UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GLENDA E. JOHNSON, Plaintiff, v. INTERNAL REVENUE SERVICE; UNITED STATES DEPARTMENT OF JUSTICE; and DAVID NUFFER, Defendants.	**REPORT AND RECOMMENDATION TO GRANT MOTION TO DISMISS (DOC. NO. 7) WITHOUT PREJUDICE** Case No. 2:20-cv-00090-HCN-DAO Judge Howard C. Nielson, Jr. Magistrate Judge Daphne A. Oberg

Pro se Plaintiff Glenda Johnson brought this action against the Internal Revenue Service ("IRS"), the United States Department of Justice ("DOJ"), and United States District Court Judge David Nuffer (collectively, "Defendants") based on claims of an erroneous judgment and order in a separate lawsuit.[1]

The IRS and the DOJ (collectively, "Agency Defendants") moved to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim. (United States' Mot. to Dismiss Compl. ("Mot."), Doc. No. 7.) After reviewing the parties' briefs,[2] for the reasons explained below, the undersigned[3] RECOMMENDS the district judge GRANT the

[1] Due to a scanning error, Doc. No. 1-2 is the operative complaint. (*See* Modification of Docket, Doc. No. 5.)

[2] Pursuant to Local Rule DUCivR 7-1(f), the court finds oral argument unnecessary and makes its recommendation on the motion based on the parties' written memoranda.

[3] On June 17, 2020, the district judge referred this case to the undersigned under 28 U.S.C. § 636(b)(1)(B). (Doc. No. 13.)

Agency Defendants' Motion to Dismiss (Doc. No. 7) and DISMISS Ms. Johnson's Complaint (Doc. No. 1-2) without prejudice.

PROCEDURAL HISTORY

Ms. Johnson bases her claims in this action on an allegedly erroneous and void judgment and order in a separate proceeding in this district, *United States v. RaPower-3, LLC*, 2:15-cv-00828 ("*RaPower*"), which Judge Nuffer presides over. Ms. Johnson is a shareholder of International Automated Systems, which is a defendant in the *RaPower* action, but she is not a named defendant herself. (Compl. ¶¶ 18–19, Doc. No. 1-2.) A preliminary understanding of the procedural history in *RaPower* is helpful here. In *RaPower*, Judge Nuffer found the defendants, including Neldon Johnson, RaPower-3, LLC, and International Automated Systems ("IAS"), had promoted an abusive tax scheme for more than ten years. This scheme ostensibly related to solar energy technology featuring "solar lenses." *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1123 (D. Utah 2018), *aff'd*, 960 F.3d 1240 (10th Cir. 2020). However, Judge Nuffer found the solar lenses were actually a "cover story" for what the defendants really sold—unlawful tax deductions and credits. *Id.* Judge Nuffer found the defendants' conduct harmed the United States Treasury and was subject to penalty under the Internal Revenue Code. *Id.* Judge Nuffer enjoined the defendants from promoting their solar energy scheme and ordered them to mitigate the harm they caused by disgorging their gross receipts. *Id.* The defendants appealed Judge Nuffer's decision, (Notice of Appeal, *RaPower*, Doc. No. 472), and the Tenth Circuit affirmed the decision (Mandate of the United States Ct. of Appeals, *RaPower*, Doc. No. 977).

After the court entered the *RaPower* judgment, it issued a receivership order.[4] Among other things, this order directed a court-appointed receiver to investigate the publicly-traded status of IAS and to recommend whether IAS should remain a publicly traded company or should otherwise be liquidated and dissolved. (Corrected Receivership Order ¶ 85, *RaPower*, Doc. No. 491.) The Corrected Receivership Order separately established a priority system for distributing assets of the receivership estate. (*Id.* ¶ 89.) Under this system, IAS shareholder claimants would be entitled to share in any recovery only to the extent any assets or funds remain after the receiver pays $50,025,480 to numerous, higher priority claimants. (*Id.*; Receiver's Mot. for Order Canceling Shares of IAS 2, *RaPower*, Doc. No. 682.)

The receiver ultimately recommended the court dissolve IAS and cancel its shares for multiple reasons, including: there was no basis to find the shares had current value; IAS engaged in no legitimate business operations; IAS had no future prospects for business operations; and IAS shares have no future value. (Receiver's Mot. for Order Canceling Shares of IAS 6–7, *RaPower*, Doc. No. 682.) Over an objection filed by IAS, (Opp'n to Receiver's Mot. for an Order Canceling Shares of IAS, *RaPower*, Doc. No. 690), the *RaPower* court granted the receiver's motion and ordered all equity in IAS shares to be canceled. (Order Canceling IAS's Shares, *RaPower*, Doc. No. 719.)

[4] The Agency Defendants ask the court to take judicial notice of all publicly filed matters in *RaPower*. (Mot. 2 n.3, Doc. No. 7.) This is proper, especially where this prior litigation closely relates to the case now before the court. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it."); *Sec. & Exch. Comm'n v. Goldstone*, 952 F. Supp. 2d 1060, 1192 (D.N.M. 2013) (noting that the court can take judicial notice of its own files and records and of facts which are part of the public record).

Ms. Johnson is not a named defendant in the *RaPower* action. (Compl. ¶ 19, Doc. No. 1-2.) However, she personally appeared in the case several times after the entry of the judgment. In her filings with the *RaPower* court, Ms. Johnson made arguments similar to those she makes before this court. (*See, e.g.*, Resp. to Receiver's R&R to Include Affiliates and Subsidiaries in the Receivership Estate, *RaPower*, Doc. No. 596; Verified Obj. to Decision and Order Granting Turnover Mot., *RaPower*, Doc. No. 930.)

Separately, the receiver in *RaPower* brought an action against Ms. Johnson to recover amounts and assets the receivership entities allegedly improperly transferred to Ms. Johnson. (Compl., *R. Wayne Klein v. Glenda E. Johnson*, Case No. 2:19-cv-00625 (D. Utah), ("*Klein*"), Doc. No. 2.) Ms. Johnson filed a counterclaim against the receiver for inverse condemnation and a *Bivens* claim alleging a violation of her due process rights stemming from the cancellation of the IAS shares. (Answer, Jury Demand, and Countercl., *Klein*, Doc. No. 5.) The court granted the receiver's motion to dismiss (*Klein*, Doc. No. 8) for lack of subject matter jurisdiction. (Mem. Decision and Order Granting Pl.'s Mot. to Dismiss Def.'s Countercls., *Klein*, Doc. No. 18.)

BACKGROUND

In this case, Ms. Johnson brings three causes of action against the Agency Defendants.[5] (Compl., Doc. No. 1-2.) Specifically, she alleges:

1. The Agency Defendants violated Ms. Johnson's due process rights because they did not provide her notice or an opportunity to protect her property before

[5] When determining Ms. Johnson's causes of action, the court only considers allegations asserted in Ms. Johnson's Complaint, not any new allegations she asserts for the first time in her Opposition to the Motion to Dismiss. As the Tenth Circuit observed, "[w]hile it might be appropriate for a court to consider additional facts or legal theories asserted in a response brief to a motion to dismiss if they were consistent with the facts and theories advanced in the

obtaining an order from Judge Nuffer canceling all shares of IAS, including those owned by Ms. Johnson. (*Id.* ¶¶ 18–23.) Ms. Johnson claims the alleged due process violation "negates jurisdiction." (*Id.* ¶ 23.)

2. IAS was an improper party to *RaPower* because the IRS conceded "the solar lens[es] sold by [IAS] had been recanted prior to 2013." (*Id.* ¶ 27.) Ms. Johnson argues this left "no point in controversy" between the IRS and IAS. (*Id.*) Because of this, Ms. Johnson contends *RaPower* should have been dismissed for lack of jurisdiction, and the *RaPower* court could not, and should not, have ruled on the motion to cancel IAS shares. (*Id.* ¶¶ 27, 35.)
3. The judgment in *RaPower* is void and invalid as a matter of law because it violates the requirements of both due process and jurisdiction. (*Id.* ¶ 37.)
4. Lastly, although not labeled a cause of action, Ms. Johnson claims the "government has consistently identified and acknowledged Fresnel lenses as solar equipment, and in the case brought against Plaintiff the government admitted the product sold was a Fresnel lens." (*Id.* ¶ 15.) Ms. Johnson appears to argue that this is a "violation[] of the UNCAC treaty[, s]pecifically[,] Article 19, Abuse of Functions." (*Id.* ¶ 16.)

Ms. Johnson seeks an injunction prohibiting Defendants from proceeding further against her in *RaPower* until this court rules on her due process claims, and she seeks a declaration that the judgment in *RaPower* is void and of no effect. (*Id.* at 8.)

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complaint . . . a court may not consider allegations or theories that are inconsistent with those pleaded in the complaint." *Hayes v. Whitman,* 264 F.3d 1017, 1025 (10th Cir. 2001). Given that Ms. Johnson's Opposition contains significant and different allegations than her Complaint, the court rules on the allegations in Ms. Johnson's Complaint as filed.

The Agency Defendants moved to dismiss Ms. Johnson's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. (Mot., Doc. No 7.) They contend Ms. Johnson lacks Article III standing because she has suffered no legal injuries caused by the United States and, even if she did, the purported injuries are not redressable in this court. (*Id.* at 8.) Ms. Johnson seeks damages and an injunction against further proceedings in *RaPower*, and the Agency Defendants argue that because this court is not a reviewing court, it cannot redress her claims. (*Id.* at 8–9.) The Agency Defendants further assert the court lacks subject matter jurisdiction because Ms. Johnson has not identified any waiver of the United States' sovereign immunity. (*Id.* at 9–11.) Alternatively, the Agency Defendants argue Ms. Johnson's claims for equitable relief should be dismissed pursuant to Rule 12(b)(6) because her Complaint fails to state a claim for which equitable relief can be granted. (*Id.* at 12.) Specifically, the Agency Defendants contend equitable relief is unavailable when Ms. Johnson had an adequate remedy at law—an appeal to the Tenth Circuit—to air her grievances. (*Id.* at 12–13.)

Ms. Johnson opposed the Agency Defendants' Motion to Dismiss ("Opposition") but did not address any of the arguments made in the Motion to Dismiss. (Opp'n. to Mot. to Dismiss ("Opp'n."), Doc. No. 8.) Rather, Ms. Johnson's Opposition is comprised primarily of new allegations and facts not part of her original Complaint. Such new allegations and facts include that: the DOJ should have alerted the *RaPower* court to purported contradictory positions taken by the IRS in *RaPower* and in a tax court proceeding; Dr. Mancini, the government's expert witness, changed his testimony between the *RaPower* proceeding and a tax court proceeding; the IRS engaged in fraud on the court; Judge Nuffer drew his own conclusions and made up his own facts; and Judge Nuffer was biased and made errors of law. (*Id.*) Lastly, in her Opposition, Ms.

Johnson attempts to relitigate the underlying facts in *RaPower* and to introduce new evidence to alter that judgment. (*Id.* at 11–12, 14.)

In their reply, the Agency Defendants conclude, based on Ms. Johnson's opposition, she was attempting to bring a Rule 60(d)(1) and (d)(2) motion to invoke the court's inherent authority to "entertain an independent action" to relieve her from the *RaPower* judgment, orders, or proceedings—or to set aside the *RaPower* judgment for fraud on the court. (United States' Reply on its Mot. to Dismiss the Compl. ("Reply") 2–3, Doc. No. 11.) The Defendants argue this was not clear from Ms. Johnson's Complaint. (*Id.* at 4.) The Agency Defendants acknowledge a Rule 60 independent action, brought in the same court as the original lawsuit, does not require an independent basis for jurisdiction. (*Id.* at 3.) Based on this, the Agency Defendants concede that if the court construes Ms. Johnson's Complaint as an independent action under Rule 60(d)(1), it should not grant the United States' Motion to Dismiss based on the jurisdictional arguments in section II.A. of its motion. (*Id.* at 3 n.12.) However, the Agency Defendants also note that their reply is not an appropriate place for a full response to any Rule 60 claim by Ms. Johnson.[6] (*Id.* at 4.)

LEGAL STANDARD

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.

[6] The Agency Defendants point out the defendants in *RaPower* filed a nearly identical Rule 60 Motion. (Reply at 4, Doc. No. 11.) Due to the factual and legal similarity between the Rule 60 Motion in *RaPower* and Ms. Johnson's Opposition, the Agency Defendants asked this court to stay its decision until the *RaPower* court resolved its Rule 60 motion. (*Id.* at 4–5.) Ms. Johnson opposed this request. (Answer to Opp'n to Dismiss, Doc. No. 12.) The *RaPower* court ultimately denied the Rule 60 motion as moot rather than resolving it on the merits. (Mem. Decision and Order Den. Notice and/or Mot. to Withdraw as Counsel for Defs. and Den. as Moot Mot. to Set Aside J., *RaPower*, Doc. No. 976.) Therefore, the Agency Defendants' request to stay is moot.

8(a)(2). "Rule 8 serves the important purpose of requiring plaintiffs to state their claims intelligibly so as to inform the defendants of the legal claims being asserted." *Mann v. Boatright*, 477 F.3d 1140, 1148 (10th Cir. 2007).

Rule 12(b)(1) of the Federal Rules of Civil Procedure empowers a court to dismiss claims over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A dismissal for lack of subject matter jurisdiction must be without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006). A party may move to dismiss pursuant to Rule 12(b)(1) through "either a facial or factual attack." *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020). Where the motion is a facial attack, and challenges subject matter jurisdiction based on the allegations in the complaint, the court must accept the allegations in the complaint as true. *Id.*; *see also Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). A factual attack goes beyond the complaint "and adduces evidence to contest jurisdiction." *Baker v. USD 229 Blue Valley*, 979 F.3d at 872. In that instance, the court may consider other evidence presented by the parties.[7] *Id.* An attack on a plaintiff's standing "is a jurisdictional issue properly raised by a Rule 12(b)(1) motion." *Willis v. KG/KK Gov't Emps. Ins. Co.*, No. 13-280 KG/KK, 2016 U.S. Dist. LEXIS 189398, at *5 (D.N.M. Feb. 18, 2016) (unpublished) (citing *Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011) (en banc)).

Ms. Johnson proceeds pro se; accordingly, her filings are liberally construed and held "to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Still, a pro se plaintiff must "follow the same rules of procedure that govern other litigants." *Garrett v. Selby, Connor, Maddux & Janer*, 425 F.3d 836, 840 (10th

[7] Although not specifically noted, the Agency Defendants assert a factual attack, as their motion goes beyond the Complaint and discusses the *RaPower* action and related docket.

Cir. 2005) (quoting *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994)). Thus, a pro se plaintiff has "the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall*, 935 F.2d at 1110. While the court must make allowance for "the [pro se] plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements[,]" *id.*, the court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf," *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (internal quotation marks omitted).

DISCUSSION

As described above, this court must construe Ms. Johnson's claims in the light most favorable to her. Accordingly, the court construes her complaint as a Rule 60(b)(4)[8], 60(d)(1) and 60(d)(3) motion.[9] In relevant part, Rule 60(b)(4) permits a court to relieve "a party or its legal representative from a final judgment [or] order" if "the judgment is void." Fed. R. Civ. P. 60(b)(4). Rule 60(d) notes that Rule 60 "does not limit a court's power to . . . (1) entertain an

[8] Ms. Johnson does not seek relief from the *RaPower* judgment under Rules 60(b)(1), (2), or (3). *See* Fed. R. Civ. P. 60(b)(1)–(3). In any event, a claim under these subsections based on the *RaPower* judgment would necessarily be denied as untimely. Any motions under Rule 60(b)(1), (2), or (3) must be brought "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Ms. Johnson filed her Complaint in February 2020, (Compl., Doc. No. 1-2), more than a year after the *RaPower* Judgment was issued on October 4, 2018. (Judgment in Civil Case, *RaPower*, Doc. No. 468.) Further, Ms. Johnson does not seek relief under Rules 60(b)(1), (2), or (3), based on the court's order canceling IAS shares. (*See* Order Canceling IAS' Shares, *RaPower*, Doc. No. 719.)

[9] Construing Ms. Johnson's claim as an appeal from Judge Nuffer's decision in *RaPower* would require immediate dismissal, as only an appeals court has authority to review a district court's decision. 28 U.S.C. § 1291 (noting the court of appeals has jurisdiction over appeals from all final decision of district courts).

independent action to relieve a party from a judgment, order, or proceeding . . . or (3) set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(1), 60(d)(2).

Under a liberal reading of the Complaint, Ms. Johnson's claims can best be construed as bringing an independent action to relieve her from the underlying judgment and subsequent order in *RaPower* canceling the shares of IAS, which she alleges are void. *See* Fed. R. Civ. P. 60(b)(4); Fed. R. Civ. P. (d)(1); (Compl. ¶¶ 18–23, 27, Doc. No. 1-2.) Additionally, under the most liberal reading of the Complaint, Ms. Johnson's claims might be construed as bringing an independent action to set aside judgment in *RaPower* for fraud on the court. *See* Fed. R. Civ. P. 60(d)(3). Although Ms. Johnson never asserts allegations of fraud specifically, she appears to allege the Agency Defendants engaged in fraud on the court when obtaining the *RaPower* judgment, by claiming that, contrary to the position taken by the government in *RaPower*, in other contexts the "government has consistently identified and acknowledged Fresnel lenses as solar equipment, and in the case brought against Plaintiff the government admitted the product sold was a Fresnel lens." (Compl. ¶ 15, Doc. No. 1-2.) She claims this is a violation "of the UNCAC treaty," specifically, the "Abuse of Functions." (*Id.* ¶ 16.)

I. Rule 60 Motion as an Independent Action

Ms. Johnson brings her Rule 60 motion as an independent action, as opposed to raising it in the underlying action from which she is seeking relief—*RaPower*. Rule 60, by its very terms, permits a motion to be brought as a separate action. *See* Fed. R. Civ. P 60(d)(1) (providing a court may "entertain an independent action"). Although not specifically identified in the language of the rule, a motion seeking relief under Rule 60(b)(4) and Rule 60(d)(3) may also be brought as an independent action. *See Winfield Assocs., Inc. v. Stonecipher*, 429 F.2d 1087, 1090 (10th Cir. 1970) ("Rule 60(b), as amended, specifically preserves the right to attack a

judgment by an independent equitable action."); Fed. R. Civ. P. 60 committee notes (2007 amendment) (noting relief pursuant to Rule 60(b) "continues to be available only as provided in the Civil Rules or by independent action"). Similarly, a fraud-on-the-court claim pursuant to Rule 60(d)(3) may be brought as an independent action. *See, e.g.*, *United States v. Baker*, 718 F.3d 1204, 1207 (10th Cir. 2013).

II. Jurisdiction and Standing

A. Ancillary Jurisdiction

The Agency Defendants are correct in their concession that when Ms. Johnson's Complaint is construed as a Rule 60 motion, their subject matter jurisdiction arguments fail in part. (Reply 3 n.12, Doc. No. 11.) When an independent action is brought to obtain Rule 60 relief in the federal court which rendered the initial judgment, the court has ancillary jurisdiction over the action despite the absence of a federal question or diversity of citizenship. *See United States v. Beggerly*, 524 U.S. 38, 46 (1998) (noting that it is "wrong to suggest that an independent action brought in the same court as the original lawsuit requires an independent basis for jurisdiction"); *Crosby v. Mills*, 413 F.2d 1273, 1275–76 (10th Cir. 1969) (finding ancillary jurisdiction when an independent action is brought under Rule 60).

Further, when Ms. Johnson's Complaint is construed as a Rule 60 motion, the Agency Defendants' arguments regarding sovereign immunity no longer apply. Because the independent action is ancillary to the original suit, "the doctrine of sovereign immunity, which precludes suits against the United States without its consent, is not an obstacle to the exercise of jurisdiction. In effect, the government gave its consent to the action for relief by filing or defending against the original suit." 12 Moore's Federal Practice - Civil § 60.84 (2020); *see also Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995) (recognizing that under principles of fairness and justice, the

United States' consent to suit in the underlying action will continue to the related, independent action).

B. Ms. Johnson's Standing Under Rule 60

Ancillary jurisdiction does not, however, resolve the question of standing. Rule 60 is not an affirmative grant of standing to bring an independent action but, rather, "merely does not restrict any standing a party otherwise has." *Herring v. Fed. Deposit Ins. Corp.*, 82 F.3d 282, 285 (9th Cir. 1995). Standing is a "threshold issue" that is "an essential and unchanging part of the case-or-controversy requirement of Article III" regardless of whether a court is ruling on a Rule 60 motion. *Horne v. Flores*, 557 U.S. 433, 445 (2009) (internal quotation marks omitted). Ms. Johnson, as the party invoking federal jurisdiction, "bears the burden of establishing standing." *Baker v. USD 229 Blue Valley*, 979 F.3d at 871 (internal quotation marks omitted). To establish standing, Ms. Johnson must establish she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1547 (2016)). In standing inquiries, "the critical question" is whether at least one petitioner has "alleged such a personal stake in the outcome of the controversy as to warrant [*her*] invocation of federal-court jurisdiction." *Horne*, 557 U.S. at 445 (internal quotation marks omitted).

i. Nonparty Actions

Rule 60(b), by its own terms, limits recovery to "a party or its legal representative." Fed. R. Civ. P. 60(b). Even more limiting is Rule 60(d)'s language allowing an independent action to be brought to relieve *a party* from a judgment or an order. *See* Fed. R. Civ. P. 60(d)(1).

Although Rule 60 does not specify who may bring a claim,[10] the "general rule" is that nonparties to the underlying action lack standing to bring a Rule 60 motion. *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013); *see also* 2 Fed. R. Civ. P., Rules and Commentary *Rule 60. Relief From a Judgment or Order*, Westlaw (Feb. 2020) ("Courts generally will not permit the judgment to be later challenged by a third party—even if that party has an interest affected by the original judgment."). That is, nonparties generally fail to allege such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction.

The Tenth Circuit interprets "legal representative" under the rule strictly—as "one who by operation of law is tantamount to a party in relationship to the matter involved in the principal action." *W. Steel Erection Co. v. United States*, 424 F.2d 737, 739 (10th Cir. 1970) (holding that the law firm lacked standing under Rule 60(b) as a "legal representative"). As the *Western Steel* court explained, "[i]f the threshold bar were not restricted, rule 60(b) could be opened to the broadest claims of ancillary jurisdiction and thereby thwart the finality of principal judgments and established procedures to correct fundamental legal errors." *Id.* Further, and "[m]ore importantly, any relationship between the cause of action in chief and that brought into the court's jurisdiction through its ancillary jurisdiction would become irreparably attenuated." *Id.*

Notwithstanding the general rule that nonparties lack standing under Rule 60(b), several circuits have allowed relief where a nonparty is in some form of close privity with a named party or where the nonparty's interests were "directly or strongly affected by the judgment." *Bridgeport Music, Inc*, 714 F.3d at 940–41; *see also Eyak Native Village v. Exxon Corp.*, 25 F.3d

[10] Despite this, the "court's inherent power to inquire into the integrity of judgments implies the existence of a justiciable case or controversy," which is lacking if "no one before the court has an interest in the underlying litigation." 21A Fed. Proc., L. Ed. § 51:202; *see also Herring*, 82 F.3d at 285.

773, 777 (9th Cir. 1994) (finding nonparty environmental organizations were so in privity with the State, an original party, they were identical). *But see Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987) ("It is not clear that the privity exception does any more than restate in different language the rule that persons tantamount to a party may be allowed standing.").

The exception for a nonparty whose interests are directly affected is a limited, "exceedingly narrow exception to the well-established rule that litigants, who were neither a party, nor a party's legal representative to a judgment, lack standing to question a judgment under Rule 60(b)." *Grace v. Bank Leumi Trust Co.*, 443 F.3d 180, 188–89 (2d Cir. 2006) (finding, on the specific facts of the case, a nonparty's interests were "sufficiently connected and identified with" a suit to give standing). This exception is often limited to circumstances where the nonparty's rights were "not adequately represented by the parties." 12 Moore's Federal Practice - Civil § 60.63 (2020). As the Second Circuit has noted, prior cases of nonparty standing were limited to specific "extraordinary circumstances" where the nonparty "had interests on which the outcome of the proceedings had significant consequences for the movants, yet those interests had not been adequately represented during litigation, because of the peculiar structure of each case." *Federman v. Artzt*, 339 F. App'x 31, 34 (2d Cir. 2009) (unpublished). The court found "nothing similarly extraordinary" when a nonparty shareholder sought to bring a Rule 60(b) motion, where his interests were well-enough aligned with other shareholders as to be adequately represented in prior class action litigation. *Id.*

Here, Ms. Johnson proffers no evidence to satisfy any exception to the general rule that nonparties to the underlying action lack standing to bring subsequent Rule 60 motions. Ms. Johnson alleges no facts to suggest she is tantamount to a party in *RaPower* by operation of law, or that she is in close enough privity with a party to the original action. Nor has she alleged any

facts to suggest an "extraordinary circumstance" where her interests were sufficiently connected with a party in *RaPower*, yet were not adequately represented by the parties.

Ms. Johnson simply claims she owned shares of IAS's stock before the court canceled the stock. (Compl. ¶ 18, Doc. No. 1-2.) But Ms. Johnson's status as a shareholder, by itself, does not create an exception sufficient to grant a nonparty standing. *See, e.g.*, *Federman*, 339 F. App'x at 34. Although Ms. Johnson claims the court did not provide her notice or an opportunity to protect her rights, (Compl. ¶ 18, Doc. No. 2-1), nowhere does she claim her rights were not protected by the named parties. In fact, IAS made the same argument to the *RaPower* court that Ms. Johnson makes here—that canceling IAS's shares violates the due process rights of its shareholders. (Opp'n. to Receiver's Mot. for an Order Canceling Shares of IAS 3-7, *RaPower*, Doc. No. 690.)

To the extent Ms. Johnson believed her rights were not adequately protected by IAS, she could have sought to intervene as a party. *See, e.g.*, *Ericsson Inc. v. InterDigital Commc'ns Corp.*, 418 F.3d 1217, 1224 (Fed. Cir. 2005) (noting a nonparty who failed to properly intervene could not bring a Rule 60 motion); *Smith v. Mo. Pac. R.R. Co.,* 615 F.2d 683, 685 (5th Cir.1980) (affirming a district court's determination that Rule 60(b) may not be used by a nonparty to attack a final judgment where the nonparty failed to timely intervene). Moreover, Ms. Johnson did not file anything opposing the Receiver's Motion for Order Canceling Shares of IAS, (*RaPower*, Doc. No. 682), despite having already appeared in *RaPower* two months earlier to oppose the receiver's report and recommendation to include affiliates in the receivership estate. (*See* Resp. to Receiver's R&R to Include Affiliates and Subsidiaries in the Receivership Estate, *RaPower*, Doc. No. 596.)

Even construed liberally, Ms. Johnson's Complaint fails to state any facts establishing she satisfies the standing requirement for a nonparty to bring a Rule 60 motion.

ii. Redressable Injury

Even if Ms. Johnson could show an exception to the general rule against nonparty actions applies, she still fails to establish standing because she has not alleged her purported injury is "redressable by a favorable ruling." *See Horne*, 557 U.S. at 445. When movants cannot recover funds on their underlying claims, they lack standing. *Herring*, 82 F.3d at 284. In *Herring*, for example, shareholders claimed a loss of $530,124. *Id.* However, the Ninth Circuit found that even if the defendant engaged in fraud and the disputed amount were disallowed, there would be a resulting deficiency, which would still leave the shareholders no recovery. *Id.* at 284–85. Because the shareholders could not recover funds even if they prevailed on their fraud allegations, they had no interest in the litigation; thus, they lacked standing to challenge the fraud. *Id.* at 285.

At the crux of Ms. Johnson's alleged injury is the loss of the value of her IAS shares. (Compl. ¶¶ 18–19, 21, Doc No. 1-2.) But the *RaPower* court entered the receiver's findings and conclusions that IAS "has not engaged in any business operations other than this scheme" and "has never generated a profit." (Order Canceling IAS 2, 4, *RaPower*, Doc No. 719.) Specifically, the court held the IAS shareholders would be entitled to share in any recovery to the extent assets or funds remain after the receiver pays $50,025,480 to the United States Treasury and other priority claimants. (*Id.* ¶ 3.) The court also found "no reasonable prospect" of the receivership estate yielding more than $50,000,000 in assets and noted, as a result, there would be no distribution to IAS shareholders. (*Id.* ¶ 4(i).) Ultimately, the *RaPower* court cancelled all equity in IAS shares and found IAS shares "have no value." (*Id*. at 5.) Ms. Johnson alleges no

facts suggesting that IAS shares have value, that IAS shareholders would receive a distribution, or that, even if IAS were not a named defendant, it would be excluded from the receivership estate, such that if she prevailed, she would recover funds. Ms. Johnson has simply not established her injury is redressable.

Ms. Johnson has failed to establish standing to bring this action. Accordingly, the undersigned recommends the district judge dismiss Ms. Johnson's Complaint (Doc. No. 1-2), which is construed as a Rule 60 motion, without prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

RECOMMENDATION

For the reasons set forth above, the undersigned RECOMMENDS the district judge GRANT the Motion to Dismiss (Doc. No. 7) and DISMISS Ms. Johnson's Complaint without prejudice for lack of standing (Doc. No. 1-2).

The court will send copies of this Report and Recommendation to all parties, who are notified of their right to object to the same. *See* 28 U.S.C.§ 636(b)(1); Fed R. Civ. P. 72(b). The parties must file any objection to this Report and Recommendation within fourteen (14) days of service thereof. *Id.* Failure to object may constitute waiver of objections upon subsequent review.

DATED this 29th day of January, 2021.

BY THE COURT:

Daphne A. Oberg
United States Magistrate Judge