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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' BRIEF IN OPPOSITION TO NELDON JOHNSON'S RULE 60 MOTION** Judge David Nuffer Magistrate Judge Daphne A. Oberg

On August 3, 2020, Defendant Neldon Johnson filed a *pro se* Rule 60 motion to set aside judgment in this case based on purported new evidence, fraud on the court, and change in the law.[1] The Court has adjudicated the United States' motion for Rule 11 sanctions against Nelson, Snuffer, Dahle & Poulson for filing a Rule 60 motion on nearly identical grounds, and therefore the United States now timely opposes Neldon Johnson's Rule 60 motion.[2]

Rule 60(b) relief, which "provides an exception to finality that allows a party to seek relief from a final judgment,"[3] "is extraordinary and may only be granted in exceptional circumstances."[4] Neldon Johnson has not presented any reason, much less extraordinary or exceptional circumstances, to justify revisiting this Court's final judgment, injunction, or disgorgement award. His motion should be denied.

I. This Court has repeatedly rejected Neldon Johnson's "new evidence" and "fraud" claims.

Neldon Johnson's "new evidence" and "fraud on the court" arguments are similar, if not identical to, the arguments this Court has already rejected twice: first in its Memorandum Decision and Order Granting Turnover Motion; Denying Motion to Strike; Overruling Objection to Authentication of Exhibits; and Overruling Objection to Rejection of Reputed Contract

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[1] ECF No. 986.

[2] ECF No. 1030; ECF No. 997.

[3] *Johnson v. Spencer*, 950 F.3d 680, 694 (10th Cir. 2020) (quotation omitted).

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

("Turnover Order")[5] and then in its Memorandum Decision and Order Denying Motion for Rule 11 Sanctions.[6] This Court should reject them a third time.

II. *Liu v. SEC* did not change the decisional law in this case.

Neldon Johnson's "change in the law" argument fares no better. He claims that *Liu v. SEC*, a Supreme Court decision issued in June 2020, changed the law governing the proper method to calculate the equitable disgorgement award in this case. In the Tenth Circuit, "a change in relevant case law by the United States Supreme Court [may] warrant[] relief under Fed.R.Civ.P. 60(b)(6)."[7] Relief under Rule 60(b)(6) "'is even more difficult to attain [than relief under other clauses of the Rule] and is appropriate only when it offends justice to deny such relief.'"[8] "Rule 60 is not intended to provide relief from the consequences of a decision deliberately made by a party or counsel, even though subsequent events reveal that the decision was unwise."[9]

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[5] ECF No. 1007 at 43-44.

[6] ECF No. 1030. Further, to the extent it is required, the United States incorporates by reference the arguments it made in its Rule 11 motion, which identified the standard for a Rule 60 motion and the reasons that NSDP's motion failed to meet that standard. ECF No. 964 at 8-20. The same arguments apply here.

[7] *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *but see* 12 Moore's Federal Practice - Civil § 60.48[c] (2020); *Kustom Signals, Inc. v. Applied Concepts, Inc*., 247 F. Supp. 2d 1233, 1244 (D. Kan. 2003), aff'd, 111 F. App'x 611 (Fed. Cir. 2004). Neldon Johnson's summary "change in law" argument does not argue that applying the injunction "prospectively is no longer equitable" under Fed.R.Civ.P. 60(b)(5), so that provision will not be addressed.

[8] *XY, LLC v. Trans Ova Genetics, LC*, 2016 WL 6664619, at *3 (D. Colo. Nov. 10, 2016) (quoting *Yapp v. Excel Corp*., 186 F.3d 1222, 1231, 1232 (10th Cir. 1999) (internal quotation marks omitted)).

[9] 12 Moore's Federal Practice - Civil § 60.02 (2020).

Liu did not change the governing law in this case. It did not change Neldon Johnson's failure to present evidence on his own behalf at trial or his failure to adequately make arguments that he may belatedly consider relevant. And *Liu* expressly anticipates that, under proper circumstances like the ones presented here, disgorgement of a fraudster's gross receipts is consistent with equity principles. It creates no reason – much less an exceptional or extraordinary reason – to revisit this Court's disgorgement award.

A. *Liu*.

In *Liu*, the SEC sought (and the district court awarded) disgorgement of the defendants' gross receipts from their fraudulent scheme. The district court "declined to deduct expenses on the theory that they were incurred for the purposes of furthering an entirely fraudulent scheme."[10] The Supreme Court addressed the question of "whether, and to what extent, the SEC may seek 'disgorgement' in the first instance through its power to award 'equitable relief' under 15 U.S.C. § 78u(d)(5), a power that historically excludes punitive sanctions.[11] The Supreme Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5)."[12]

But the Supreme Court also acknowledged that "when the 'entire profit of a business or undertaking' results from the wrongdoing, a defendant may be denied inequitable deductions

[10] *Liu v. SEC*, 140 S. Ct. 1936, 1950 (2020).

[11] *Id.* at 1940.

[12] *Id.*

[from gross receipts] such as for personal services."[13] This exception "requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains under another name."[14] The law that *Liu* cited, quoted, and relied upon for these points is not new; the Supreme Court expressly grounded its decision in historical equity practice.[15]

Liu did not address *how* a district court is to ascertain whether a fraudster's expenses are legitimate or not.[16] And *Liu* reserved the question of whether, on the facts of *that* case, the district court correctly determined that the fraudsters' entire enterprise was a fraud and therefore ordered disgorgement of their gross receipts without deducting certain expenses.[17]

B. This Court's disgorgement award is consistent with equity principles, before and after *Liu*.

Before trial, this Court set forth the correct method for *how* the Court would evaluate the United States' disgorgement claim: the United States had the burden of showing an amount that was a "reasonable approximation" of Defendants' unjust enrichment; Defendants had the burden of "introduc[ing] evidence showing that unjust enrichment is something less" than what the United States' evidence showed.[18] Defendants also had "the burden of proving entitlement to a

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[13] *Id.* at 1950 (quotations and citations omitted).

[14] *Id.* (quotations and citations omitted).

[15] *Id.* at 1944-46.

[16] *Id.* at 1950 (quotations and citations omitted).

[17] *Id.* at 1947.

[18] ECF No. 359.

credit or deduction for business expenses, which may include refunds to customers." [19] This Court further instructed that Defendants would not be "entitled to a credit for costs or expenses incurred in an attempt to defraud" the United States.[20]

The United States met its burden. This Court "used Defendants' own business records to determine how many lenses were sold, and multiplied that by a conservative estimate of the amount paid for each lens" to arrive at its reasonable approximation of Defendants' gross receipts.[21]

But Neldon Johnson did not meet *his* burden of showing, with admissible evidence, that the disgorgement amount should be less.[22] Although he (or entities within his control) possessed "the best evidence of a reasonable approximation of [his] gross receipts," he "failed to rebut the United States' evidence."[23] He "introduced no credible evidence of [his] own."[24]

Because Neldon Johnson failed to introduce evidence 1) that his gross receipts were less than the reasonable approximation presented by United States or 2) that would have supported a finding that he incurred expenses (whether legitimate or solely in furtherance of his fraud on the

[19] *Id.*

[20] *Id.*

[21] *United States v. RaPower-3, LLC*, 960 F.3d 1240, 1253 (10th Cir. 2020); *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1194–95 (D. Utah 2018). Neldon Johnson claims that the Court relied solely on the bank deposit evidence the United States presented to determine gross receipts. ECF No. 986 at 2. The plain text of the Court's opinion shows that this claim is false. *RaPower-3*, 343 F. Supp. 3d at 1194–95; *id.* at 1195 n.621. The Tenth Circuit rejected a similarly conclusory argument, unsupported in the record, on direct appeal. *RaPower-3*, 960 F.3d at 1253.

[22] *RaPower-3*, 343 F. Supp. 3d at 1195.

[23] *Id.*

[24] *Id.*

United States), he waived any legal argument that could (theoretically) be based on such evidence. For example, he argued on direct appeal that this Court "should have subtracted operating expenses from the gross receipts to determine the amount that should be disgorged."[25] He argued that the United States did not show that he "'intentionally defrauded investors,'" such that he should be given a credit against his gross receipts for purportedly legitimate business expenses.[26] But the Tenth Circuit concluded that he did not "muster an adequate challenge to the sufficiency of the evidence on that score."[27] In short, Neldon Johnson "bore the risk of uncertainty, particularly when caused by [his] own record keeping, obstruction of discovery[,] *and decision not to put on any evidence or call any witnesses* who could have helped the court reach a more precise estimate of [his] receipts or any legitimate expenses."[28]

For these reasons, the Tenth Circuit affirmed this Court's method of calculating the disgorgement award on Neldon Johnson's direct appeal.[29] The Tenth Circuit also summarily rejected Neldon Johnson's post-*Liu* petition for rehearing, when he argued that this Court's disgorgement order "was excessive because it was based on gross receipts and 'courts must deduct legitimate expenses before ordering disgorgement.'"[30] Again, the Tenth Circuit held that

[25] *RaPower-3*, 960 F.3d at 1252.

[26] *Id.* (quoting Aplt. Br. at 25).

[27] *Id.* (quoting Aplt. Br. at 25); *see also RaPower*, No. 18-4119, Order denying petition for reh'g ("Order") (July 17, 2020), attached hereto.

[28] *RaPower-3*, 960 F.3d at 1253 (emphasis added).

[29] *Id.* at 1250-53.

[30] Order at 2 (quoting *Liu*, 140 S.Ct. at 1950).

Neldon Johnson failed to adequately present this argument in his briefs on appeal and he failed to adequately challenge the sufficiency of the United States' evidence that he intentionally defrauded investors.[31] Further, in the petition for rehearing, he failed to identify any "expenses that were not part and parcel of [his] scheme and should be deducted from the disgorgement order under the standard stated in *Liu*."[32]

This Court should deny Neldon Johnson's Rule 60 motion for the same reasons. Nothing in the *Liu* decision changed a defendant's burden to come forward with evidence of purportedly legitimate business deductions if he wished the court to count them against his gross receipts for any reason. Neldon Johnson failed to come forward with such evidence at trial, on direct appeal, when petitioning for rehearing at the Tenth Circuit, and now again in his Rule 60 motion. There was no error, before or after *Liu*, much less any error so offensive to justice to warrant Rule 60's extraordinary relief.

III. Conclusion

Neldon Johnson has failed to show extraordinary or exceptional circumstances that would support relief from the injunction, disgorgement award, or final judgment against him – much less that it would "offend justice" to deny him such relief. His Rule 60 motion should be denied.

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[31] *Id.* at 2-3.

[32] *Id.*

Dated: December 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, the foregoing UNITED STATES' BRIEF IN OPPOSITION TO NELDON JOHNSON'S RULE 60 MOTION was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

I also certify that, on the same date, I served the same documents by first-class mail upon:

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