel invoices and acquiesced in or approved payments to the defendant on those invoices," they could find that Defendant had no intent to commit fraud. See 8/4/11 Trial Tr. at p. 186.

Ms. Esposito's perjured testimony permitted defense counsel to make several arguments regarding government knowledge and lack of intent to deceive. Defendant argued during the opening argument that "the evidence will show that this was a company that was scrupulous in

its efforts to do the right thing." See 7/26/11 Trial Tr. at p. 159. Defense counsel used the word "scrupulous" no fewer than five times during its opening recitation of the evidence. See 7/26/11 Trial Tr. at pp. 159, 160, 167, 177. Defense counsel described the Defendant's witnesses as "people of honor" who were committed to accuracy. See 7/26/11 Trial Tr. at p. 167.

Defense counsel argued in closing to like effect. See 8/4/11 Trial Tr. at p. 129-164. During closing argument, defense counsel, argued, that State Department was well aware of all of Blackwater's interactions with DAKKAK. See 8/4/11 Trial Tr. at pp. 151, 153-54, 162.

Ms. Esposito's perjury impacted the government knowledge defense, with Defendant arguing that the State Department was fully apprised of all issues. Had Ms. Esposito told the truth, it would have been apparent to the jury that the Defendant actively hid facts from the government, and did so in order to prevent detection of wrongdoing. Had Ms. Esposito told the truth, Relators' counsel would have been able to use Trial Exhibit 279, and argue that Defendant's intent to defraud was evidenced by the fact that Mr. Taylor and Ms. Esposito discussed providing the audit to BDO Seidman but instead withheld it. Relators would have been able to argue that Ms. Esposito and Mr. Taylor deceived the government by signing management letters claiming they had been fully forthcoming.

In short, the jury was misled by Ms. Esposito into believing that Defendant was forthcoming with the government, and did not hide any information from the State Department. Ms. Esposito's testimony and the fact that Defendant concealed information from the government casts a significant shadow over the totality of her testimony, and indeed, undermines the totality of Defendant's defense that they were an honest, scrupulous company that simply made a few mistakes in the midst of a dangerous warzone. Put simply, if Ms. Esposito, as the former COO, was willing to lie on the stand about giving an audit to Mr. Farrell, what else could

she be lying about? And what else was withheld from the government? See *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 733 F.2d 509 (8th Cir. 1984) (stating that inconsistent stories demonstrated that witness was a liar, and his testimony should be discredited, and further stating that "[a]t a minimum, the Tribe is entitled to an opportunity to present *all* the relevant facts to a jury." *Id.*

Ms. Esposito's perjury is part and parcel of a larger effort to deceive not only the Court, but the government. *See Stewart v. Wyoming Cattle Ranch Co.,* 128 U.S. 383, 388, 9 S.Ct. 101, 32 L.Ed. 439 (1888) ("the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."). By her deception, Ms. Esposito created the impression that she, and by extension the company that she helped run, were honest, and that any mistakes or shortcomings in the operation were clearly communicated to Mr. Farrell, the State Department's auditor. The defense relied on the "fact" that Blackwater was an honest company. See 7/26/11 Trial Tr. at pp. 159, 160, 167, 177.

The length of the jury's deliberations establishes beyond dispute that the jury considered the case to be close, and that jury might have reached a different result if they knew the truth – both about the events at issue and about Ms. Esposito's willingness to commit perjury. The Fourth Circuit has held that a new trial should be granted if the court finds that the "jury 'might' have decided case differently…that is, that there is more than a faint possibility of a different jury verdict but something less than a probability." *United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1975) (reversing district court's denial of motion for new trial based on witness's recantation). See also *Carnell Construction Corp. v. Danville Redevelopment & Housing*

Authority, Inc., Slip Copy, 2011 WL 1655810 (W.D.Va. 2011) (applying *Davis* and granting new trial based on false testimony); *Johnson v. Verisign, Inc.*, 2002 WL 1887527 at *12 (E.D.Va. 2002) (same); *Williams v. United Dairy Farmers*, 188 F.R.D. 266, 275-6 (S.D. Ohio 1999) (new trial granted in part because credibility of witness was 'pivotal' and was weighed heavily by jury, making it likely that jury might have reached a different conclusion); *White v. Anthology, Inc.*, No. 08 C 1371, 2009 WL 4215096, at *2 (N.D.Ill. Nov.16, 2009) (defendant employer testified at trial that another employee similarly situated to plaintiff did not receive a raise; new trial granted based on affidavit from that employee, submitted post-trial, stating that she did in fact receive a raise).

Here, the facts are clear: Ms. Esposito perjured herself to obtain a defense verdict. She testified that she was the primary contact between the company and the State Department. Her testimony was delivered in a forthright, candid and credible manner – but it was false. Ms. Esposito perjured herself to create the illusion that Defendant was an honest company that occasionally made mistakes "both ways.

CONCLUSION

The Court has a duty to prevent such a miscarriage of justice. The caselaw in the Fourth Circuit and elsewhere is clear: perjury is a reason to grant a new trial. This Court should grant Relators' motion for a new trial.

Respectfully submitted,

/s/Susan L. Burke
Susan L. Burke (VA Bar No. 27769)
Susan M. Sajadi
Counsel for Relators
BURKE PLLC

1000 Potomac Street, N.W.
Washington, DC 20007-1105
Telephone: (202) 386-9622
Facsimile: (202) 232-5513
sburke@burkepllc.com

September 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2011, we filed the Memorandum in Support of Relators' Motion for a New Trial using the CM/ECF system, which will send a notification to counsel for the United States and counsel for the Defendants.

/s/Susan L. Burke
Susan L. Burke (VA Bar No. 27769)
Susan M. Sajadi
Counsel for Relators
BURKE PLLC