

JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*
DC Bar No. 985670, erin.healygallagher@usdoj.gov
ERIN R. HINES, *pro hac vice*
FL Bar No. 44175, erin.r.hines@usdoj.gov
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

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

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828 DN</p> <p>UNITED STATES' MOTION TO EXCEED PAGE LIMIT FOR ITS FORTHCOMING MOTION FOR RULE 11 SANCTIONS REGARDING ECF NO. 931, MOTION TO SET ASIDE JUDGMENT AGAINST DEFENDANTS</p> <p>Judge David Nuffer Magistrate Judge Daphne A. Oberg</p>
---	---

On May 26, 2020, Steven Paul, an attorney at Nelson, Snuffer, Dahle & Poulson (“NSDP”), filed a Rule 60 motion.¹ The signing attorneys seek 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). According to the motion, the basis for the alleged new evidence derives from a bench colloquy between an IRS attorney and a Tax Court judge and testimony during a Tax Court trial held January 21-23, 2020. Specifically, the signing attorneys claim that “the IRS expressly conceded” a critical point in the Tax Court proceedings and a key witness, Dr. Thomas Mancini, testified differently before the Tax Court than he did in this matter.² The signing attorneys conclude that these claimed inconsistencies in argument and testimony undermine the United States’ position in this litigation and “materially affect[.]” the Court’s findings and conclusions that led to the injunction and order of disgorgement.³ According to the motion, the Department of Justice’s failure to alert the Court to the so-called “new position” and changed testimony is “grossly misleading,” and therefore the Department of Justice “violat[e]d its] duty of candor to this Court.”⁴ Therefore, the signing attorneys contend,

¹ ECF No. 931. Because Mr. Paul signed the Rule 60 motion with a “/s” and his name, and the docket reflects that the motion was filed under his ECF login and password, he signed the Rule 60 motion “for purposes of [Federal Rule of Civil Procedure 11](#).” D. Utah CM/ECF and Efiling Admin. Pro. Manual § II.A.1. Because “a law firm must be held jointly responsible for a [Rule 11] violation committed by its partner, associate, or employee,” [Fed. R. Civ. P. 11\(c\)\(1\)](#), this motion refers to the “signing attorneys” throughout.

² See ECF No. 931 at 2, 8.

³ ECF No. 931 at 2, 8.

⁴ ECF No. 931 at 2, 8.

“this Court should reassess the prior decision, set it aside, and dismiss the case brought against the Defendants.”⁵

The United States served a [Rule 11](#) motion on the signing attorneys on June 12, 2020.⁶ The 21-day safe harbor period ended on July 6, 2020.

Now, pursuant to DUCivR 7-1(a)(3)(C) & (e), the United States respectfully requests leave of Court to exceed the Local Rules’ page limitation to file its Rule 11 motion on the docket. DUCivR 7-1(a)(3)(C) permits such a motion and supporting memorandum to be 10 pages, exclusive of its “face sheet, table of contents, table of authorities, signature block, certificate of service, and exhibits.”

The current draft of the United States’ motion and supporting memorandum is 24 pages, as counted under the Local Rules. This length is appropriate, considering the nature of any Rule 11 motion. Determining whether a document like the Rule 60 motion violates Rule 11 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 [motion] violated Rule 11.”⁷ Accordingly, the current draft of the United States’ [Rule 11](#) motion addresses: 1) the legal standard for a [Rule 11](#) motion, and how the

⁵ [ECF No. 931](#) at 8.

⁶ Before any Rule 11 motion may be filed with the court, the moving party must allow the non-moving party or attorney an opportunity to withdraw the challenged paper. A [Rule 11](#) motion “must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.” [Fed. R. Civ. P. 11\(c\)\(2\)](#). We served the motion only after having delivered a letter to the signing attorneys, inviting them to withdraw the Rule 60 motion. *See* [ECF No. 935](#) at 2. They did not withdraw it by the date we requested.

⁷ [Adamson v. Bowen](#), 855 F.2d 668, 672 (10th Cir. 1988).

United States has met the procedural requirements to file such a motion with the Court; 2) the signing attorneys' factual contentions in the Rule 60 motion, and why they are false; 3) the three legal standards the signing attorneys raise in the Rule 60 motion, and why the Rule 60 motion fails them; 4) the facts and law regarding the signing attorneys' failure to comply with prior orders of this Court when they filed the Rule 60 motion; and 5) the appropriate sanctions for the Rule 11 violation. Careful, but concise, analysis of each topic requires a brief longer than 10 pages.

For this good cause shown and under these exceptional circumstances, the United States respectfully requests leave to file a [Rule 11](#) motion, with supporting memorandum, that is 24 pages, exclusive of its "face sheet, table of contents, table of authorities, signature block, certificate of service, and exhibits." If the Court allows the overlength motion, consistent with DUCivR 7-1 (e), we will include "a table of contents, with page references, listing the titles or headings of each section and subsection." A proposed order granting the requested relief is attached and will be emailed to the Court consistent with the Local Rules.

Dated: July 8, 2020

Respectfully submitted,

/s/ Erin Healy Gallagher

ERIN HEALY GALLAGHER

DC Bar No. 985760

Email: erin.healygallagher@usdoj.gov

Telephone: (202) 353-2452

ERIN R. HINES

FL Bar No. 44175

Email: erin.r.hines@usdoj.gov

Telephone: (202) 514-6619

Trial Attorneys, Tax Division

U.S. Department of Justice

P.O. Box 7238

Ben Franklin Station

Washington, D.C. 20044

FAX: (202) 514-6770

**ATTORNEYS FOR THE
UNITED STATES**