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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-DAO **UNITED STATES' REPLY ON ITS MOTION FOR RULE 11 SANCTIONS REGARDING ECF NO. 931, "RULE 60 MOTION TO SET ASIDE JUDGMENT AGAINST DEFENDANTS (NEWLY DISCOVERED EVIDENCE) (FRAUD ON THE COURT)"** **ORAL ARGUMENT REQUESTED** Judge David Nuffer Magistrate Judge Daphne A. Oberg

The United States initiated Rule 11 proceedings after Steven Paul, an attorney at Nelson, Snuffer, Dahle & Poulson ("NSDP"), filed a Rule 60 motion seeking to set aside the judgment against Defendants because of purportedly new evidence and for alleged fraud by the United States (both on Defendants and on the Court).[1] After allowing the signing attorneys the opportunity to withdraw the Rule 60 motion and waiting the required safe harbor period under Rule 11, the United States filed a motion seeking sanctions.[2] The signing attorneys opposed the motion.[3] The United States responds to their specific arguments below.

I. The signing attorneys violated Rule 11.

By filing a written motion in federal district court (or later advocating it), an attorney "certifies that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that: 1) the "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" and 2) that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[4]

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[1] ECF No. 931.

[2] ECF No. 964.

[3] ECF No. 990.

[4] Fed. R. Civ. P. 11(b)(2)-(3).

The standard to evaluate whether a motion violated Rule 11 is an objective standard: "'whether a reasonable and competent attorney would believe in the merit of an argument.'"[5] The reason for this objective standard, according to the Tenth Circuit, is "to eliminate any empty-head pure-heart justification for patently frivolous arguments."[6] Whether an argument is objectively reasonable or patently frivolous turns on "the prevailing facts and circumstances of a given case."[7] It depends, in part, on whether the motion "was based on a plausible view of the law."[8] This analysis typically requires "subsidiary findings, such as the current state of the law or the parties' and attorneys' behavior and motives within the context of the entire litigation, as well as a conclusion on the ultimate question whether the pleading violated Rule 11."[9]

Therefore, a court "should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."[10] Rule 11 also "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention."[11]

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[5] *Miller v. Wulf*, 2015 WL 423264, at *1 (D. Utah Feb. 2, 2015) (quoting *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1155 (10th Cir. 1991)) (Nuffer, J.).

[6] *Collins v. Daniels*, 916 F.3d 1302, 1320 (10th Cir. 2019) (quotation omitted).

[7] *ITN Flix, LLC v. Univision Television Grp., Inc.*, 2018 WL 2464502, at *1 (D. Utah June 1, 2018) (Pead, M.J.)

[8] Fed. R. Civ. P. 11 advisory committee's note to 1983 amendments.

[9] *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988); *see also United Pac. Ins. Co. v. Durbano Const. Co.*, 144 F.R.D. 402, 408–09 (D. Utah 1992) (Winder, J).

[10] Fed. R. Civ. P. 11 advisory committee's note to 1983 amendments.

[11] Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments.

A. A reasonable and competent attorney would not have filed the Rule 60 motion.

As the United States showed in its opening brief in support of its motion for sanctions (and in materials delivered to the signing attorneys as early as June 8, 2020[12]), the signing attorneys failed Rule 11's objective standard when they filed the Rule 60 motion.[13] A reasonable and competent attorney would not have filed the Rule 60 motion. It was not "reasonable to believe at the time the [Rule 60 motion] was submitted"[14] that its factual contentions had evidentiary support and its legal contentions were "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[15]

Rather, the objective facts of the proceedings before this Court, the Tenth Circuit, and the Tax Court, and the law governing both the merits claims and the standard for post-judgment relief show why a reasonable and competent attorney would *not* have filed the Rule 60 motion.[16] This Court's post-trial opinion recites myriad facts that support its legal conclusions that both an injunction and a disgorgement award against Defendants was necessary and appropriate for the enforcement of the internal revenue laws.[17] Among those legal conclusions were the following:

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[12] *See* ECF No. 964-1, Declaration of Erin Healy Gallagher, ¶¶ 2-3, 6; Pl. Exs. 977, 970-976.

[13] ECF No. 964.

[14] Fed. R. Civ. P. 11 advisory committee's note to 1983 amendments.

[15] Fed. R. Civ. P. 11(b)(2)-(3).

[16] *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115 (D. Utah 2018); *United States v. RaPower-3, LLC*, 960 F.3d 1240 (10th Cir. 2020); ECF No. 964 at 8-20.

[17] *RaPower-3*, 343 F. Supp. 3d 1115.

customers were not allowed depreciation upon the lenses because customers "were not in a trade or business or holding the lenses for the production of income and their lenses were not 'placed in service.'"[18] Further, "customers' solar lenses did not use[] solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat in the years in which the taxpayers bought the lenses and claimed credits."[19] Indeed, during the entire time Defendants were promoting their scheme, Defendants' "customers' lenses have never been used in a system that generates electricity, that heats or cools a structure or provides hot water for use in a structure," or provides solar process heat.[20]

In our opening brief, we thoroughly described the ways in which the IRS's arguments and evidence in the Tax Court proceedings were entirely consistent with this Court's opinion and judgment on the merits of this case.[21] We debunked the signing attorneys' subjective and self-serving "interpretations" of the IRS's arguments and evidence.[22] We showed that the signing attorneys "wholly fail[ed] to deal with the voluminous . . . evidence" contrary to their positions and that their legal arguments failed to "grapple with the specific evidence presented in this case."[23]

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[18] *RaPower-3*, 343 F. Supp. 3d at 1185; *see also id.* at 1173-84 (explaining why the defendants knew or had reason to know that the lenses did not qualify for a depreciation deduction).

[19] *RaPower-3*, 343 F. Supp. 3d at 1185; *see also id.* at 1147-52.

[20] *RaPower-3*, 343 F. Supp. 3d at 1185; *see also id.* at 1147-52.

[21] ECF No. 964 at 8-15.

[22] ECF No. 964 at 8-15.

[23] ECF No. 964 at 8-15, 22 (quoting *RaPower-3*, 960 F.3d at 1250).

In response, the signing attorneys do not meaningfully attempt to justify their conduct under the objective standard required by Rule 11. Instead, they ask this Court to credit their subjective "good faith" belief in the rightness of the positions they took in the Rule 60 motion.[24] As an initial matter, the signing attorneys claim that they thought the United States had changed its litigating position.[25] The United States' Rule 11 letter, dated June 8, 2020, clearly revealed that they were mistaken.[26] A reasonable and competent attorney would have promptly withdrawn the Rule 60 motion after the receiving the United States' initial letter (and later-served brief).[27]

Nonetheless, and in the face of "overwhelming facts" contrary to their position, the signing attorneys cling to their debunked and self-serving subjective beliefs in an attempt to justify their conduct.[28] But the signing attorneys' alleged subjective beliefs are irrelevant to this Court's analysis – *especially* because of the heightened factual and legal burden the signing attorneys willingly assumed by filing the Rule 60 motion.[29] As described in our opening brief,

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[24] *E.g.*, ECF No. 990 at 2 (The Rule 60 motion "was based on a good faith understanding of the legal and factual concerns relating to these proceedings."), 6 ("NSDP and its attorneys . . . believe the Rule 60 motion was justified . . . .").

[25] *E.g.*, ECF No. 990 at 3, 4, 6, 9.

[26] ECF No. 364-1, Healy Gallagher Decl. ¶ 2-3; Pl. Exs. 977, 970-976.

[27] *E.g.*, *Wesley v. Don Stein Buick, Inc.*, 184 F.R.D. 376, 378–79 (D. Kan. 1998) (sanctioning a party when she refused to withdraw or change her argument in the face of binding Supreme Court precedent, when her refusal to do so "caused the defendants to expend unnecessary time and effort to oppose not only a losing argument, but an utterly groundless one").

[28] *See Adamson*, 855 F.2d at 674.

[29] ECF No. 964 at 15-20.

"Rule 60(b) relief "is extraordinary and may only be granted in exceptional circumstances."[30] The signing attorneys' assertions about the "significance" of the purportedly changed arguments and evidence before the Tax Court (even if they were true, which they are not) would not meet any standard for Rule 60 relief in light of the facts and circumstances that justified (and still justify) this Court's opinion, injunction, and disgorgement award.

Judged under the legal and evidentiary standards applicable to post-judgment relief under Rule 60(b)(2), 60(b)(3), and 60(d)(3), "it is clear that [the Rule 60 motion had] absolutely no chance of success under any existing law."[31] The signing attorneys offer this Court no facts or law to suggest that a reasonable and competent attorney could conclude:

1) that there was "newly discovered evidence" at all, much less "material" new evidence that would probably produce a different result at a new trial;[32]

2) that there was any evidence (much less clear and convincing evidence) of any "fraud, misrepresentation, or misconduct" by the Department of Justice that substantially interfered with any party's ability to proceed at trial in this litigation;[33] or

3) that there was any evidence (much less clear and convincing evidence) that the Department of Justice intended to engage in fraud on this Court, such as through an attempt to

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[30] *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).

[31] *See Garth O. Green Enters., Inc. v. Harward*, 2017 WL 213787, at *7 (D. Utah Jan. 18, 2017) (Nuffer, J); ECF No. 964 at 8-20.

[32] *Zurich N. Am.*, 426 F.3d at 1290 (alterations and quotation omitted).

[33] *Zurich N. Am.*, 426 F.3d at 1290 (alterations and quotation omitted); *see Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993-94 (10th Cir. 1999); *accord Thomas v. Parker*, 609 F.3d 1114, 1120 (10th Cir. 2010).

bribe this Court or an attorney's falsification of evidence.[34] Claims of fraud on the court are analyzed separately from claims of fraud between the parties "because they are much more difficult to prove."[35]

Indeed, the signing attorneys do not even mention the latter point – the most notorious of their false accusations against the Department of Justice – in their opposition brief, much less attempt to justify it under an objective standard.

B. This Court's order mooting the Rule 60 motion did not moot the Rule 11 motion.

A Rule 11 violation occurs when an attorney files a motion that does not meet the Rule's objective standard. The plain text of Rule 11 places an attorney on clear notice that he certifies that he is meeting the Rule's objective standard at the time that he "*present[s]* to the court a . . . written motion . . . . —whether by *signing*, *filing*, *submitting*, or later advocating it."[36] This plain text means that "the central purpose of Rule 11 is to deter baseless *filings* in district court and thus streamline the administration and procedure of the federal courts. Baseless *filing* puts the

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[34] *Zurich N. Am.*, 426 F.3d at 1291. *Med. Supply Chain, Inc. v. Gen. Elec. Co.*, 144 F. App'x 708, 716 (10th Cir. 2005) ("It is clear that at least MSC's claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even that he knew MSC existed. Therefore, it was abuse of discretion not to find that portion of the amended complaint frivolous."); *accord Salmon v. Nutra Pharma Corp.*, 687 F. App'x 713, 719 (10th Cir. 2017) (affirming imposition of Rule 11 sanctions when "Mr. Salmon had no objective basis to believe that NPC was responsible in any way for the calls placed to his cell phone, and . . . no reasonable attorney would have brought a claim against NPC based on the information in his possession") (internal quotations and alterations omitted).

[35] *Zurich N. Am.*, 426 F.3d at 1291; *id.* ("Intent to defraud is an 'absolute prerequisite' to a finding of fraud on the court." (quoting *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995)).

[36] Fed. R. Civ. P. 11(b); *see also* Fed. R. Civ. P. 11 advisory committee's note to 1983 amendments (a court "should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted"); *accord* ECF No. 953 at 4.

machinery of justice in motion, burdening courts and individuals alike with needless expense and delay."[37]

Contrary to this well-established authority, and without citation, the signing attorneys claim that "there is no underlying conduct for the Court to sanction NSDP under Rule 11" because this Court mooted their Rule 60 motion.[38] But there is no reason that the Court's subsequent actions should bear on whether *the signing attorneys* violated Rule 11 by filing the Rule 60 motion and then failing to withdraw it. This Court has already noted that withdrawal by the signing attorneys would not immunize them from sanctions for having filed the Rule 60 motion.[39] The signing attorneys' choice to file the Rule 60 motion has already created a burden on this Court and the United States, and created needless expense and delay. It also likely had the effect of multiplying other vexatious proceedings by Neldon Johnson[40] and Glenda Johnson.[41] Deciding the issues presented by the Rule 11 motion now will conserve judicial resources by obviating some or all of these related vexatious matters – and may prevent future frivolous

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[37] *Collins*, 916 F.3d at 1322–23 (quotations and alterations omitted, emphasis added).

[38] ECF No. 990 at 1.

[39] ECF No. 953 at 4 (Because "the conduct subject to sanctions typically is appraised *as of the time of the filing*, courts properly have held that an attorney cannot immunize himself from the imposition of sanctions under Rule 11 simply by withdrawing from the case. Further, although an attorney's withdrawal from representation during the safe harbor period may be viewed by some courts as removing them from the reach of Rule 11 sanctions for violations committed prior to the withdrawal, such an attorney would still be subject to the imposition of sanctions initiated on the court's own motion . . . .") (quotations, alteration, and citations omitted)).

[40] *See* ECF No. 986.

[41] *Compare* ECF No. 964-1, Healy Gallagher Decl. ¶ 2 (Rule 11 letter delivered on June 8, 2020) *with* ECF No. 937, 2d Decl. of Glenda Johnson in Resp. to Not. of Noncompliance ECF 923 and Order EDF [*sic*] 933, ¶ 3.h. (citing the Rule 60 motion) (filed June 10, 2020). Glenda Johnson also appears to have used a version of the Rule 60 motion to oppose the United States' motion to dismiss her *pro se* complaint in another matter. *See Glenda Johnson v. IRS*, No. 2:20-cv-00090-HCN, Docket No. 8 (filed May 20, 2020).

filings.[42] In sum, the signing attorneys give this Court no reason to deviate from Rule 11's requirement to evaluate their conduct as of the time they filed the Rule 60 motion.

II. The signing attorneys do not dispute the United States' other arguments.

The signing attorneys do not contest that they violated the Corrected Receivership Order by filing the Rule 60 motion without "a statement, made under penalty of perjury, identifying the source of the funds for the filing or submission in sufficient detail to show that the funds are not Receivership Property or otherwise derived from the solar energy scheme."[43] This failure is obvious from the plain text of paragraph 10 of the Corrected Receivership Order and the procedural history of this litigation. A reasonable and competent attorney would not have submitted the Rule 60 motion without the required statement regarding the funds used to file it.

Further, although the signing attorneys dispute whether sanctions are warranted as a general matter, they do not object to any of the specific sanctions the United States requested in its motion.

III. Conclusion

The signing attorneys violated Rule 11 because the Rule 60 motion has no basis in fact or governing law. No reasonable or competent attorney would have filed it – and any reasonable and competent attorney would have withdrawn it after having been placed on notice of its fundamental defects. It wasted the time and resources of this Court and the United States, and

[42] *See* Fed. R. Civ. P. 11(c)(4) (Rule 11 sanctions "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.").

[43] ECF No. 491 at 6 ¶ 10.

sanctions are warranted against all persons responsible for it. The Court should grant the United States' motion and order Rule 11 sanctions on the following terms, to deter the signing attorneys and their clients, and others who consider engaging in similar behavior:

- That Steven Paul, and Nelson, Snuffer, Dahle & Poulson identify the persons who authorized filing the Rule 60 motion, for each party on whose behalf they purported to file;

- That Steven Paul, and Nelson, Snuffer, Dahle & Poulson identify all persons who provided funds to file the Rule 60 motion, and otherwise comply with ¶ 10 of the Corrected Receivership Order for purposes of the Rule 60 motion;

- That Steven Paul, and Nelson, Snuffer, Dahle & Poulson disgorge to the Court any fees they were paid to file the Rule 60 motion, plus a monetary penalty, for the waste of judicial resources and time the filing caused;

- That Steven Paul, Nelson, Snuffer, Dahle & Poulson, and any individual named as having authorized the Rule 60 motion, jointly and severally, pay the United States' attorney's fees and costs for preparing, filing, and litigating this Rule 11 motion; and

- That any document filed in this matter by Steven Paul (or any attorney at Nelson, Snuffer, Dahle & Poulson) shall contain 1) the information required by the last sentence of ¶ 10 of the Corrected Receivership Order and 2) a verified signature by the person or persons who authorized the filing of the document that the information in the filing is accurate. If the document does not comply with this paragraph, the document should be deemed a nullity and deemed not filed, therefore no party to this case should be required to respond to such a document.

Dated: September 4, 2020

Respectfully submitted,

/s/ Erin Healy Gallagher

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