UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. 8 GILCREASE LANE, QUINCY FLORIDA 32351, *ET AL.*, Defendants.	Civil No. 08-1345 (RMC) **THOMAS A. BOWDOIN, JR.'S RESPOND TO ORDER TO SHOW CAUSE AND MOTION TO RESCIND RELEASE OF CLAIMS**

THOMAS A. BOWDOIN, JR.'S RESPONSE TO ORDER TO SHOW CAUSE AND RENEWED MOTION TO RESCIND RELEASE OF CLAIMS

Thomas A. Bowdoin, Jr., by counsel and pursuant to Federal Rule of Civil Procedure 60(b), hereby responds to this Court's July 24, 2009 Order to Show Cause and moves this Court to vacate the January 22, 2009 Order, restoring Mr. Bowdoin's right to litigate the above-captioned civil *in rem* forfeiture proceeding. Mr. Bowdoin filed a verified claim to seized property on August 15, 2008. On January 13, 2009, he filed a motion to release claims to seized property. Mr. Bowdoin's January 13, 2009 motion was predicated on misinformation and misrepresentation; therefore, Mr. Bowdoin's Motion to Release Claims is voidable and subject to rescission under Rule 60(b). Mr. Bowdoin hereby responds to the Order to Show Cause, and respectfully requests that this Court reinstate his claims to seized property.

Under Rule 60(b), good cause exists to reinstate Mr. Bowdoin's claims to seized property. Under FRCP 60(b), a court may relieve a party from a final judgment, order, or proceeding when the judgment resulted from, *inter alia*: mistake, inadvertence, surprise, or excusable neglect; fraud, misrepresentation, or misconduct by an opposing party; when the judgment is void as a matter of law; or for any other reason that justifies relief. *See* FRCP 60(b)(1), (3), (4), (6). Bowdoin's January 13, 2009 motion to release claims was based on his belief that relinquishing his civil claims could possibly prevent imprisonment in a forthcoming criminal matter. Bowdoin believed he had an agreement with the government that required the release of claims in the above-captioned civil matter. Mr. Bowdoin reasonably relied on information received from his counsel in forming the belief that release in the civil suit could possibly avoid imprisonment. In fact, no agreement existed and Mr. Bowdoin now faces a significant period of incarceration. Given the lack of an agreement, Mr. Bowdoin's release in the above-captioned case is illogical. He received nothing of value for the release. Bowdoin has consistently demonstrated an intent to aggressively defend ownership of his property in the civil *in rem* forfeiture proceeding. This Court should rescind its January 22, 2009 Order because Mr. Bowdoin lacked knowledge of the consequences for his actions and was induced into filing the release on false pretenses.

FACTS

Mr. Bowdoin believed his January 13, 2009 release of claims constituted a settlement with the government that could possibly prevent imprisonment in an imminent criminal action. His release of claims was based on false pretenses.

Mr. Bowdoin's January 13, 2009 motion resulted from negotiations with Government counsel concerning criminal charges. When Mr. Bowdoin hired his original attorneys from Ackerman Senterfitt, they informed him that he could potentially face criminal liability. *See* Affidavit of Thomas A. Bowdoin, Jr., at ¶ 4 (hereinafter "Bowdoin Affidavit"). Bowdoin's Ackerman Senterfitt attorneys referred him to the law firm of Dobson and Smith, a Florida-based firm specializing in criminal matters. *Id.* Bowdoin retained Steven Dobson to handle criminal issues arising from Bowdoin's operation of AdSurfDaily. *Id.* at ¶ 5. When Bowdoin retained Dobson, no criminal charges were pending and Bowdoin was not aware of any matters before the grand jury. *Id.* Bowdoin paid Dobson a retainer in the amount of $50,000.

Dobson scheduled several meetings with William Cowden, an attorney with the Department of Justice handling the above-captioned civil *in rem* forfeiture matter. *Id.* at ¶ 6. Between November and December, Dobson met with Cowden on two separate occasions in Washington, D.C. to discuss Bowdoin's criminal liability. *Id.* Dobson did not explain in detail the substance of his meetings in Washington, D.C. *Id.*

Dobson then scheduled a meeting with Cowden and Bowdoin in Tallahassee, Florida. *Id.* at ¶ 7. Before meeting with Cowden, Dobson requested that Bowdoin sign an agreement stating that Bowdoin would cooperate fully with the Government in exchange for leniency in any forthcoming criminal matters. *Id.* at ¶ 8. Dobson represented that if Bowdoin did not sign the agreement, he would promptly be arrested and likely receive a maximum penalty under the statute: between 20 and 40 years for each charge. See *id.* at ¶ 10. Bowdoin understood from Dobson that he was obligated to dismiss claims in the civil *in rem* forfeiture action if he was to receive leniency from the government. *Id.* Dobson represented that Bowdoin's cooperation would preclude the possibility of imprisonment following criminal charges. *Id.*

Bowdoin signed a document agreeing to release claims in the civil matter because he believed doing so would prevent the possibility of prison time. *Id.* Bowdoin is 74 years old and has a heart condition. *Id.* Because any measure of prison time would constitute a life sentence, Bowdoin's sole concern was avoiding incarceration. *Id.* Bowdoin understood from Dobson that to possibly avoid prison time he had to release claims in the civil forfeiture proceeding and disclose facts concerning the operation of ASD to Government counsel. *Id.* at ¶ 8. Until his meeting with Cowden in Tallahassee, Florida, Bowdin had consistently exercised his Fifth Amendment privilege against self-incrimination in judicial proceedings, thus evidencing an intent to protect information from disclosure.

During the first meeting with Cowden in Tallahassee, Dobson provided Cowden with Bowdoin's signed agreement. *Id.* at ¶ 9. During the meeting, Cowden reiterated the need for Bowdoin to dismiss claims in the civil forfeiture matter. *Id.* Dobson represented to Bowdoin that a failure to follow through with his agreement would lead to prompt arrest without bail. *Id.* at ¶¶ 9-10. Following the signed agreement, Bowdoin disclosed details of the ASD business. *Id.* The first meeting with Cowden lasted three days. *Id.* at ¶ 14. Toward the end of the meetings, Bowden came to understand that he likely would face incarceration following an imminent criminal action. *Id.* Bowdoin slowly came to understand that what he understood from Dobson was not the case. *Id.* at ¶ 15. His agreement to cooperate provided Bowdoin with no benefit in the criminal matter. *Id.* Contrary to Bowdoin's understanding, the pleadings that Bowdoin authorized his Ackerman Senterfitt attorneys to file in the civil proceeding were not filed in exchange for the government's relinquishment of seeking a prison sentence. *Id.* In fact, Bowdoin had no agreement at all with Government counsel. *Id.*

Pursuant to the signed statement Dobson provided, Bowdoin was asked by government counsel to provide statements which Bowdoin did not believe to be true. *Id.* at ¶ 16. Government counsel requested that Bowdoin admit to criminal conduct despite Bowdoin's belief that operation of ASD was not a Ponzi scheme. *Id.* at 16. The government thus sought more than cooperation from Bowdoin. It

sought to have Bowdoin confess and, therefore, concede his rights in the civil forfeiture proceeding and any forthcoming criminal matters.

Bowdoin came to understand that Dobson's representation did not serve his interests and resulted in an agreement with which Bowdoin did not agree. *Id.* at ¶ 17. At the close of the second meeting with Government counsel in Tallahassee, Cowden told Dobson to call Robert Garner, the general council, and tell him to send the balance of $200,000.00 in the legal trust account to Dobson. Dobson directed Garner to release the $200,000.00 to Dobson, but Garner had distributed a portion of the funds to another attorney in an unrelated matter. Dobson discussed this with Cowden, and Cowden directed that the funds be returned to the trust fund and released to Dobson. Cowden represented that a failure to return funds to the trust account would be considered money laundering and subject the receiving attorney to criminal liability. Prior to releasing funds to Dobson, Garner got approval from Bowdoin.

Following this Court's January 22, 2009 Order, Bowdoin learned that his agreement negotiated between Dobson and the Government was meaningless. *Id.* at ¶ 19. Bowdoin learned that Dobson had not resolved any aspect of the criminal matter. *Id.* On or about May 2009, Bowdoin learned that the Government submitted charges against him to the grand jury. *Id.* Having lost confidence with Dobson, and having learned that his release served no purpose, Bowdoin rejected

the Government's offer to travel to Washington, D.C. and enter a criminal plea under a sealed indictment. *Id.* at ¶ 20.

Bowdoin abandoned his right to litigate before this Court without receiving a return benefit, an action he did intend. *Id.* Therefore, on February 27, 2009, Bowdoin filed a motion to rescind his release and reinstate his claims to seized property. *Id.*

DISCUSSION

This Court should rescind its January 22, 2009 Order and rescind Bowdoin's release of claims. Bowdoin's release filed with this Court on January 13, 2009 represented a settlement agreement that lacked mutual assent and consideration. Under principles of contract law, Bowdoin's release is voidable. In addition, because Bowdoin released his rights under false pretenses, his January 13, 2009 motion was not offered with full knowledge. Accordingly, Bowdoin's release lacked indicia of voluntariness and was thus deficient. Finally, this Court should grant relief under Rule 60(b)(6) in the interests of justice. Bowdoin's reasonable reliance on faulty advice of counsel induced Bowdoin to abandon his legal rights without incentive. Serious derelictions by counsel form the basis for relief under Rule 60(b).

1. Bowdoin's Release was Not Legally Effective

The Supreme Court has upheld the use of "release-dismissal" agreements, whereby a criminal defendant releases his civil rights in return for a prosecutor's

dismissal of pending criminal charges. *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386 (1987). Courts must examine on a case-by-case basis whether the release was valid. *See Woods v. Rhodes*, 994 F.2d 494, 499 (8th Cir. 1993). The release must be voluntary. *Id.* Several factors should be considered to determine voluntariness, including: the sophistication of the party signing a release; the cost/benefit considerations made by the signer; and the circumstances of the signing. *See id.*; *Rumery*, 480 U.S. at 394. In addition, Courts also consider whether the signer expressed any unwillingness, and whether the release was clear. *See Woods*, 994 F.2d at 499. "The most important general concern bearing on the enforceability of the releases … [is] whether the releases were knowing and voluntary." *Id.* Moreover, the "nature of the pending criminal charge is also important because 'the greater the charge, the greater the coercive effect.'" *Id.* at 502-03 (Heaney, J., Dissenting) (quoting *Rumery*, 480 U.S. at 401).

Thomas A. Bowdoin's release was not knowing and voluntary. He lacked essential information and proceeded with a misunderstanding of the consequences. It was not that he failed to properly assess the consequences; rather, based on statements from his counsel, he believed that his release served a specific bargained-for purpose; it secured an agreement with the Government. Absent that agreement, Bowdoin would not have submitted a release before this Court. Indeed, the release is senseless given Bowdoin's legal predicament. Bowdoin effectively relinquished his right to litigation in exchange for nothing. Following

the release, Government counsel is not obligated to seek a lesser sentence in a criminal matter. Bowdoin faces the same criminal exposure as he did before the release. He has wasted the efforts of his legal team and the financial investment in the above-captioned forfeiture matter.

Bowdoin's criminal counsel provided no benefit. His counsel's advice did not secure an agreement with the Government. Yet Bowdoin was led to believe that such an agreement existed. Bowdoin agreed to release his claims in the civil forfeiture matter believing first that such action would avoid the possibility of imprisonment. That material misimpression prevented Bowdoin from providing this Court with an informed and voluntary release of his rights. A release cannot be voluntary where the party executing the release lacks fundamental knowledge of the consequences. *C.f. Woods*, 994 F.2d at 499 (defendant's release was valid only because she "signed a release document knowing the advantages and disadvantages at the time").

The fact that Bowdoin was represented is immaterial because his attorney's derelict advice contributed to Bowdoin's belief that an agreement existed. Bowdoin's release was secured under false pretenses and, therefore, the agreement is not voluntary.

2. Bowdoin's agreement with the Government was not valid

Even if this Court finds that an agreement existed between Bowdoin and the Government, that agreement is invalid and voidable. A compromise and

settlement, like other contractual agreements, can be invalidated on grounds that consideration was lacking or that mutual assent never existed. *See Ulliman Schutte const., Inc. v. Emerson Process Management Power & Water Solutions*, D.D.C. No. 02-1987, at *4 n.4 (June 2007) ("settlement agreements are governed by the law of contracts"). Under contract law, "[t]here is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other." *See* Restatement (Second) of Contracts § 20 (Effect of Misunderstanding). A misunderstanding between the parties will prevent contract formation when the misunderstanding is "vital enough to justify upsetting the entire arrangement." *Id.* (citing Palmer, *The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second*, 65 Mich. L. Rev. 33, 57 n.77 (1966).

If assent is wanting on the part of one who signs a contract, his or her act has no more efficacy than if it had been done under duress or by a person of unsound mind. *See, e.g.,* 17 C.J.S. Contracts § 35 (Necessity of Assent).

No mutual assent existed between Bowdoin and the United States Government. Before speaking with Government counsel, Bowdoin entered what he thought was an agreement that would possibly prevent prison time. Operating on that understanding, Bowdoin disclosed sensitive information against his interest and executed a release in the civil *in rem* forfeiture action.

During negotiations with Government counsel that lasted more than one month, Bowdoin realized that his understanding of the agreement was different from what the Government intended. The Government intended to seek incarceration while Bowdoin believed his cooperation would possibly prevent imprisonment. Given the disparity, the parties ostensibly lacked mutual understanding of Bowdoin's liability under the arrangement.

This Court's January 22, 2009 Order is akin to enforcing an invalid contract. Without mutual assent any purported agreement is invalid and Bowdoin's performance under the agreement, the January 13, 2009 release of claims, should be excused by this Court. *See MIF Realty LP v. Rochester Associates*, 92 F.3d 752, 756 (8th Cir. 1996) (stating that settlement agreements must be based upon a meeting of the minds on essential terms to be enforceable, and "as a general rule, when the parties dispute the existence or terms of an agreement, the parties must be allowed an evidentiary hearing").

3. This Court should grant Bowdoin relief under Rule 60(b)(6)

This Court should grant extraordinary relief under Rule 60(b)(6). Under Rule 60(b)(6), this Court may order relief from judgment where necessary to accomplish justice, or where the equities favor setting the judgment aside. *See, e.g., Food Handlers Local 425, Amalgamated Meat Cutters and Butcher Workmen*

of North America, AFL-CIO v. Pluss Poultry, Inc., 23 F.R.D. 109. 112-13 (W.D.Ark. 1958); *MIF Realty*, 92 F.3d at 755-56.

In *MIF Realty*, the U.S. Court of Appeals for the Eighth Circuit held that Rule 60(b) is to be given liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice. *See MIF Realty*, 92 F.3d at 755. The *MIF Realty* Court held that "[o]ne important equitable consideration is whether the litigants received a ruling on the merits of their claim." *Id.* at 756. The Court held that the "district court abused its discretion by denying [the] Rule 60(b) motion, because the prior judgment was based on a mistaken belief that the parties had agreed upon a settlement." *Id.* Similarly, Bowdoin prematurely terminated his claims in the civil *in rem* forfeiture because he believed that a settlement agreement existed with the United States Government that would possibly prevent his imprisonment. The existence of that perceived agreement was the only reason Bowdoin relinquished his right to litigate the civil forfeiture. Where that agreement never in fact existed, equity militates for Rule 60(b) relief so that Bowdoin can vet his rights before a court of law. The Government suffers no prejudice from having to prove its case in court as commanded by Congress. *See* 18 U.S.C. § 985(c) ("[i]n a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property …

the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture").

This Court should rescind its January 22, 2009 Order because Bowdoin's decision to release his claims was predicated on derelict advice from his criminal attorney. Bowdoin's criminal attorney convinced him that an agreement existed with the Government. No such agreement existed. Bowdoin's criminal attorney induced Bowdoin to sign away his rights in the civil forfeiture proceeding on the representation that Bowdoin could possibly avoid prison time if he abandoned the civil claims. That representation was wholly incorrect. Bowdoin received no benefit from his attorney's criminal representation. Dobson did not barter an advantageous deal that could possibly avoid prison time. Dobson did not enter an appearance in a criminal matter. He provided limited counsel during several extra-judicial interviews and collected legal fees in the amount of $150,000. Bowdoin found Dobson's requested fees "astonishing." *See* Bowdoin Affidavit at ¶ 17. For that price, Dobson convinced Bowdoin to relinquish his legal claim to more than $70 million while receiving nothing in return.

Serious derelictions by an attorney can furnish a basis for relief under Rule 60(b)(6). *See Jackson v. The Washington Monthly*, 569 F.2d 119, 122-23 (D.C. Cir. 1977). In *Jackson*, the appellant's attorney provided negligent advice

concerning the status of the case. *Id.* at 122 (finding that the attorney "misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention"). The *Jackson* Court held that an attorney's deception of a blameless client survives as a basis for relief under Rule 60(b)(6). *Id.* at 123. "When a client does not knowingly and freely acquiesce in his attorney's neglectful conduct, but instead is misled into believing that the attorney is industrious, dismissal is … a harsh step …" *Id.* (observing that "[p]ublic confidence in the legal system is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system").

Bowdoin believed that his attorney acted in his best interest and provided him with truthful advice. Bowdoin acted on that advice when he asked his Ackerman Senterfitt attorneys to file a release of claims on January 13, 2009. But Dobson's advice was not just poor judgment. He convinced Bowdoin—a 74 year old man with a heart condition—that imprisonment was otherwise assured if he failed to release the civil claims. He persuaded Bowdoin to release significant legal interests in exchange for nothing, and misled Bowdoin into believing his release of his claim could possibly assure his freedom.

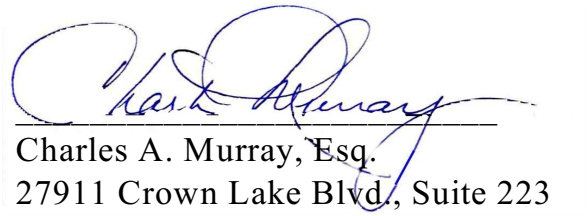
CONCLUSION

For the foregoing reasons, the equities favor Bowdoin's motion. This Court should rescind its January 22, 2009 Order and grant Bowdoin relief under Federal Rule of Civil Procedure 60(b), reinstating Bowdoin's claims to seized property.

September 14, 2009

Respectfully submitted,

THOMAS A. BOWDOIN, JR.,

By: 

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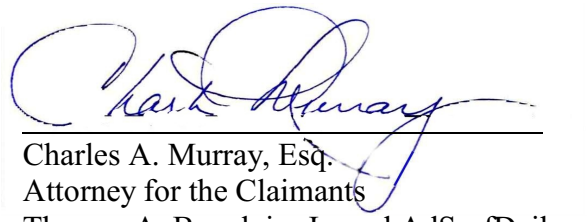
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished via, email and regular First Class U.S. Mail to William R. Cowden and Vasu B. Muthyala, Assistant United States Attorneys, Asset Forfeiture Unit, 555 4th Street N.W. Washington, DC 20530 this 14th day of September, 2009.



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