

**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)**

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' RULE 60(b)  
MOTION FOR RELIEF FROM FINAL JUDGMENT**

Plaintiffs' motion for relief from judgment under Rule 60(b) is premised solely on a declaration by their counsel stating that she learned, after executing a settlement agreement and filing stipulations of dismissal with prejudice on Plaintiffs' behalf, that in fact Plaintiffs were not fully informed about the settlement terms. Plaintiffs' submission does not state a cognizable Rule 60(b) claim, and the Court should therefore deny Plaintiffs' motion without an evidentiary hearing, for two independent reasons.

First, counsel's declaration carefully *does not state* that Plaintiffs had not previously authorized her to enter into a settlement on these terms; it addresses only a process she used after the fact to obtain their formal assent. The declaration accordingly does not negate—and by its omissions in fact support—the possibility of “buyer's remorse.”

Second, even if counsel's affidavit were sufficient to cast doubt on her actual authority to enter into the settlement agreement, it does not refute her apparent authority to do so, which suffices to bind Plaintiffs to the settlement even if actual authority was lacking.

If, however, the Court determines that it cannot find apparent authority on the basis of the existing record or that it must reach the question of actual authority, the Court must then allow discovery and an evidentiary hearing before deciding whether the requested relief is warranted.

**I. Plaintiffs Have Not Stated A Basis For Rule 60(b) Relief.**

Federal Rule of Civil Procedure 60(b) states that a court “may relieve a party or its legal representative from a final judgment, order, or proceeding” for any of six enumerated reasons. Plaintiffs here cite Rule 60(b)(1), which permits relief on the basis of “mistake, inadvertence, surprise, or excusable neglect” and Rule 60(b)(6), which permits relief for “any other reason that justifies relief.”

Under established precedent in this Circuit, “before a party may seek relief under Rule 60(b), a party first must show ‘timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances.’ After a party has crossed this initial threshold, he then must satisfy one of the six specific sections of Rule 60(b).” *Dowell v. State Farm Fire & Cas. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (quoting *Dowell v. State Farm Fire & Cas. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993)). “Reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” *Am. Ass’n Blood Bankers v. Boston Paternity*, 2009 WL 3379893 (D. Md. Oct. 16, 2009) (citing *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)); *see also, e.g., Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990) (“The remedy provided by [Rule 60(b)] ... is extraordinary and is only to be invoked upon a showing of exceptional circumstances.”).

When the allegations in a Rule 60(b) motion would not entitle the movant to relief even if proven, the court may deny the motion without a hearing. *See United States v. Baus*, 834 F.2d 1114, 1123 (1st Cir. 1987). That is the appropriate result here.

**A. Counsel's Declaration Does Not Carry Plaintiff's Burden Of Refuting Her Actual Authority To Enter Into The Agreed-Upon Settlement.**

The declaration submitted by Plaintiffs' counsel carefully does *not* state that counsel lacked authority to settle on the economic terms agreed to verbally on November 3, 2009, and in a signed writing on November 4, 2009. The declaration relates solely to whether the process put in place by Plaintiffs' counsel *after that agreement was reached* actually conveyed to each Plaintiff the detailed information that counsel sought to convey. Counsel states only that she learned after the fact that her clients did not receive a translated version of the settlement papers and were not provided with information pertaining to the value of the settlement, the duties imposed by the settlement, and the fact that it required all Plaintiffs' participation. Burke Decl. ¶¶ 12, 13.

It is commonplace for attorneys to receive prior authorization from clients to settle a case within specified parameters. Nothing in the declaration even addresses the issue of counsel's prior authority here. During the settlement discussions, Plaintiffs' counsel represented that she had such prior authority and that this settlement was within the parameters of her authority.

Moreover, counsel does not state that she lacked the authority to enter into a settlement agreement on Plaintiffs' behalf without first providing them with the information she claims they did not receive, or that her clients did not make a deliberate decision to authorize her to settle without first receiving that information. To the contrary, based on the sequence of events described in counsel's affidavit, it appears that counsel and her clients explicitly contemplated that Plaintiffs would receive the settlement papers and give their formal assent only *after* counsel had executed the settlement agreement on their behalf. *E.g.*, Burke Decl. ¶¶ 6, 7 (stating that interpreter began collecting client signatures *after* counsel executed settlement agreement).

The cases make clear that failure to convey all relevant information to a client does not constitute a “mistake” cognizable under Rule 60(b). “When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant’s attorney.” *Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988). As long as a party makes a deliberate choice to enter into a settlement—even if he does so without first educating himself on the terms and conditions of the settlement—the party is not entitled to relief under Rule 60(b). “Generally speaking, a party who takes deliberate action with negative consequences ... will not be relieved of the consequences [by Rule 60(b)(1)] when it subsequently develops that the choice was unfortunate.” 7 Moore, *Federal Practice* ¶ 60-22 [2], p. 60-182. Accordingly, “**Rule 60(b)(1) relief is not available for a party who simply misunderstands the legal consequences of his deliberate acts.**” *Cashner v. Freedom Stores*, 98 F.3d 572, 577 (10th Cir. 1996) (emphasis added); *see also, e.g., Powell v. Omnicom*, 497 F.3d 124, 127 (2d Cir. 2007) (“When a party makes a deliberate, strategic choice to settle, a court cannot relieve him of that a choice simply because his assessment of the consequences was incorrect.”); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 795 (7th Cir. 1980) (Rule 60(b) “is not intended to enable litigants to avoid the consequences of a decision to settle or compromise which in retrospect appears unfortunate”).<sup>1</sup>

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<sup>1</sup> As a general matter, attorney mistakes—even when they reach the level of malpractice—do not “usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1).” *Casey v. Albertson’s, Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004); *see also Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101-02 (9th Cir. 2006) (“A party will not be released from a poor litigation decision made because of inaccurate information or advice, even if proffered by an attorney.”). In essence, to justify relief under Rule 60(b), the attorney’s mistake must be “so gross as to constitute abandonment.” *Jacobs v. Elec. Data Sys. Corp.*, 240 F.R.D. 595, 600 (M.D. Ala. 2007); *see id.* at 601 (“[T]he kinds of attorney misconduct justifying relief under Rule 60(b)(6)

A party who authorizes his or her lawyer to settle a case within particular parameters is not entitled to relief when, after the fact, he reviews the papers and does not like what he sees. *See, e.g., Powell v. Omnicom*, 497 F.3d 124, 127-28 (2d Cir. 2007) (“legal equivalent of buyer’s remorse” does not “relieve [a party] of . . . [the] choice [to settle] simply because his assessment of the consequences was incorrect”); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 795 (7th Cir. 1980) (Rule 60(b) “is not intended to enable litigants to avoid the consequences of a decision to settle or compromise which in retrospect appears unfortunate.”); *Zogheib v. U.S. Bancorp*, 2007 WL 1612145, at \*6 (D. Nev. Mar. 26, 2007) (“case of buyer’s remorse” does not merit Rule 60(b) relief); *see also* Restatement (Third) Agency § 2.03 (2006) (“A principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts offer an advantage.”).

This appears to be precisely what happened here. Counsel’s declaration is not accompanied by an affidavit of any plaintiff stating that he did not authorize counsel to settle his claims on his behalf, or that he conditioned such authority on first having an opportunity to review an Arabic translation of the settlement documents. Nor does counsel’s affidavit identify a single plaintiff who did not make a deliberate choice to settle or who imposed such conditions on her settlement authority. To the contrary, counsel states that her Iraqi interpreter “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.” *Id.* ¶ 5. Plaintiffs’ claimed failure to appreciate fully the terms and consequences of the settlement agreement is not a mistake justifying relief under Rule 60(b)(1).

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indicate a complete failure of an attorney to provide any meaningful representation at all—in essence, a collapse of the attorney-client relationship altogether.”).

**B. Plaintiffs Are Not Entitled To Relief From Judgment Because Their Counsel Had Apparent Authority To Enter The Stipulation Of Dismissal.**

Even if the declaration submitted by Plaintiffs' counsel could be construed to state that counsel had *no* previously-conferred authority to agree to the settlement's "key economic and non-economic terms" (Burke Decl. ¶ 4), Plaintiffs' Rule 60(b) motion would fail because it is clear from the record before the Court that Plaintiffs' counsel had apparent authority to enter into the settlement.

An attorney "is presumed to possess authority to act on behalf of the client," but a judgment entered upon an agreement of the attorney may be set aside upon affirmative proof that the attorney had no right to consent to its entry." *Larson v. Heritage Square Assocs.*, 952 F.2d 1533, 1537 (8th Cir. 1992) (citations and internal quotation marks omitted). To overcome this presumption, a party must satisfy the "heavy burden" of demonstrating that his or her counsel acted without "any kind of authority in agreeing to the entry of judgment in the trial court"—that the counsel lacked *both* apparent authority and actual authority. *Surety Ins. Co. v. Williams*, 729 F.2d 581, 583 (8th Cir. 1984); *see also, e.g., United States v. Int'l Bhd. of Teamsters*, 986 F.2d 15, 19 (2d Cir. 1993) ("The burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial."). Courts deny Rule 60(b) motions when plaintiffs are unable to carry this burden. *Larson*, 952 F.2d at 1537 (holding that plaintiff had not met his burden of showing "exceptional circumstances" justifying Rule 60(b) relief, given his inability to show that his attorney lacked authority to enter a settlement similar to one the two had discussed previously).

The standard for determining apparent authority is not—as Plaintiffs claim—whether the party was "fully informed of the terms" or "made a knowing and voluntary decision to participate in the settlement." Mem. at 5; *see also id.* at 6 (characterizing standard as "informed

consent”). Rather, it is beyond dispute that a Rule 60(b) motion will be rejected if, as here, Plaintiffs’ counsel executed it with apparent authority. *See Millner v. Norfolk & Western Ry. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1981) (“[A] trial court’s authority to enforce a settlement agreement and enter judgment based on a third party’s reasonable determination of apparent authority has long been recognized” in this Circuit.); *Singer*, 144 Va. at 405 (1926) (holding that a plaintiff was bound to a settlement entered into by her attorney, who had apparent authority to do so); *see also, e.g., Fennell v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989) (“[I]f an attorney has apparent authority to settle a case, and the opposing counsel has no reason to doubt that authority, the settlement will be upheld.”).

The Fourth Circuit has recognized that “an agent is imbued with apparent authority to bind his or her principal if a third person could *reasonably interpret* acts or omissions of the principal as indicating that the agent has authority to act on behalf of the principal.” *Metco Prods., Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989) (emphasis added) (citing Restatement (Second) of Agency § 27)). Indeed, “the apparent authority, so far as third persons are concerned, is the *real authority*, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent’s actual authority.” *Singer Sewing Mach. Co. v. Ferrell*. 144 Va. 396, 404 (Va. 1926) (emphasis added) (quoting *J.C. Lysle Milling Co. v. S.W. Holt & Co.*, 122 Va. 565, 571-72, 95 S.E. 414, 415 (1918)).<sup>2</sup>

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<sup>2</sup> Indeed, Defendants not only were *justified* in relying on Plaintiffs’ counsel’s apparent authority to settle, given that counsel were required to “inform the clients of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter” (Va. Rule of Prof. Conduct 1.4(c)), but also were *required* to rely on those representations, given that they were prohibited by the Virginia Rules of Professional Conduct from directly contacting Plaintiffs, because they were represented by counsel (*See* Va. R. of Prof. Conduct, Rule 4.2).

In determining whether apparent authority exists, therefore, Plaintiffs’ knowledge and subjective intent (*see* Mem. at 5)—or whether they in fact gave “informed consent” to the settlement (*id.* at 6)—are not relevant considerations. Rather, the Court must view Plaintiffs’ actions from the perspective of the Defendant. *See Singer*, 132 S.E. at 402 (“The apparent authority of plaintiff’s counsel, *when viewed from the defendant’s standpoint*, is fully shown.”) (emphasis added).

Numerous factors throughout this litigation illustrate the reasonableness of Defendants’ belief that Plaintiffs’ counsel was authorized to settle and dismiss the litigation. To begin, the counsel who signed the Settlement Agreement on Plaintiffs’ behalf and who signed and entered the Stipulation of Dismissal with Prejudice are counsel of record, and, “as a general rule, counsel of record have apparent authority to settle litigation on behalf of their client.” *Columbus-America Discovery Group v. Atlantic Mut. Ins.*, 203 F.3d 291, 298 (4th Cir. 2000); *see also Moore v. Beaufort County, N.C.*, 936 F.2d 159, 163-64 (4th Cir. 1991); *In re Collecting Concepts*, 296 B.R. 683, 689 (E.D. Va. 2001).

Moreover, counsel have represented Plaintiffs—quite diligently—throughout this litigation, without any objection from Plaintiffs, leading Defendants to believe reasonably and in good faith that Plaintiffs’ counsel was cloaked with apparent authority to enter into a settlement. *See, e.g., Singer*, 144 Va. at 404 (finding that counsel’s representation of a plaintiff throughout the course of litigation indicated the existence of apparent authority to settle plaintiff’s claim); *Johnson v. Lovus*, 2008 WL 5694148 (Va. Cir. Ct. 2008) (noting that when an attorney diligently pursued the party’s case, defendants could reasonably assume that the attorney had obtained

information relevant to the pursuance of the case through communications with the client and thus had authority to pursue the case).

Plaintiffs' counsel have filed and repeatedly amended complaints, filed and opposed motions (including dispositive motions), appeared multiple times in Court, consented to scheduling and protective orders, retained expert witnesses, and served discovery requests on behalf of their clients. Moreover, the Stipulations of Dismissal filed November 6 do not represent the first time that Plaintiffs' counsel have voluntarily dismissed their clients' cases on their behalf. Plaintiffs' counsel originally filed two lawsuits in the U.S. District Court for the District of Columbia (Nos. 1:07-cv-2273, 1:07-cv-1831) and four lawsuits in the U.S. District Court for the Southern District of California (Nos. 3:09-cv-626, 3:09-cv-647, 3:09-cv-631, 3:09-cv-561), all of which counsel voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1) and refiled in this Court, without any objection from Plaintiffs.

Indeed, certain counsel who entered an appearance on behalf of eighteen plaintiffs earlier in this litigation subsequently withdrew his appearance, as well as a motion for another attorney to appear pro hac vice, stating that he "received a copy of a document dated September 28, 2008, signed by the plaintiffs which requested that this be done." *See* No. 09-cv-615, Dkt. No. 64. Plaintiffs' rejection of that counsel—while maintaining their representation by Ms. Burke—further evidenced her apparent authority to act on their behalf.

Moreover, counsel herself acknowledges that she has been "attempt[ing] to settle these lawsuits with the Defendants" for "a period of two years." Burke Decl. ¶ 3. In the course of these discussions, counsel repeatedly emphasized her ability to communicate with her clients rapidly and effectively through a paralegal who spoke both English and Arabic located in Iraq.

She responded to settlement proposals and made counterproposals on behalf of Plaintiffs very expeditiously—further reinforcing her apparent authority.

Defendants had no reason to doubt the authority of Plaintiffs' counsel until after the papers had been signed and the stipulations of dismissal filed. "Nothing whatever took place to put defendant's counsel upon notice that plaintiff was not aware of the scope of the settlement; on the contrary, defendant was unaware that plaintiff did not consider the matter settled until the institution of this action." *Singer*, 144 Va. at 315. Under these circumstances, "[t]he apparent authority of plaintiff's counsel, when viewed from defendant's standpoint, is fully shown." *Id.*; *see, e.g., Moore*, 936 F.2d at 164 (attorney had apparent authority to settle where client "permitted [attorney] to represent them throughout the settlement process" and "never acted to limit [attorney's] authority, or to dispel the impression that he had settlement authority"); *Johnson v. Lovus*, 2008 WL 5694148 (Va. Cir. Ct. 2008) (attorney had apparent authority to settle where he served as counsel of record and actively pursued case on client's behalf by appearing at scheduling conference and filing pleadings and exhibit lists); *Avery-Craft v. Kang*, No. CL75015 (Va. Cir. Ct. Aug. 8 2008), *available at* <http://valawyersweekly.com/wp-files/pdf/009-8-021.pdf> (defendants reasonably believed that plaintiff's counsel had communicated with client and had apparent authority to settle when counsel was counsel of record and had been "pursuing the case diligently"). *Cf. Walson v. Walson*, 37 Va. App. 208 (2001) (attorney lacked apparent authority where client "was clearly in charge of the [settlement] negotiations" and "[i]t was unmistakably evident at the second negotiation meeting that [attorney] had no authority to act on his own").

Finally, public policy strongly supports this conclusion. As a fundamental matter, "compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216

U.S. 582, 595 (1910). Moreover, it is essential to facilitating such compromises that attorneys be able to rely on the apparent authority of opposing counsel to act on his client's behalf. Were it otherwise, "an attorney could never rely on the word of opposing counsel in determining authority . . . . Such a result would strike at the very basis upon which attorneys and litigants have compromised their differences for decades." *Cia Anon Venezolana de Navegacion*, 374 F.2d 33, 35-36 (5th Cir. 1967); *see also, e.g., Edwards v. Born, Inc.*, 792 F.2d 387, 390 (3rd Cir. 1986) ("enforcing settlement agreements on the basis of apparent authority is consistent with the principles of agency law, the policies favoring settlements generally, and the notions of fairness to the parties in the adjudicatory process").

Because it is clear that Plaintiffs' counsel had, at minimum, apparent authority to settle and dismiss the litigation on Plaintiffs' behalf, and Plaintiffs have come forward with no factual allegations to the contrary, this Court should find that Plaintiffs have failed to meet their heavy burden of demonstrating exceptional circumstances warranting relief from judgment under Rule 60(b).<sup>3</sup>

## **II. The Court Cannot Grant Plaintiffs' Motion Without Conducting An Evidentiary Hearing.**

Defendants' view, as stated above, is that the Court should deny Plaintiffs' Rule 60(b) motion solely on the basis of the record as it exists. If this Court finds that Plaintiffs have raised a material factual dispute about counsel's authority to settle and dismiss the litigation on their

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<sup>3</sup> If Plaintiffs are not permitted to reopen this case, they are not left without recourse. Rather, they may pursue an action against their attorney for malpractice. Richard A. Rosen, et al., SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES § 7.02(A) (2009) ("Regardless of outcome, an attorney who acts beyond his authority or contrary to the wishes of a client may be subject to a claim of professional malpractice."); *see Rodgers v. Davenport*, 331 S.E.2d 389, 390 (Va. 1985) (noting that client's allegations that attorney had accepted a settlement without authority were sufficient to state a cause of action against attorney); *see generally Whitley v. Chamouris*, 574 S.E.2d 251 (Va. 2003) (affirming judgment against attorney where attorney had agreeing to dismissal of case without client's consent).

behalf, established case law requires the Court to hold an evidentiary hearing before deciding this issue.

If the allegations in a Rule 60(b) motion “if proven, would justify relief,” a district court must hold an evidentiary hearing to determine the truth of those allegations. *United States v. Baus*, 834 F.2d 1114, 1123 (1st Cir. 1987); *see Surety Ins. Co. v. Williams*, 729 F.2d 581, 583 (8th Cir. 1984) (district court should have held an evidentiary hearing “[b]ecause the motion to vacate the judgment stated a claim cognizable under rule 60(b)”); *Steverson v. GlobalSantaFe Corp.*, 508 F.3d 300, 305 (5th Cir. 2007) (district court “should have” held “a hearing to resolve . . . conflicting stories” when plaintiff contested his attorney’s authority to enter into settlement pursuant to Rule 60(b)); *Greater Kansas City Laborers Pension Fund v. Paramount Indus., Inc.*, 829 F.2d 644, 645-46 (8th Cir. 1987) (when Rule 60(b) movant challenged whether attorney had authority to consent to settlement, district court abused its discretion in failing to hold a hearing). Indeed, in any proceeding to enforce or challenge a settlement, when “there is a material dispute about . . . the authority of an attorney to enter a settlement agreement on behalf of his client, the trial court must, of course, conduct a plenary evidentiary hearing to resolve that dispute.” *Millner*, 643 F.2d at 1009 (citations omitted); *accord Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 541 (4th Cir. 2002); *Columbus-America Discovery Group*, 203 F.3d at 298 (same); *Ragsdale v. Potter*, 227 F. App’x 271, 272 (4th Cir. 2007).

Conclusory affidavits such as those provided here are insufficient as a matter of law to carry a plaintiffs’ burden of demonstrating a lack of authority. *Surety Ins. Co.*, 729 F.2d at 583 (plaintiffs “may not rely on [a] conclusory affidavit, but must establish through competent evidence that their attorney lacked actual, implied or apparent authority to stipulate to an entry of judgment”). The conclusory statement of Plaintiffs’ counsel that she “did not have informed

consent from all clients, and hence the authority, to execute the settlement agreement,” and her vague assertions that unidentified clients did not receive certain pieces of information (Burke Decl. ¶¶ 12, 13) do not assist Plaintiffs in carrying their “heavy burden” under Rule 60(b).

Indeed, these statements are not only hearsay (*i.e.*, Plaintiffs’ counsel purports to relate what her Iraqi clients told her), but are double hearsay—Plaintiffs’ counsel is reporting the out-of-court statements of unidentified interpreters, who in turn translated her clients’ remarks from Arabic into English. *See* Fed. R. Evid. 802; *United States v. Vidacak*, 553 F.3d 344, 352 (4th Cir. 2009) (explaining that when “the particular facts of a case cast significant doubt upon the accuracy of a translated [remark], the translator . . . must be available for testimony and cross-examination”) (internal citations omitted).

Moreover, even if counsel’s affidavit did constitute competent evidence that she lacked actual authority to enter into a settlement on their behalf, one party’s tender of proof does not eliminate the need for an evidentiary hearing at which the opposing party may scrutinize evidence, cross-examine witnesses, and conduct discovery. *See Maturo v. Richards Bldg. Supply Co.*, No. 87 c 3667, 1988 WL 87052, at \*2 (N.D. Ill. 1988) (requiring an evidentiary hearing after movants presented affidavits in support of counsel’s lack of authority to settle); *see also Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 795 (7th Cir. 1980); *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992) (grounds for Rule 60(b) motion “must be clearly substantiated by adequate proof”) (internal quotation marks and citations omitted); *Fox Grocery Co. v. Mineral Labs, Inc.*, No. 91-1643, 1992 WL 83292, at \*3 (4th Cir. Apr. 27, 1992) (where “the affidavit evidence reviewed by the court was, at best, equivocal,” the situation presented the “classic circumstance[]” in which an evidentiary hearing was required “to resolve the underlying factual issue”). Such fact-finding procedures are particularly important given the “extraordinary relief”

provided by Rule 60(b). *Di Vito v. Fidelity & Deposit Co. of Md.*, 361 F.2d 936, 938 (7th Cir. 1966).

Defendants are entitled to probe the nature of the purported miscommunications between Plaintiffs and their counsel and to test the credibility of Plaintiffs' assertions that their counsel lacked authority, including through cross-examination of the objecting Plaintiffs, of their counsel, and, of course, of the interpreter and staff identified as the root of the purported problem. In addition, Defendants are entitled to present contrary evidence, including the following facts:

- The parties engaged in settlement discussions episodically during the nearly two years that these actions have been pending. Ms. Burke repeatedly represented to defense counsel that she had excellent communication with her clients through her representative in Iraq—with whom she stated she worked closely. Indeed, this representative participated in settlement discussions on at least one occasion.
- Ms. Burke was able to respond quickly on behalf of her clients to settlement offers, make counteroffers on behalf of her clients, and identify the limits of the settlement authority she had received from her clients. These statements indicate a continuing dialogue between Ms. Burke and her clients regarding settlement authority as well as the prior authorization by Plaintiffs of settlements within specified limits—including the settlement agreement ultimately reached.
- Ms. Burke unambiguously represented to defense counsel that she had “oral authorization” from all of her clients to execute the Settlement Agreement and to file Stipulations of Dismissal with Prejudice on their behalf. She explained that she understood it was “common for plaintiffs to hold out on signing documents after



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*Counsel for Defendants*

## CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
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LITIGATION**

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**DECLARATION OF ANDREW NICELY**

I, Andrew Nicely, declare under the penalty of perjury that the following is true and correct:

1. I am an attorney with the law firm of Mayer Brown LLP and a member of the bar of this Court. I represent the Defendants in the above-captioned actions. I submit this declaration in support of Defendants' Opposition to Plaintiffs' Rule 60(b) Motion for Relief from Final Judgment.

2. On Monday, November 9, 2009, I received a phone call from Susan Burke, counsel for Plaintiffs, concerning Plaintiffs' purported Withdrawals of the Stipulations of Dismissal with Prejudice filed in the above-captioned actions on November 7, 2009, and Defendants' response thereto, filed November 9, 2009.

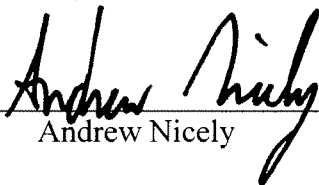
3. Ms. Burke stated that she had not requested an evidentiary hearing under Rule 60 because she was hopeful that the problems she was experiencing with her clients would be resolved in the next several days and that the parties' settlement would remain intact.

4. Ms. Burke stated that she would not have filed the Stipulations of Dismissal with Prejudice without oral authorization from all of her clients, because that would not be a very good situation for her to be in.

5. Ms. Burke stated that she now had written authorization from all but three of her clients, and was working to figure out, with the assistance of translators, what the issues were with those three clients.

6. Ms. Burke stated that she did not have a lot of experience as a plaintiffs' lawyer, but based on her discussions with more veteran members of the plaintiffs' bar, it is common for plaintiffs to hold out on signing documents after providing verbal authorization in an effort to renegotiate the contingency fee with their attorney. Ms. Burke stated that she needed to determine how much more money these three plaintiffs wanted.

Executed at Washington, D.C. on November 19, 2009.

  
\_\_\_\_\_  
Andrew Nicely