

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

**IN RE: XE SERVICES ALIEN TORT
LITIGATION**

**No. 1:09-cv-615
No. 1:09-cv-616
No. 1:09-cv-617
No. 1:09-cv-618
No. 1:09-cv-645
No. 1:09-cv-1017
No. 1:09-cv-1048
(consolidated for pretrial purposes)
(TSE/IDD)**

PLAINTIFFS' MOTION FOR RELIEF UNDER F.R.C.P. 60(b)

Plaintiffs respectfully request that the Court grant them relief under F.R.C.P. 60(b). As explained in the accompanying Memorandum of Law and Declaration of Susan L. Burke, plaintiffs' counsel filed a stipulation of dismissal under the mistaken belief that each of her clients had knowingly consented to settlement and dismissal of the litigations. Such a mistake suffices as a basis to set aside the stipulated dismissal under F.R.C.P. 60(b).

Respectfully submitted,

/s/ Susan L. Burke

Susan L. Burke (Virginia Bar No. 27769)
BURKE O'NEIL LLC
1000 Potomac Street
Washington, DC 20007
Tel: (202) 445-1409
Fax: (202) 232-5514
sburke@burkeoneil.com

Attorneys for All Plaintiffs

Katherine Gallagher (admitted *pro hac vice*)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor

New York, NY 10012

Attorneys for Plaintiffs in 1:09-cv-616, 1:09-cv-617

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR
RELIEF UNDER F.R.C.P. 60(b)**

Plaintiffs respectfully request that the Court to grant them relief under F.R.C.P. 60(b). As set forth in the attached Declaration of Susan L. Burke, plaintiffs' counsel filed a stipulation of dismissal under the mistaken belief that each of her clients had knowingly consented to settlement and dismissal of the litigations. Such a mistake suffices as a basis to set aside the stipulated dismissal under F.R.C.P. 60(b).

PROCEDURAL BACKGROUND

Late on November 6, 2009, Plaintiffs' counsel filed a Stipulation of Dismissal With Prejudice pursuant to F.R.C.P. 41(a)(1), which requested a Court order dismissing these litigations with prejudice. On Sunday, November 8, 2009, Plaintiffs' counsel filed a motion to withdraw the Stipulation of Dismissal.

On November 12, 2009, this Court held a hearing and ruled that Plaintiffs' motion to withdraw the stipulation should be deemed an informal motion to set aside the judgment under

F.R.C.P. 60(b). The Court granted Plaintiffs' counsel an opportunity to gather additional facts, and then to submit a formal Rule 60 motion if necessary.

The relevant facts, as set forth in the attached Declaration of Susan L. Burke, demonstrate that undersigned counsel, contrary to her understanding through an Iraqi interpreter at the time, did not in fact have client authority to enter into the settlement agreement in question or to agree to dismissal of the subject litigations.

ARGUMENT

F.R.C.P. 60(b) sets forth the circumstances in which a court may relieve a party from what would otherwise be a final judgment. Those circumstances include “(1) mistake, inadvertence, surprise, or excusable neglect; [...] or (6) any other reason that justifies relief.” *Id.*

The decisional law interpreting Rule 60(b) in this jurisdiction makes clear that “mistake” encompasses occasions when counsel acted without client authority or contrary to client interests. *See Augusta Fiberglass Coatings, Inc., v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988) (“When the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside”); *see also Bonney v. Roelle*, 1997 WL 407831 (4th Cir. July 21, 1997) at *8-9 (holding that under Rule 60(b)(1) blameless parties should not be penalized for attorney’s mistake, and that foreign parties’ “understandable unfamiliarity with the American legal system” constituted exceptional circumstance). *Buffalo Wings Factory, Inc. v. Mohd*, 2008 WL 2557999 at * (E.D.Va. June 23, 2008) (unpublished) (client’s allegations that his attorney entered a settlement agreement would qualify as an “exceptional circumstance” and as a mistake under Rule 60(b)(1)). Decisional law in other jurisdictions is to the same effect. *See, e.g., Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir.2000) (finding that relief under Rule 60(b)(1) is available where an attorney acts

without his client's authority); *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir.1999)(same); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996) (“as a general proposition, the ‘mistake’ provision in Rule 60(b)(1) provides for the reconsideration of judgments only where: (1) a party made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party”); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 796 (7th Cir. 1980) (“a consent judgment shown to have been entered without express authority from the client or without the client’s actual consent may be the subject of Rule 60(b) relief”); *Surety Insur. Co. of Calif. v. Williams*, 729 F.2d 581, 592-83 (8th Cir. 1984) quoting *Bradford Exchange v. Trein's Exchange*, 600 F.2d 99, 102 (7th Cir. 1979) (per curiam) (a judgment by agreement may be set aside on affirmative proof that the attorney had no right to consent to its entry.)

Here, as set forth in the Declaration of Susan L. Burke, plaintiffs’ counsel lacked client authority to dismiss the actions with prejudice. Contrary to her understanding at the time of the filing the Stipulated Dismissal, each of her Iraqi clients had not been fully informed of the terms of the settlement agreement, and had not made a knowing and voluntary decision to participate in the settlement and to dismiss the actions with prejudice. Plaintiffs’ counsel acted promptly as soon as she became aware of the mistake, preventing any prejudice to Defendants. *See Werner v Carbo*, 731 F.2d 204, 207 (4th Cir. 1984) (harms “present when any judgment is vacated,” such as the time and expense of legal proceedings and the loss of leverage in settlement negotiations, are not “the type of prejudice contemplated” by Rule 60(b).)

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DECLARATION OF SUSAN L. BURKE

I, Susan L. Burke, hereby declare the following under penalty of perjury:

1. I have been a member of the Virginia bar since 1987. I serve as lead counsel in the litigation against Xe Services and other Defendants on behalf of Iraqi citizens harmed by the Defendants.
2. I do not speak Arabic, and my clients do not speak English. For day-to-day communications with clients, I rely on an English-speaking Iraqi man to provide interpretation services. On occasion, I also have transported various clients to meet with me in person in Istanbul, Turkey, where I have been able to use trained interpreters.
3. Over a period of two years, I have attempted to settle these lawsuits with the Defendants. Beginning in late October, 2009, I renewed these efforts.
4. By Monday, November 3, 2009, we reached a tentative agreement in principle on key economic and non-economic settlement terms. I contacted my Iraqi interpreter by telephone and email to provide him with a copy of the draft settlement agreement and to educate him on various complexities of the settlement process. I directed my Iraqi interpreter to ask

each client for his or her informed consent to participate in the proposed settlement. In particular, I instructed my interpreter to make available to each client an Arabic translation of the draft settlement agreement, which set forth the total amount of settlement funds to be made available by Defendants. I also instructed my interpreter to provide each client with the approximate settlement amount likely to be received by each claimant, and to ensure they understood their material affirmative obligations under the settlement agreement. Each client also was to have been informed that although the settlement was contingent on full participation by all clients, each client had an independent right to decide whether to participate in the proposed settlement.

5. On Tuesday, November 4, 2009, I conferred with my Iraqi interpreter by telephone and confirmed that he and his two colleagues had been able to reach each of the clients and to obtain their consent to participate in the proposed settlement agreement. He represented that all of the clients were willing to accept the terms of the proposed settlement.
6. Based on these representations, I executed the Settlement Agreement late in the evening on November 4, 2009. I advised our Iraqi interpreter that we had executed the Settlement Agreement on behalf of all the clients, and that he should begin to collect the required signatures, thumbprints and videotapes
7. On November 5, 2009, Defense Counsel sent to me the Defendants' executed copy of the settlement agreement. I contacted my Iraqi interpreter to obtain an update on the progress of collecting signatures, thumbprints and videos. He and two staff working under his direction had made substantial progress, with the task quite near completion.

8. For the reasons stated during the Court hearing held on November 12, 2009, I filed the stipulated dismissal at approximately 6:30 pm on Friday, November 6, 2009, believing that I was securing the Settlement Agreement benefits agreed to by my clients.
9. On Saturday, November 7, my Iraqi interpreter informed me that he had not been able to procure signatures from certain clients. I questioned him as to the reasons for the refusal to sign, but he was unclear in responding. I became concerned that my instructions regarding providing complete information in advance of obtaining the verbal consents had not been followed. I promptly contacted Defense Counsel White via email, alerting him that there was a serious issue arising regarding whether I had authority to execute the settlement agreement on behalf of my clients without informed consent from each of them. I also contacted a lawyer named Scott Gilbert of Gilbert LLP, and retained him on behalf of my clients to assist in addressing this situation and to participate in future discussions concerning settlement of this litigation. I worked with Mr. Gilbert during my tenure with Covington & Burling and I know he has extensive experience in the settlement of mass tort matters, as well as a strong interest in human rights.
10. On Sunday, November 8, in order to protect the interests of my clients, I filed a withdrawal of the stipulated dismissal and the Amended Complaints. I remained concerned about the apparent failure of my Iraqi interpreter to understand the gravity of the situation and to adhere to my instructions on how to obtain informed consent from each client. I feared I lacked full client authority at the time I executed the settlement agreement, but needed a more complete understanding of what had transpired with the clients before reaching that conclusion. I wanted to use the services of professional interpreters in Istanbul to interview fully several representative clients so that I could determine precisely what disclosures were

made prior to my execution of the agreement. Accordingly, I arranged for my Iraqi interpreter and several clients to meet with me and two professional interpreters in Istanbul on the weekend of November 14.

11. Due to weather issues, I missed my flight to Istanbul from New York, and instead, on November 15, I conducted the interviews of my clients by telephone.
12. The information elicited during this interview revealed that I did not have informed consent from all clients, and hence the authority, to execute the settlement agreement in the first place. In particular, I learned that although my Iraqi interpreter initially had contacted all clients, he did not provide each of the clients with the information that I had directed him to provide, including the total value of the settlement, the amount likely to be paid to the client in question, the fact that the settlement required participation by all claimants, and the duties imposed on the participants to the settlement.
13. Further, my Iraqi interpreter did not adhere to my request to translate the proposed settlement agreement or otherwise even append the Settlement Agreement itself to the signature page. As a result, the clients who actually executed the signature page did so without even having an opportunity to review a translated version. As a result, even those who executed the Agreement did not make an informed decision to accept its terms.

/s/ Susan L. Burke

Susan L. Burke (Virginia Bar No. 27769)
BURKE O'NEIL LLC
1000 Potomac Street
Washington, DC 20007
Tel: (202) 445-1409
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PROPOSED ORDER GRANTING RELIEF UNDER F.R.C.P. 60(b)

The Court hereby GRANTS plaintiffs' motion for relief under F.R.C.P. 60(b) and ORDERS the Stipulated Dismissal filed on November 6, 2009, to be given no legal force or effect.
