No. 11-41349

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHESAPEAKE OPERATING, INC., Plaintiff – Appellee

v.

WILBUR DELMAS WHITEHEAD, doing business as Whitehead Production Equipment, Defendant – Appellant

v.

CASH FLOW EXPERTS, INC., Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi Division
Civil Action No. C-10-301

BRIEF OF PLAINTIFF – APPELLEE CHESAPEAKE OPERATING, INC.

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May 25, 2012

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Chesapeake Operating, Inc., Plaintiff – Appellee.

2. Chesapeake Energy Corporation, parent corporation of Plaintiff – Appellee Chesapeake Operating, Inc.

3. Jesse R. Pierce, Brian K. Tully, PIERCE & O'NEILL, LLP; Trial and Appellate Counsel for Plaintiff – Appellee Chesapeake Operating, Inc.

4. Wilbur Delmas Whitehead, individually and d/b/a Whitehead Production Equipment, Defendant – Appellant.

5. Richard W. Rogers, III, LAW OFFICES OF RICHARD W. ROGERS, III; Trial Counsel for Defendant – Appellant Wilbur Delmas Whitehead, individually and d/b/a Whitehead Production Equipment.

6. An "unnamed attorney hired in this case" (as referenced in the "Rule 60(b) Motion for Reversal of Summary Judgment and Brief in Support" filed by Defendant – Appellant Wilbur Delmas Whitehead, individually and d/b/a Whitehead Production Equipment, with the federal district court, RE-H at R1380) or "Whitehead's other counsel" (as referenced on page 17 of *Appellant's Brief*), law firm unknown; (apparently) Trial Counsel for Defendant – Appellant Wilbur Delmas Whitehead, individually and d/b/a Whitehead Production Equipment.

7. James L. Hankins, HANKINS LAW OFFICE; Appellate Counsel for Defendant – Appellant Wilbur Delmas Whitehead, individually and d/b/a Whitehead Production Equipment.

8. Garvin A. Isaacs, Jr.; GARVIN A. ISAACS, INC.; Criminal Trial Counsel for Defendant – Appellant Wilbur Delmas Whitehead, individually

and d/b/a Whitehead Production Equipment in a pending federal criminal case styled *United States v. Whitehead*, No. 11-cr-273-M, In the United States District Court for the Western District of Oklahoma.

9. Cash Flow Experts, Inc., Defendant – Appellee.

10. David H. Crago, Monica Henry, CRAGO LAW FIRM, P.C., Trial and Appellate Counsel for Defendant – Appellee Cash Flow Experts, Inc.

11. Thomas F. Nye; GAULT, NYE & QUINTANA, L.L.P., Appellate Counsel for Defendant – Appellee Cash Flow Experts, Inc.

12. The Honorable Janis Graham Jack, United States District Court for the Southern District of Texas, Corpus Christi Division.

13. The Honorable Nelva Gonzales Ramos, United States District Court for the Southern District of Texas, Corpus Christi Division.

STATEMENT REGARDING ORAL ARGUMENT

The events leading to the judgment against Defendant – Appellant Wilbur Delmas Whitehead d/b/a Whitehead Production Equipment ("Appellant" or "Whitehead") are straightforward. Notwithstanding Whitehead's lack of participation in the lawsuit following his answer and appearance through counsel, Plaintiff – Appellee Chesapeake Operating, Inc. ("Chesapeake") conclusively proved through the evidence in support of its motion for summary judgment that Whitehead had not provided the equipment referenced on the invoices at the center of this lawsuit. Significantly, Chesapeake did so over the opposition of Whitehead's assignee on these invoices, Defendant – Appellee Cash Flow Experts, Inc. ("Cash Flow"), which had the same incentive as Whitehead to show that Whitehead delivered this equipment to Chesapeake.

The outcome of this proceeding is squarely governed by longstanding and uncontroversial precedent from this Court that Whitehead's claim of "ineffective assistance of counsel," which serves as the foundation of the arguments in his brief, simply has no application in a civil, as opposed to a criminal, proceeding. This Court will not need anything other than the briefs to decide this appeal, and oral argument simply will not aid the Court's decision-making process in any way. Chesapeake therefore respectfully requests that this Court deny Whitehead's request for oral argument.

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STATEMENT REGARDING JURISDICTION

Jurisdiction is not contested in this matter.

Chesapeake, a corporate citizen of Oklahoma corporation, filed this lawsuit against Whitehead, a citizen and resident of Texas, alleging federal jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (diversity of citizenship). R13. With leave from the federal district court, Chesapeake later joined an additional defendant, Cash Flow. R41-54. As Cash Flow was also a citizen of Texas, diversity jurisdiction remained intact. *See* 28 U.S.C. § 1332(a)(1); R45. The federal district court had diversity jurisdiction over Cash Flow's counterclaims against Chesapeake, and had supplemental jurisdiction over Cash Flow's cross-claims against Whitehead. *See* 28 U.S.C. §§ 1332(a)(1), 1367; R128, R130-33. No party challenged jurisdiction in the federal district court, and, following a bench trial, it entered a final Judgment consistent with its Findings of Fact and Conclusions of Law, RE-D at R1139, RE-E at R1377. Whitehead then filed a timely motion seeking relief from the Judgment under Rule 60(b), RE-H at R1380, which the federal district court denied, RE-F at R1466. This was an appealable order, and Whitehead's Notice of Appeal, RE-G at R1467, was filed timely.

Chesapeake acknowledges that this Court has jurisdiction over Whitehead's appeal.

ISSUE PRESENTED FOR REVIEW (RESTATED)

In his brief, Whitehead explicitly states that he only raises a single issue in this appeal:

> it was an abuse of discretion for the district court to deny his motion to vacate the judgment pursuant to Rule 60(b).

Appellant's Brief, p. 3.

In light of the proceedings in the federal district court below, this Court may consider restating the issue to provide the proper context. Chesapeake offers the following:

> Whether a defendant that indisputably appeared in a civil lawsuit through counsel is entitled to have the resulting judgment against him vacated under FED. R. CIV. P. 60(b) based on his claim (whether or not true) that his counsel was negligent or otherwise acted improperly.

STATEMENT OF THE CASE

After it had already paid several invoices issued by Whitehead, Chesapeake discovered that the equipment represented on those and other invoices had never been delivered. Chesapeake just wanted to get its money back.

To do so, it filed this lawsuit against Whitehead. Almost immediately, Whitehead's lawyer informed Chesapeake, on the record in open court, that he could not hope to prove that Whitehead had actually delivered the equipment represented on the invoices, and in fact, would not substantively contest the allegations. Following the trail of money, Chesapeake then added Cash Flow, a factoring company that was Whitehead's assignee on these invoices, as a defendant to this lawsuit. The central issue under both Chesapeake's claims (as well as Cash Flow's counterclaims and cross-claims) was whether Whitehead delivered the equipment referenced in the invoices sent to Chesapeake. Through the evidence supporting its motion for summary judgment, Chesapeake conclusively proved, over Cash Flow's opposition, that Whitehead had not. The remaining claims proceeded to a bench trial, and the federal district court entered Judgment in accordance with its Findings of Fact and Conclusions of Law.

Whitehead had appeared through counsel shortly after the lawsuit was filed, but he did not substantively participate in it until after Judgment had already been entered. Purporting to proceed *pro se*, Whitehead sought to vacate the judgment

entered by the federal district court, asserting that he was entitled to relief under Rule 60(b) because his attorney in the trial court was negligent, engaged in unauthorized actions, or otherwise failed to defend the allegations. However, even at this late stage of the proceedings, Whitehead did not dispute that he was, in fact, represented by counsel at the trial court level and he still could not present any evidence of a meritorious defense (or even a substantive defense, as opposed to a mere denial). The federal district court denied Whitehead's Rule 60(b) Motion without a hearing.

Whitehead's entire appellate brief can be reduced to a single sentence:

> Even though I chose not to participate in the lawsuit after making an appearance through counsel, the trial court should have vacated the Judgment and given me a second chance because I now claim that my lawyer did a bad job, but I can't really point to anything specific.

Whitehead's "ineffective assistance of counsel" argument is the foundation of his brief.

While it is fundamental in criminal law that the Sixth Amendment's "right to counsel" must be read as the "right to *competent* counsel," it is a different rule in a civil case. There is no right to *any* counsel in a civil lawsuit, and this Court has long recognized that a claim of ineffective counsel provides no basis for relief from a civil judgment. Rather, the claimed negligence or improper actions by Whitehead's trial counsel gives rise only to a separate action against that lawyer

for legal malpractice. Thus, the federal district court would have had no valid reason to vacate or otherwise grant relief to Whitehead, and this Court should affirm the Judgment in its entirety.

STATEMENT OF FACTS

The claims, counterclaims, and cross-claims asserted in this lawsuit arise out of thirty-one invoices issued by Whitehead to Chesapeake, each for the same type of equipment used in oil and gas field operations. Chesapeake paid twenty-three of these invoices, for a total of $855,175.00. RE-D at R1143. Chesapeake did not pay eight other invoices which totaled $295,484.00. RE-B at R1002-03. Although these invoices were issued by Whitehead and paid by Chesapeake, Cash Flow actually received the money through its factoring arrangement with Whitehead. RE-D at R1143.

From Whitehead's perspective, everything worked well until Chesapeake discovered that it had not received any of the equipment referenced on these invoices. Chesapeake brought this lawsuit to get back the money it paid on the twenty-three invoices, and for a judicial declaration that it owed nothing on the remaining eight invoices that were not paid.

A. Chesapeake-Whitehead commercial relationship.

Chesapeake is in the business of exploring for oil and natural gas. RE-D at R1139. Whitehead, a manufacturer and provider of equipment in oil and gas

operations, was one of Chesapeake's vendors. RE-D at R1144. One of the types of equipment that Whitehead could make or provide was a skid-mounted 48-inch O.D. separation unit, commonly referred to as a "Fat Boy" separator. RE-D at R1142. Chesapeake would receive invoices from Whitehead for equipment, and Chesapeake would later pay them. RE-D at R1140.

B. Whitehead-Cash Flow commercial relationship.

Cash Flow is a factoring company, which provides businesses with an alternative source of financing by advancing a loan secured by invoice for completed work. RE-D at R1140. Under the separate arrangement between Cash Flow and Whitehead, Cash Flow would purchase the invoices from Whitehead at a discount and Cash Flow would collect the full amount of the invoice when paid by Chesapeake. RE-D at R1140, R1143. Through this arrangement, Cash Flow stood as Whitehead's assignee on the invoices, but there was no direct contractual relationship between Chesapeake and Cash Flow. RE-B at R1003.

C. The invoices at issue in this lawsuit.

All of the invoices at issue in this lawsuit were also part of the Cash Flow-Whitehead factoring arrangement, which was governed by their "Factoring and Security Agreement."

1. The Cash Flow-Whitehead "Factoring and Security Agreement".

The "Factoring and Security Agreement" (the "Factoring Agreement") between Cash Flow and Whitehead governed the assignment of accounts which was the basis of their relationship. Under this arrangement, Whitehead (identified as the "Client") would assign a completed invoice to Cash Flow; Whitehead would receive a lump sum payment, typically about 80% of the face amount on the invoice, immediately, with Cash Flow (identified as the "Factor") receiving the full amount on the invoice when paid by Chesapeake (identified as the "Customer"). R594. Additionally, after the invoice was paid by the Customer, Cash Flow would typically make an additional payment to Whitehead (based on the number of days from the assignment of the invoice until it was paid) as a partial refund of the pre-paid interest charges. RE-D at R1140.

As specified in the Factoring Agreement, when assigning an invoice to Cash Flow, Whitehead represented that the invoices were for "bona fide" sales of equipment actually delivered to Chesapeake, the invoices were "accurate and undisputed" statements of amounts owed by Chesapeake to Whitehead, and that the right to be paid by Chesapeake was not subject to any security interests nor had

it been previously assigned by Whitehead to any other entity.[1] R595. Whitehead also agreed that he would not send any of the invoices subject to the Factoring Agreement directly to Chesapeake and that Cash Flow's address would be listed on the invoices as the "pay to" address. R596. Thus, when an invoice was paid by Chesapeake, it would be received by Cash Flow, which also had the power to deposit checks made payable to Whitehead. R596.

In the Factoring Agreement, Cash Flow and Whitehead also made provisions in the event of disputes raised by Chesapeake or other such "Customers" of Whitehead. The contract provided that Cash Flow's discovery of any such dispute would be "conclusive and binding" on Whitehead, and that Cash Flow would have the power to settle or adjust any such disputes with the Customer directly. R597-98. Whitehead also agreed to indemnify Cash Flow against any liability, loss, or expense that could result from either a customer's dispute or even the customer's inability to pay. R597. Finally, Cash Flow could force Whitehead to repurchase the invoices by repaying the amount of the advance, a remedy which Cash Flow exercised as to at least one Chesapeake invoice. R598; RE-D at R1143.

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[1] To further assure itself that Whitehead had not previously assigned a particular invoice to another factoring company, Cash Flow insisted that it would only purchase *original* invoices from Whitehead. R675-76.

2. Each of the invoices were purportedly signed by "Kyle Willey," whose employment at Chesapeake was terminated in April 2009.

Each and every one of the thirty-one invoices at issue in this lawsuit is for equipment described as "Production Skid – 48" OD x 5'6" 500# ASME Code Separator 3-Phase with Controls," which is a Fat Boy separator. RE-D at R1142. The invoices are dated from January 16, 2009 to December 15, 2009. RE-D at R1141. Each of these invoices has the purported signature of "Kyle Willey," one of Chesapeake's Construction Foremen working out of its Field Office located in Cleburne, Texas. R260-90; R293. However, Kyle Willey's employment relationship with Chesapeake was terminated in April 2009. R293-94. Glenn Stetson, who had also worked at the Cleburne Field Office for Chesapeake, was promoted to Construction Foreman and served as Mr. Willey's replacement. R1211. Due to the administrative process of getting this promotion authorized and approved, Mr. Stetson was not able to begin his new job (which consisted of taking over the projects that Mr. Willey had been working on) for several weeks. R1211-12. During that interim time period — between Mr. Willey's termination and Mr. Stetson's promotion being finalized — Mr. Willey's former position sat vacant, and the matters on which he had been working, including any invoices awaiting his approval, had been idle. R1211-12.

3. Chesapeake paid a number of invoices issued by Whitehead.

One of Mr. Stetson's responsibilities in his new position was to review and approve outstanding invoices (which would have been reviewed and approved by Mr. Willey, had he not been terminated), including those issued by Whitehead for the Fat Boy separators. R1211-12. Mr. Stetson's approval of some of the invoices was based his conclusion that the equipment was properly described, the price term was appropriate for that equipment, and the invoice referenced a property that was in production. R1214-15. The status of the property as being in production (i.e., that the well was producing oil and/or natural gas) was significant because a well cannot produce without a separator. R1215. Mr. Stetson, knew that a particular property had a separator, unfortunately, however, he assumed that it had a Fat Boy separator that was manufactured by Whitehead, which was not the case. R1216-17. When Mr. Stetson saw Mr. Willey's apparent signature on the invoices, even though he had been terminated, he did not think it unusual, as it could have been signed by Mr. Willey and returned to the vendor before his termination, and only then routed its way back to Chesapeake for payment. R1213-14. Only later, however, did Mr. Stetson realize that some invoices (but only the Whitehead invoices at issue in this lawsuit) were apparently signed by Mr. Willey, but were dated *after* Mr. Willey was terminated. R1216-17. Mr. Stetson feared that there was a problem, but Chesapeake decided to investigate before jumping to any

conclusions. R1217. Meanwhile, Chesapeake was still receiving calls about the status of payments of these invoices.

4. Chesapeake's investigation reveals that Whitehead had not delivered any Fat Boy separators.

Chesapeake looked at this matter, and the Whitehead invoices, in more detail. Chesapeake had already engaged a third party, Contek Solutions, LLC ("Contek") to prepare an inventory of all "trackable" equipment (*i.e.*, substantial pieces of equipment bearing a serial number) in place at all of the facilities managed by its Cleburne Field Office, and saw that this might be used to also confirm what equipment had been manufactured by Whitehead. RE-B at R995; R1220-21. This inventory confirmed that none of the properties managed by Chesapeake's Cleburne Field Office (*i.e.*, the properties for which Mr. Willey or Mr. Stetson would have ordered a Fat Boy or any other kind of separator) had a Fat Boy separator that was manufactured by Whitehead.[2] The inescapable conclusion was that Chesapeake had therefore paid for equipment that it had never received.

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[2] The Contek inventory did show that there were separators manufactured by Whitehead, but none of them were Fat Boy separators (they were a different type of separator). R249-53. Also, some items on the Contek inventory suggested that there were a Fat Boy separator manufactured by Whitehead at a handful of properties, but personal visits to these properties revealed that this was an error in the Contek report, as the separator present was not a Fat Boy separator. R252; R1221-22.

5. Whitehead couldn't provide any documentation and apparently abandoned his worksite when visited by Chesapeake personnel.

Mr. Stetson, and Chesapeake personnel, arranged a meeting with Whitehead to discuss the invoices, and to see whether Whitehead had any proof that he had actually delivered the Fat Boy separators. R1218-20; R1222. In other words, at this point, Chesapeake was still willing to give Whitehead the benefit of the doubt, and considered the possibility that it was missing some piece of the puzzle, depending on what documentation Whitehead could provide. When called by Chesapeake personnel the evening before their scheduled meeting, Whitehead announced that he had to leave the following morning in order to go to Mexico, but, as the Chesapeake personnel were already in town, he agreed to briefly meet with them. At Whitehead's office, he could not provide any bills of lading, delivery receipts, or other documents confirming that the equipment had actually been delivered to Chesapeake. R1222-25. Rather, Whitehead evaded their questions, and said that his accounting employee would have to be there to get the records from his two-room office. R1224-25. Whitehead literally had no answer when asked how Mr. Willey's signature appeared on invoices dated after his termination. R1226.

When the Chesapeake employees returned the following morning, they found the Whitehead facility locked, and the Whitehead employees had been

instructed not to let them in. R1182-85. Above all else, the one Whitehead employee that spoke with the Chesapeake personnel clearly communicated that he just did not want to get involved in any dispute involving Whitehead. R1185 (testimony of Linda Havrilla noting comments from Whitehead employee that ". . . people cause trouble for themselves, people dig their own graves . . . .").

D. Chesapeake brought this suit to get back the money it paid, later joining Cash Flow and requesting declaratory relief on the unpaid invoices.

During the initial pre-trial conference before Judge Jack, Chesapeake explained that it had filed this lawsuit against Whitehead, in order to recover the $855,175.00 that it paid on the twenty-three invoices because Whitehead never delivered the equipment.[3] Mr. Rogers, the attorney for Whitehead, was candid about the underlying facts and the strength of Whitehead's defense:

> THE COURT: And Mr. Rogers, your client has some kind of evidence that those separators were delivered?
>
> MR.ROGERS: Judge, we're the target of a Grand Jury in Oklahoma City that's meeting mid-December and *I don't know of any reason my client is not going to get indicted up there for this same exact transaction*.[4]

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[3] At the time of the Initial Pre-Trial Conference before Judge Jack, Cash Flow had been served, but its Answer was not yet due, and counsel for Cash Flow did not participate. *See* R218-19.

[4] Shortly before the bench trial, Whitehead was, in fact, indicted in federal court on numerous counts of mail fraud involving the same invoices which are the subject of this lawsuit. R1328-29.

> So I don't know where that's going to put us on this suit, but I told [Chesapeake's] Counsel at one time my client and I discussed just withdrawing the Answer and letting them take the Judgment . . . .
>
> But just to be candid, *we don't have a lot of documentation to support the transaction*.

R216 (emphasis added).

Chesapeake had first learned of Cash Flow when it subsequently sued Chesapeake in a separate state court lawsuit,[5] seeking to collect the $295,484.00 on the eight outstanding invoices. *See* R103; R138; R163. With leave of court, Chesapeake filed an amended complaint to assert claims against Cash Flow as well. R41, R54, R55. Cash Flow, as expected asserted counterclaims against Chesapeake (the same claims Cash Flow had tried to assert in state court) as well as cross-claims against Whitehead for fraud and contractual indemnity. R128.

E. Whitehead continued to appear through counsel, but, asserting the Fifth Amendment, did not participate in discovery or summary judgment.

Whitehead did not participate in discovery, but asserted his Fifth Amendment right against self-incrimination. R1146. Cash Flow did participate in

[5] Based on principles of comity, Chesapeake was able to have the state court lawsuit filed by Cash Flow stayed in deference to previously-filed the federal court lawsuit filed by Chesapeake, as both suits involved the same "case or controversy." R147. The federal district court also denied Cash Flow's motion asking this Court abstain from exercising jurisdiction in deference to the state court action. R138.

discovery, sending written interrogatories to Chesapeake, completing its disclosure obligations, and deposing several Chesapeake employees.

Chesapeake filed a "Traditional and No-Evidence Motion for Summary Judgment" on its claims for breach of contract and money had and received against Whitehead and against Cash Flow. R232. The basis of Chesapeake's motion was that, as established by the Contek Report and explained by the affidavit of Linda Havrilla, none of the properties managed by Chesapeake's Cleburne Field Office had a Fat Boy separator that was manufactured by Whitehead; therefore, Whitehead had not delivered any of the equipment represented by the invoices. R232. Cash Flow filed an opposition to Chesapeake's motion, arguing that Whitehead's failure to deliver the Fat Boy separators had not been proven as a matter of law, and a fact issue remained for trial. R546.

Just like the discovery phase of the lawsuit, Whitehead did not participate in summary judgment either. R896. Whitehead's counsel represented to both Chesapeake and Cash Flow (after they had already filed their motions for summary judgment) that Whitehead had instructed him "not to contest" the motions for summary judgment "or file any pleading in response." R896. Based on these representations from Whitehead's counsel, Chesapeake moved the federal district court for entry of partial summary judgment against Whitehead. R896.

But, rather than grant summary judgment by "default," the federal district court analyzed the merits of the issues presented by the parties' summary judgment motions and supporting evidence. *See* RE-B at R996, RE-C at R1011. As to the central issue in the case — whether Whitehead delivered the Fat Boy separators references on the thirty-one invoices — the lower court was clear, explaining its reasoning in a section entitled "The Separators Were Not Delivered." RE-B at R998-1001. The operative paragraph of that section reads:

> As noted, Defendant Whitehead has asserted a Fifth Amendment privilege and has not responded to the Plaintiff's motion for summary judgment and has not presented any controverting evidence. After reviewing Chesapeake's summary judgment evidence and Cash Flow's evidence and objections to Chesapeake's evidence, the Court finds that there is no genuine issue of material fact regarding whether Defendant Whitehead delivered the invoiced Fat-Boy separators to Plaintiff Chesapeake. It did not.

RE-B at R1001. Accordingly, the lower court found that Chesapeake was entitled to recover on its breach of contract claim against Whitehead and recover $855,175.00 ("the amount paid for which nothing was received in return") as well as a declaration that the additional sum of $295,484.00 represented by the eight unpaid invoices "is not due and owing and the charges are not enforceable." RE-B at R1002-03. The federal district court found that the declaratory relief applied equally against Cash Flow and Chesapeake was also entitled to a "no evidence" summary judgment disposing of Cash Flow's counterclaims seeking to collect on

the unpaid invoices because Cash Flow, "whose collection rights are derivative of Whitehead's contract rights, cannot prove Whitehead's performance." RE-B at R1003-04. However, the federal district court denied Chesapeake's claim for breach of contract against Cash Flow, finding that there was no contractual relationship between them, and also found that fact issues precluded summary judgment on the claims for money had and received between Chesapeake and Cash Flow. RE-B at R1004-05. The trial court also granted summary judgment in favor of Cash Flow as to its indemnity claims against Whitehead. R1006-10.

F. Whitehead appeared at the Pre-Trial Conference and Bench Trial through counsel, but did not substantively participate.

Following summary judgment, the claims remaining for trial were: (1) claims by Chesapeake and Cash Flow against Whitehead for fraud, each seeking their actual and punitive damages; and, (2) Chesapeake's claim against Cash Flow for "money had and received," asking the lower court to balance the equities and rule to what extent Cash Flow had to return the $855,175 paid by Chesapeake on the Whitehead invoices. R1170-71.

As reflected in the Joint Pre-Trial Order, which was reviewed and approved by counsel for all parties, including Whitehead, neither Chesapeake nor Whitehead had requested a jury trial in their pleadings, but Cash Flow had. R1; R39; R128; R1026. Nonetheless, at the Pre-Trial Conference, Cash Flow withdrew its request

for a jury trial and, as no other party objected (including Whitehead, who appeared at the Pre-Trial Conference through counsel), the matter proceeded to trial before Judge Ramos.[6] RE-A at R9. At the September 1, 2011 Pre-Trial Conference, Mr. Rogers, counsel for Whitehead, also represented on the record in open court, that Whitehead would not contest the claims made against him and that he plead the Fifth Amendment if called to testify as a witness. In light of these admissions by Whitehead, the parties prepared a stipulation to that effect, allowing the federal district court to take judicial notice of these facts. RE-C at R1110; *see also* R1097-99 (joint motion for judicial notice signed by counsel for each of the parties, including by Mr. Rogers as counsel for Whitehead).

At the September 6, 2011 bench trial itself, Mr. Rogers appeared (yet again) on behalf of Whitehead, but requested that he be excused from the bench trial as his presence was no longer necessary, given the stipulation and the federal district court's recognition that Whitehead would not be attending and, if called as a witness, would exercise his rights guaranteed under the Fifth Amendment and refuse to provide any testimony. R1160-62. The lower court agreed and excused Mr. Rogers. R1161-62. At the one-day bench trial, Chesapeake and Cash Flow

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[6] After Judge Ramos's investiture in August 2011, this lawsuit was transferred from Judge Jack to Judge Ramos. R926.

introduced their documentary evidence into the record and elicited testimony from Chesapeake employees and the sole owner of Cash Flow, Ms. Alice Thomas. R1157-59.

G. Whitehead, now purporting to act *pro se*, decides to substantively participate after the lower court has already entered Judgment.

Following the bench trial, the federal district court entered its Findings of Fact and Conclusions of Law, R1139. Chesapeake and Cash Flow, having both succeeded on their contract-based and tort-based claims against Whitehead, elected their remedies and each moved for entry of judgment. R1362, R1374. The federal district court entered Judgment on October 17, 2011. RE-E at R1377.

Then, judgment having already been entered against him, Whitehead decided to actively participate in the lawsuit for the first time. Purporting to act *pro se*, Whitehead filed a motion seeking relief from the judgment pursuant to FED. R. CIV. P. 60(b) on October 25, 2011. RE-H at R1380. In that motion, as he does in this appeal, Whitehead argued that "he was denied due process of law because of the refusal of his lawyer to advise him and upon the grounds of gross negligence involving legal malpractice" by "Richard Rogers, III and an unnamed attorney hired in this case." RE-H at R1380. Whitehead alleges that these attorneys did not attend depositions and failed to keep him apprised of the status of the lawsuit. RE-H at R1381-84. The "meritorious defense" offered by Whitehead was that he had,

in fact, delivered the Fat Boy separators to Chesapeake, but unspecified "[circumstances . . . beyond [his] control . . . prevented timely action on behalf of Whitehead to present evidence" to the federal district court. RE-H at R1381. Also, Whitehead argued, Chesapeake intentionally committed perpetrated a fraud on the federal district court by withholding evidence. RE-H at R1381. Whitehead asked that the lower court reverse the summary judgment and "and allow this case to go forward with further discovery." RE-H at R1384.

Cash Flow, for its part, filed a response "without aligning itself with Whitehead but for the sake of justice and equity" in order to join in Whitehead's motion and essentially ask for a new trial. R1417. Specifically, Cash Flow asked that the lower court vacate its judgment and, notwithstanding the Fifth Amendment privilege against self-incrimination, also "order Whitehead to appear in Court where he can be examined under penalty of perjury by the Court and counsel for the parties." R1417-18. Chesapeake filed its Opposition to the motions of Whitehead and Cash Flow on November 9, 2011, in which it explained why Whitehead was not entitled to relief under Rule 60(b). R1420.

But Whitehead was not done. On November 10, 2011, he filed a "Notice of Filing Affidavits in Support of Rule 60(b) Motion" which included statements from Eddie Galvan and Everett Lee Whitehead, two persons that had never been identified by any party as persons with knowledge of relevant facts. RE-I at

R1435-40. A few days later, on November 15, 2011, Whitehead provided a "Notice of Filing Receipts in Support of Rule 60(b) Motion," attaching twenty-three invoices from Whitehead to Chesapeake for Fat Boy separators. RE-I at R1441-65. That same day, before Chesapeake had the opportunity to object to the filing of these papers or point out the substantive and formal defects of the purported affidavits, the federal district court denied Whitehead's Rule 60(b) Motion. RE-F at R1466.

Whitehead filed his Notice of Appeal on December 12, 2011, in which he stated that the basis of his appeal would be the legal malpractice of the lawyers who represented him before the federal district court, and their failure to bring facts and circumstances to the lower court's attention. RE-G at R1467.

SUMMARY OF THE ARGUMENT

Chesapeake brought this lawsuit to recover money it paid on invoices for equipment that it never received. Although represented by and making appearances through his counsel, Whitehead did not substantively participate in the underlying lawsuit until after the federal district court had entered its Judgment. Before that time, the only representations by Whitehead to the other parties and to the lower court was that Whitehead would assert his Fifth Amendment privilege against discovery based on an ongoing criminal proceeding arising out of the same invoices.

The federal district court denied Whitehead's Rule 60(b) Motion, filed *pro se*, which argued that he was entitled to relief from the Judgment due to the negligence and unauthorized actions by his trial counsel, Richard W. Rogers, III. This same argument serves as the foundation for Whitehead's appellate brief, and the resolution of this appeal is squarely governed by this Court's holding in *Sanchez v. United States Postal Serv.*, 785 F.2d 1236 (5th Cir. 1986) (per curiam). Accepting Whitehead's assertion as true, the alleged improper acts by his lawyer are the subject of a separate lawsuit for legal malpractice, and not appellate relief from the Judgment entered in Chesapeake's favor.

Moreover, there is no reason for this Court to conclude that Whitehead's claims are in fact true, as he has still failed to present any evidence suggesting that he actually delivered the equipment referenced on the invoices to Chesapeake. Whitehead has similarly failed to offer any explanation why such information could not have been presented in a timely manner to the lower court.

Thus, Whitehead has failed to show any "excusable neglect" or "exceptional circumstances" justifying relief from the Judgment under Rule 60(b). Whitehead also, baselessly, alleges fraudulent litigation conduct by the undersigned counsel for Chesapeake as a basis for relief, but fails to develop that argument or even provide any specifics to support his risible, and spurious, charge. Whitehead has wholly failed to demonstrate that the federal district court abused its discretion in

denying his Rule 60(b) Motion. Indeed, had the court actually granted it, that decision would have been reversible as a abuse of discretion. Thus, the only correct course of action was for the federal district court to deny the Rule 60(b) Motion. Accordingly, the Judgment should be affirmed in its entirety.

ARGUMENT

Whitehead specifically asserts a right to relief pursuant to FED. R. CIV. P. 60(b)(1), (3), (6). *Appellant's Brief*, p. 17. Those provisions allow a federal district court the discretion to relieve a party from a final judgment for reasons of:

> (1) mistake, inadvertence, surprise or excusable neglect;
>
> . . . .
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> . . .
>
> (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b)(1), (3), (6).

A. Standard of Review

Such relief under Rule 60(b) is discretionary with the federal district court, and its decision denying Whitehead's motion can only be set aside on a showing that the lower court abused that discretion. *Carter v. Fenner*, 136 F.3d 1000, 1005

(5th Cir. 1998) (distinguishing a request for relief under Rule 60(b)(4),[7] which is subject to *de novo* review, from the remainder of Rule 60(b), which is reviewed for an abuse of discretion); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396,402 (5th Cir. 1981) ("It is not enough that the granting of relief [under Rule 60(b)] might have been permissible or even warranted — denial must have been so *unwarranted* as to constitute an abuse of discretion."). Whitehead falls far short of meeting that standard, and the Judgment should be affirmed.

B. Claims of "ineffective assistance of counsel," the principal focus of Whitehead's Brief, provide no basis for relief from a civil judgment.

In this appeal, Whitehead argues that he is entitled to relief from the Judgment due to the failures of the attorneys that represented him. He argues that while Chesapeake and Cash Flow had competent counsel advocating their interests, by contrast, "Whitehead had, in effect, no representation at all." *Appellant's Brief*, p. 15. This argument does not present a basis for relief from the Judgment.

Claims of ineffective assistance of counsel raise serious questions of due process in criminal matters, but in civil cases, like this one, they do not. This Court has long recognized that the Sixth Amendment right to effective assistance

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[7] This provision authorizes relief from a judgment that is void. FED. R. CIV. P. 60(b)(4).

of counsel has no application in civil lawsuits. *United States v. White*, 589 F.2d 1283, 1285 n.4 (5th Cir. 1979); *United States v. Rogers*, 534 F.2d 1134 (5th Cir. 1976); *see also* U.S. CONST. amend. VI; *Sanchez v. United States Postal Serv.*, 785 F.2d 1236, 1236 (5th Cir. 1986) (per curiam) ("In case any doubt still exists, we now expressly hold that the sixth amendment right to effective assistance of counsel does not apply to civil litigation.").

Whitehead cannot contest that Mr. Rogers (and some other, yet unnamed attorney) was retained as his attorney in this lawsuit, as Whitehead refers to Mr. Rogers throughout his brief as "his attorney," "his advocate," "counsel," "his lawyer," "defense counsel," or "trial counsel" over a dozen times and explicitly states that "Whitehead hired counsel to represent him in this case." *Appellant's Brief*, pp. ii, iv, 4, 8-10, 16-18, 20-23. Indeed, in both the Rule 60(b) Motion and the Notice of Appeal, Whitehead admits that he was represented by counsel. REG; RE-H.

Obviously, Whitehead is not happy with the result, and he apparently disagrees with some of the actions taken by Mr. Rogers. For all we know, Mr. Rogers may have acted negligently as argued by Whitehead.[8] But, that would be

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[8] Chesapeake has no reason to believe that Mr. Rogers acted negligently or improperly in any way during the course of his representation of Whitehead in this matter. By no means does Chesapeake intend to suggest that such claims would have any merit.

the subject of a separate lawsuit by Whitehead against Mr. Rogers, not this appeal, as this Court has made perfectly clear:

> Since no right to effective assistance of counsel exists, *we need not consider the alleged errors* by [Whitehead's] attorney. If [Whitehead's] attorney did mishandle the case, [Whitehead] may have a remedy against his attorney in the form of a malpractice suit. [Whitehead's] potential cause of action against his attorney remains separate and distinct from [the lawsuit filed by Chesapeake]; therefore, we cannot grant him any relief in this proceeding.

Sanchez, 785 F.2d at 1236. Accordingly, Whitehead having failed to provide this Court with a basis for relief from the lower court's denial of his Rule 60(b) Motion, the Judgment should be affirmed.

But even it this Court finds it necessary to "consider the alleged errors" by Mr. Rogers, Whitehead has not demonstrated any harm resulting from his attorney's actions or representations to the Court. As Whitehead was, indisputably, represented by counsel, neither Chesapeake nor Cash Flow (either directly or through counsel) could contact him directly without the permission of Mr. Rogers. TEX. DISC. R. PROF'L CONDUCT 4.02(a). Further, Whitehead is bound by his attorney's actions and representations by Mr. Rogers before the federal district, just as he is by the actions and representations by Mr. Hankins to this Court.

Whitehead specifically complains about his attorney's representations that Whitehead would not be appearing at trial and would assert the Fifth Amendment

in order to avoid testifying, *Appellant's Brief*, p.16, but this Court has long recognized that stipulations by a party or counsel are binding and treated as judicial admission withdrawing a fact from contention, *e.g.*, *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001). In any event, the federal district court specifically noted that the adverse inferences drawn from Whitehead's refusal to testify "are not necessary to [the lower court's] disposition of this case." R1153.

Whitehead also complains about the waiver of a jury trial at the Pre-Trial Conference, *Appellant's Brief*, p. 21, but *Whitehead did not even request a jury* in his pleadings, R39. *See also* FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent."). Further, there is no validity to Whitehead's contention made on page 21 of his Brief that a jury trial could not be waived at the Pre-Trial Conference by Cash Flow withdrawing its jury demand, unless *Whitehead* (as distinguished from Mr. Rogers, his lawyer) appeared and *did so personally*. *See Charles Alan Wright, et al.*, 9 FED. PRAC. & PROC. § 2332 ("The parties *or their attorneys of record* may stipulate that trial shall be without a jury even though a jury had been demanded properly under the rule.") (emphasis added).

The crux of Whitehead's Brief is that he should have been able to escape the consequences of the Judgment because of his lawyer's alleged errors before the

federal district court. But, this Court had made it perfectly clear that it need not even consider those alleged errors, because, if true, they would only give rise to a separate legal malpractice suit against the lawyer, and would provide no basis for appellate relief whatsoever. Further, considering the substance of Whitehead's allegations, he cannot demonstrate any actual errors by his attorney. Therefore, he has wholly failed to provide this Court with any basis to find that the federal district court abused its discretion in denying Whitehead's Rule 60(b) Motion. Accordingly, the Judgment should be affirmed.

C. Whitehead's so-called "meritorious defense" is not even supported by the additional evidence he presented to the trial court.

Whitehead claims that he has a meritorious defense to the claims against him: "that he in fact delivered the Fat Boy separators at issue here and he has evidence to support that defense." *Appellant's Brief*, p. 13. Whitehead directs this Court's attention to three things: (1) the affidavits of Whitehead employees Eddie Galvan and Everett Lee Whitehead; (2) a claimed discrepancy in the testimony of Chesapeake employee Glenn Stetson; and (3) speculation (couched as "a reasonable likelihood") that former Chesapeake employee "Kyle Willey and a confederate committed fraud by receiving the Fat Boys from Whitehead and then re-selling them without Chesapeake's knowledge." *Appellant's Brief*, pp. 13-15.

1. The affidavits raise more questions than they answer.

The affidavits of Eddie Galvan and Everett Lee Whitehead, offered by Whitehead in support of his Rule 60(b) Motion, do not provide any evidence of Whitehead's so-called meritorious defense.[9] Whitehead argues that these affidavits constitute "previously undisclosed evidence [that] undermines summary judgment." *Appellant's Brief*, p. 18. Of course, as these affidavits purport to be made by former Whitehead employees, Whitehead is the party that failed to disclose them.

Upon reading them, it is not even clear what Whitehead hopes to prove by these affidavits, or that they are even sworn statements.[10] The affidavit of Eddie Galvan says no more than that he "welded on 30 to 40 48" vertical separators" during the time he worked for Whitehead and that "Lee Whitehead loaded them on

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[9] Interestingly, Whitehead appears to dispute that he refused to testify pursuant to the Fifth Amendment. *Appellant's Brief*, p. 18. Yet, Whitehead never provided his own sworn statement (which could be used against him in the upcoming criminal proceeding) in support of his Rule 60(b) Motion.

[10] Both affidavits have the affiant's signature on a different page than the notary's attestations (which do not mention the affiants by name), raising questions as to the propriety of these affidavits or their authentication as an actual sworn statement of the individual listed. RE-I at R1437-40. Chesapeake could not have objected to this defect of form in its Response to the Rule 60(b) Motion because Whitehead, for whatever reason, only filed these *after* Chesapeake had already filed its Response. RE-A at R10-11. In any event, the federal district court denied the Rule 60(b) Motion a few days later, before Chesapeake could have filed such an objection. RE-F at R1466. Thus, Chesapeake has not waived its objections to this evidence. But, more importantly, and as addressed in the body of the Brief, the substance of these so-called affidavits is lacking.

an 18 wheeler, and delivered them." RE-I at R1437. The affidavit of Everett Lee Whitehead only states that, as a truck driver for Whitehead, he "delivered equipment to all parts of Texas" and "made many deliveries to the Cleburne Tx Area to deliver 48" separators." RE-I at R1439. He also states that he "made deliveries to different locations and yards in + around the Cleburne Tx Area." RE-I at R1439. These purported affidavits do not answer the following questions:

- What are the serial numbers for the separators referenced by the affidavits?
- Where, specifically, in the "Cleburne Tx Area" (and to whom) were these separators supposedly delivered?
- Where are the bills of lading, Department of Transportation permits, and other documents verifying the alleged delivery of Fat Boy separators to Chesapeake?
- Where are the delivery tickets signed by Chesapeake personnel for these Fat Boy separators that were supposedly delivered to Chesapeake?

At most, even if treated as proper affidavits, Eddie Galvan and Everett Lee Whitehead say no more than that Whitehead built separators that were delivered somewhere in the State of Texas, possibly near Cleburne. Neither of these affidavits provide any evidence that Whitehead actually delivered any of the Fat Boy separators to Chesapeake.

2. The alleged discrepancies in Mr. Stetson's deposition testimony have already been considered by the federal district court.

Whitehead also argues that the deposition testimony of Mr. Stetson raises a question of fact whether Whitehead delivered the Fat Boy separators. Appellant's Brief, p. 18. Though he does not elaborate, Whitehead is presumably referring to the testimony attached to his Rule 60(b) Motion. RE-H at R1386-90. In this section of his testimony, Mr. Stetson explained why he initially thought that the Fat Boy separators on the invoices had been delivered — because the invoices referenced a property that was in production, and a well could not produce without a separator. R1215. The testimony referenced in Whitehead's Rule 60(b) Motion speaks to the same issue that Cash Flow raised in opposition to summary judgment, that Chesapeake could not properly track its equipment. *Compare* R581 *with* RE-H at R1386-90. The federal district court already rejected that type of argument, stating that even if the evidence supports such a proposition, "it is not affirmative evidence that the separators were delivered." RE-B at R1001. Whitehead presents nothing to this Court that was not already considered, and rejected, below, and he still cannot point to any evidence that he actually delivered the Fat Boy separators to Chesapeake.

3. Just as the lower court rejected Cash Flow's speculation, this Court should reject Whitehead's speculative conspiracy theories.

In opposing Chesapeake's motion for summary judgment, Cash Flow put forth a theory that Chesapeake had received the separators, but failed to account for their location — in other words, that perhaps Whitehead had delivered them, but Chesapeake lost them. R567-68. The federal district court dismissed this argument as only raising "mere speculation, which does not rise to the level of creating a genuine issue of a material fact issue to prevent issuance of summary judgment." RE-B at R1001. This Court should similarly dismiss Whitehead's speculation that Kyle Willey somehow intercepted the delivery of the Fat Boy separators, and had sold them without Chesapeake's knowledge, pocketing the money himself. *Appellant's Brief*, p. 13. By such an argument, Whitehead is faulting Chesapeake for not affirmatively disproving conspiracy theories never even presented at the trial court level, and for which Whitehead, still, has no evidence to support.

D. Because Cash Flow had the same incentive to show that Whitehead delivered the Fat Boy separators to Chesapeake, the underlying lawsuit was adversarial.

Whitehead also complains that the proceedings below did not satisfy due process as the Judgment "was the result of an illegitimate and non-adversarial process." *Appellant's Brief*, p. 16. In doing so, however, he conveniently ignores

that Cash Flow, as Whitehead's assignee as to the right to be paid on the invoices, had the same incentive to prove that Whitehead had actually delivered the Fat Boy separators.

Under their Factoring Agreement, Cash Flow was the assignee of Whitehead's right to be paid on the invoices. Because Cash Flow was "standing in Whitehead's shoes," it could only have an enforceable right to be paid on the invoices if Cash Flow could show that Whitehead actually delivered the Fat Boy separators to Chesapeake. *E.g.*, R207. Thus, Cash Flow's right to be paid on any of the invoices was wholly dependent on Whitehead actually performing the work, under long-established Texas law. *Graham v. Henry*, 17 Tex. 164 (1856) ("Of course, the interest or right of the assignee would ultimately depend upon the performance of the precedent conditions by the grantee."); *Fid. Sav. & Loan Ass'n v. Baldwin*, 416 S.W.2d 482, 483 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.) ("[T]he assignee bought the note before the contract was performed, and the assignee's lien depended upon the performance either by the original contractor or the assignee of that which such contractor had undertaken to do to create or perfect the lien."); *see also* R207.

The parties actively participating in the lawsuit were clearly adverse on this central question — to win, Chesapeake had to show that Whitehead did not deliver

the Fat Boy separators; to win Cash Flow had to show that Whitehead did.[11] As applied here, this involves more than the parties' positions taken in the abstract, because Cash Flow opposed Chesapeake's motion for summary judgment by arguing argued that conflicting evidence created a genuine issue of material fact for trial as to whether Whitehead delivered the Fat Boy separators. R546. The federal district court disagreed, dismissing Cash Flow's arguments as merely speculation, and found that there was no evidence that Whitehead had actually performed. RE-B at R1000-01.

In the proceedings below, Cash Flow had the same incentive as Whitehead to show that Whitehead delivered the Fat Boy separators. Cash Flow actually attempted to do so, but was unsuccessful. Therefore, the proceedings below were, in fact, adversarial and can hardly be characterized as illegitimate. Because there is no reason to think that Whitehead would have succeeded where Cash Flow has already failed, the Judgment should be affirmed.

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[11] Whitehead even acknowledges this critical fact in his brief, stating that

> as to the central issue for purposes of this appeal — whether Whitehead committed breach of contract or fraud by not delivering the equipment that Chesapeake paid for — Cash Flow's legal problems are intertwined with Whitehead's.

Appellant's Brief, p.6 n.2.

E. The authorities cited in Whitehead's Brief are not applicable.

Whitehead does not cite any cases demonstrating that the federal district court abused its discretion in denying his Rule 60(b) Motion. Whitehead cites *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)[12] to support the proposition that the "previously undisclosed evidence that is so central to the litigation" (the "affidavits" of Eddie Galvan and Everett Lee Whitehead) may provide a basis for relief Rule 60(b)(6) relief because "it shows the initial judgment to be manifestly unjust" even though "the original failure to present that information was inexcusable." *Whitehead's Brief*, p. 18. But that is not what *Good Luck* stands for. The only case from this Court citing the *Good Luck* decision, *Lavespere v. Niagara Mach & Tool Works, Inc.*, 910 F.2d 167, 173-74 (5th Cir. 1990), states that while a federal district court has considerable discretion over granting relief under Rule 60(b)(6), that discretion "is not boundless." In fact, because Whitehead's failure to submit these affidavits from his own employees is "attributable solely to the negligence or carelessness of [his] attorney" (as Whitehead argues in his brief), then "it would be an abuse of discretion for the [federal district] court to reopen the case and to consider the evidence." *Lavespere*,

[12] Whitehead misrepresents the *Good Luck* case as a decision by the Fifth Circuit case. *Appellant's Brief*, pp. 18, 22 ("This Circuit has stated . . . ."). This case was actually from the United States Court of Appeals for the District of Columbia Circuit and, even if it were on point, is not controlling authority.

910 F.2d at 173. Thus, the decision of the lower court to deny Whitehead's Rule 60(b) Motion was the only correct one that it could have made.

Whitehead also cites *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) as being "instructive" in two ways, both of which relate to Whitehead's argument that the Judgment was not the result of an adversarial process because his attorney did not substantively participate. *Whitehead's Brief*, pp. 19-21. Whitehead argues that (1) "[t]he risk of injustice to Whitehead is significant" because there cannot be great confidence that the Judgment "is a just result" considering the allegations in Whitehead's Rule 60(b) Motion, and (2) his attorney effectively conceded liability "when it was neither warranted nor consented to by Whitehead." *Appellant's Brief*, pp. 20-21. But *Liljeberg* involved a situation in which the judge should have recused; here, Whitehead argues that his lawyer should have done more. The alleged failures of Whitehead's attorney do not serve to reduce public confidence in the judicial process, but only underscore the importance of presenting a defense in a timely manner in a civil lawsuit. Whitehead wholly failed to do so in this case. Indeed, based on the lower court's findings that Chesapeake conclusively proved that it did not receive the Fat Boy separators from Whitehead, RE-B at R1001, it appears that Whitehead did not give his lawyer much to work with.

Finally, Whitehead argues that Chesapeake "may not rely upon the principle of *Ackerman v. United States*, 340 U.S. 193 (1950), wherein the Supreme Court held that the extraordinary circumstances of Rule 60(b)(6) did not offer a litigant any quarter where he made free, calculated strategic dictions during the course of a litigation that turned out, in hindsight, to be improvident." *Appellant's Brief*, p. 22. This, Whitehead argues, is because the key acts he complains of were made by his attorney, "without his authorization or consent, and Whitehead views them as invalid." *Appellant's Brief*, p. 23. But *Ackerman* is very instructive in the sense that the Court should consider the reasons for inaction. In that case, the Supreme Court contrasted Ackerman's failure to act with the petitioner in *Klapprott v. United States*, 335 U.S. 601 (1949), which was cited in Ackerman's appeal:

> From a comparison of the situations shown by the allegations of Klapprott and Ackermann, it is readily apparent that the situations of the parties bore only the slightest resemblance to each other. The comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. Subsection 6 of Rule 60(b) has no application to the situation of [Ackerman]. Neither the circumstances of [Ackerman] nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60(b)(6).

Ackerman, 340 U.S. at 202. Like Mr. Ackerman, Whitehead appeared in the proceedings, but apparently relied on whatever Cash Flow was going to do before the federal district court; now, on appeal, Whitehead is essentially trying to do

post-judgment what he should have tried to do before. Further, in both his Rule 60(b) motion filed with the lower court and in his Brief here, Whitehead never even tries to explain what exactly his "extraordinary circumstances" are or why he was prevented from presenting his evidence to the federal district court in the first place.

Whitehead relies on these cases for vague recitations of general legal propositions that federal courts can use Rule 60(b) to act "in the interests of justice." But Whitehead never provides any evidence to support his position, or adequately explains why his position is just, other than to complain about his lawyer. Such arguments, however, do not provide a basis for relief under Rule 60(b) for the reasons explained by this Court in the *Sanchez* decision. 785 F.2d at 1236.

F. Whitehead has not shown that the federal district court abused its discretion in denying the Rule 60(b) Motion.

As already noted, in order to succeed in this appeal, Whitehead must show more than a possible basis for relief from the judgment under Rule 60(b). Rather, he must show that the federal district court's denial of his Rule 60(b) Motion was so unwarranted that the lower court abused its discretion in doing so. *E.g., Seven Elves*, 635 F.2d at 402 ("It is not enough that the granting of relief [under Rule 60(b)] might have been permissible or even warranted — denial must have been so

unwarranted as to constitute an abuse of discretion."). Whitehead has not even come close to satisfying this burden.

1. Whitehead is not entitled to relief under Rule 60(b)(1).

Whitehead has not shown that the Judgment should have been vacated due to "mistake, inadvertence, surprise, or excusable neglect," as required by Rule 60(b)(1). In order to show that he was entitled to relief under this part of the Rule, Whitehead had to show the existence of "mistake, inadvertence, surprise, or excusable neglect" as well as a "meritorious defense." *Broadcast Music, Inc. v. M.T.S. Enters.*, 811 F.2d 278, 280 (5th cir. 1987); *Solaroll Shade & Shutter v. Bio Energy Sys.*, 803 F.2d 1130, 1133 (11th Cir. 1986); *see also Optimal Health Care Servs., Inc. v. Travelers Ins. Co.*, 801 F.Supp. 1558, 1560-61 (E.D. Tex. 1992) (noting that a "meritorious defense" is "one that probably would have been successful"). Whitehead cannot show either of these essential elements.

Whitehead has failed to show "mistake, inadvertence, surprise, or excusable neglect." In fact, Whitehead cannot even identify what this would have been. The specific actions by his attorney that Whitehead takes issue with (failing to participate in discovery, failing to oppose the motions for summary judgment, consenting to Cash Flow's withdrawal of its jury demand, and failing to participate in the bench trial) are not errors or omissions, but a conscious and deliberate (not to mention consistent) course of conduct in this lawsuit aimed at minimizing

involvement in the civil lawsuit since Whitehead "d[idn't] have a lot of documentation to support the transaction." R216. Early on, Whitehead and his lawyer apparently realized that there was not much they could do to defend the civil claims, and instead opted to focus their attention on the associated criminal proceedings. Rule 60(b)(1) simply does not allow parties to avoid evade the consequences of their legal positions and litigation strategies, "even though they might prove unsuccessful, ill-advised, or flatly erroneous." *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 595 (6th Cir. 2002). In other words, Whitehead has not presented this Court with the type of "mistakes," etc. which warrant relief under Rule 60(b)(1). *McCurry*, 298 F.3d at 596.

As already noted above, Whitehead has failed to demonstrate a "meritorious defense" because he offers no more than his denial of wrongdoing, which was already in the record. Whitehead had already denied Chesapeake's allegations in his Answer. R39. The Judgment (or even the summary judgment) obtained against Whitehead is *not* due to his default. Indeed, the lower court denied Chesapeake's motion seeking partial summary judgment on the grounds that Whitehead's lawyer indicated no opposition; rather, the federal district court considered the merits of the parties' filings (including Cash Flow's opposition) and determined that Whitehead had not delivered the Fat Boy separators to Chesapeake. RE-B at R998-1001; RE-C at R1010; *see also Optimal Health Care*,

801 F.Supp. at 1561 ("This is not a default judgment case but a summary judgment case. The dismissal was not entered because [the Rule 60(b) movant] failed to respond. Rather, the court acted on the record before it to rule on the merits."). Whitehead's denial is not a meritorious defense authorizing relief under Rule 60(b) because it was already considered, and rejected, prior to the Judgment at issue.

2. Whitehead is not entitled to relief under Rule 60(b)(3).

Whitehead never makes it clear what fraud allegedly supports his claim for relief, as he cites Rule 60(b)(3), but fails to identify any litigation conduct by Chesapeake as constituting a fraud. *Appellant's Brief*, pp. 17-24. Thus, Whitehead has waived this basis for relief from the Judgment by failing to adequately brief it. *E.g., Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004) ("Issues not raised or inadequately briefed on appeal are waived.").

Even if this Court finds no such waiver, neither Chesapeake nor its counsel engaged in any such conduct. Rule 60(b)(3) is concerned with fraudulent conduct in the litigation as opposed to the underlying transaction. *Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 427 F.3d 129, 134 (1st Cir. 2005). But, Whitehead must show such fraud by clear and convincing evidence and also show that such fraud interfered with his ability to prepare for and proceed at trial. *Roger Edwards*, 427 F.3d at 134; *Tiller v. Baghdady*, 294 F.3d 277, 280 (1st Cir. 2002). A party's conduct runs afoul of Rule 60(b)(3) if "he fails to disclose evidence he knows

about and the production of such evidence was clearly called for by any fair reading of the discovery order." *Gov't Fin. Servs. v. Peyton Place, Inc.*, 62 F.3d 767, 772-73 (5th Cir. 1995).

Whitehead does not identify any evidence which Chesapeake failed to disclose, or any similar conduct. Whitehead based his request for Rule 60(b) relief on the affidavits of his former employees Eddie Galvan and Evert Lee Whitehead (although he did not file them until after Chesapeake had already responded to the Motion) and the twenty-three invoices. RE-I at R1435, R1441. All such statements by Whitehead's employees are considered as evidence under Whitehead's control and could not be somehow suppressed by Chesapeake. In any event, the federal district court already recognized that Chesapeake had no obligation to obtain evidence *from Whitehead* that Whitehead failed to deliver the Fat Boy separators. RE-B at R1000 (noting that such imposing such an obligation on Chesapeake would be "contrary to our system of jurisprudence"). Thus, there is no basis here to grant relief from the Judgment.

3. Whitehead is not entitled to relief under Rule 60(b)(6).

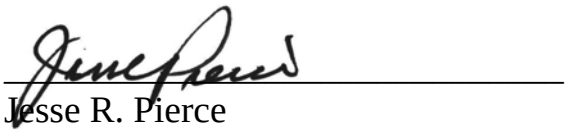
This provision is a "catch all" authorizing relief from a judgment due to "any other reason that justifies relief" not listed in Rules 60(b)(1)-(5). *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005); *see also Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994) ("Rule 60(b)(6) empowers federal

courts with broad authority to relieve a party from a final judgment."). To earn such relief, Whitehead had to show the lower court that there were "extraordinary circumstances" justifying the reopening of a final judgment. *Gonzalez*, 545 U.S. at 535. Whitehead fails to even clearly identify, let alone prove, any exceptional circumstances demonstrating a right to such relief. For the reasons previously identified in this brief, Whitehead must do more than tell this Court "I didn't do it" or "My lawyer did a bad job."

CONCLUSION

Chesapeake respectfully requests that this Court affirm the Judgment entered by the federal district court, and for all other relief to which it may be justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of May, 2012, the foregoing Brief of Plaintiff – Appellee Chesapeake Operating, Inc. was electronically filed with the Fifth Circuit's CM/ECF system. The undersigned will deliver seven paper copies to Federal Express for next-day delivery to the Fifth Circuit for filing when requested by the Clerk of the Court.

The undersigned hereby certified that on this 25th day of May, 2012, the foregoing Brief of Plaintiff – Appellee Chesapeake Operating, Inc. was served, pursuant to Fifth Circuit Rule 25.2.5 on the following counsel of record, by e-mail and by regular U.S. Mail.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned certifies that this Brief complies with the page and type-volume limitations of FED. R. APP. 32(a) because:

1. This brief contains 9,841 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 Times New Roman 14-point font in the text and 12-point font in the footnotes.

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