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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 **UNITED STATES' 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

After nearly three years of litigation and a 12-day bench trial, this Court concluded that Neldon Johnson and R. Gregory Shepard, and Johnson's entities International Automated Systems, Inc., RaPower-3, LLC, and LTB1, LLC, ran "a hoax funded by the American taxpayer by defendants' abusive advocacy of the tax laws."[1] The Court entered an injunction, an order of disgorgement, and judgment against all Defendants on October 4, 2018.[2]

On June 2, 2020, the United States Court of Appeals for the Tenth Circuit affirmed all pre-trial orders, and the judgment, in full.[3]

On May 26, 2020, Steven Paul, an attorney at Nelson, Snuffer, Dahle & Poulson ("NSDP"), filed a Rule 60 motion.[4] 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

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[1] Trial Tr. 2516:2-3.

[2] *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1120–21 (D. Utah 2018); ECF No. 468. Upon Defendants' motion to amend the technical language of the judgment, the Court entered an amended and restated judgment on November 13, 2018. ECF No. 507. The Court denied Defendants' subsequent Rule 59(e) motion on December 4, 2018. ECF No. 529. The Court is familiar with the record in this matter. Therefore, we provide only a brief overview of the procedural posture here. Because the facts are best discussed in connection with the governing legal standards, we reserve details for below.

[3] *United States v. RaPower-3, LLC*, 960 F.3d 1240 (10th Cir. 2020). The Tenth Circuit dismissed certain Affiliated Entities' appeal of this Court's "Affiliates Order" on June 22, 2020. *United States v. Solco I, LLC*, No. 19-4089, — F.3d —, 2020 WL 3407013 (10th Cir. 2020).

[4] 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 will refer to the "signing attorneys" throughout.

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.[5] 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.[6] 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 "violate[d its] duty of candor to this Court."[7] Therefore, the signing attorneys contend, "this Court should reassess the prior decision, set it aside, and dismiss the case brought against the Defendants."[8]

The injunction, disgorgement order, and judgment in this case were and are well-founded in fact and law.[9] Nothing has changed the detailed findings of fact and conclusions of law this Court entered. The United States' positions and the facts supporting them (including Dr. Mancini's testimony) are, and have always been, consistent. The signing attorneys' factual assertions to the contrary are demonstrably false. The signing attorneys' request to vacate the injunction, disgorgement order, and judgment, is wholly unsupported by any legal authority for

[5] *See* ECF No. 931 at 2, 8.

[6] ECF No. 931 at 2, 8.

[7] ECF No. 931 at 2, 8.

[8] ECF No. 931 at 8.

[9] *E.g., United States v. RaPower-3, LLC*, 960 F.3d at 1250-55.

relief under that rule. For these reasons, the signing attorneys violated Fed. R. Civ. P. 11(b)(2) and (3), and sanctions are warranted.

Table of Contents

I. The signing attorneys violated Rule 11 because the Rule 60 motion has no basis in fact or law; therefore, sanctions are warranted.

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."[10]

When a paper filed in federal district court fails to meet this standard, sanctions under Fed. R. Civ. P. 11 may be appropriate. "[T]he 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 machinery of justice in motion, burdening courts and individuals alike with needless expense and delay."[11] But a Rule 11 motion "should not be made or threatened for minor, inconsequential violations of [its] standards."[12] Instead, a court "should only award Rule 11 sanctions when it is clear that a claim has absolutely no chance of success under any existing law."[13]

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

[11] *Collins v. Daniels*, 916 F.3d 1302, 1322–23 (10th Cir. 2019) (quotations and alterations omitted).

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

[13] *Garth O. Green Enters., Inc. v. Harward*, 2017 WL 213787, at *7 (D. Utah Jan. 18, 2017) (Nuffer, J).

"'In deciding whether to impose Rule 11 sanctions, a district court must apply an objective standard; it must determine whether a reasonable and competent attorney would believe in the merit of an argument.'"[14] "Reasonableness of counsel's conduct necessarily depends upon the prevailing facts and circumstances of a given case."[15] This evaluation does not use hindsight: the 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."[16] This test looks to factors such as: "how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; [and] whether the pleading, motion, or other paper was based on a plausible view of the law."[17] Rule 11 "require[s] litigants to 'stop-and-think' before initially making legal or factual contentions."[18] It 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."[19]

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[14] *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.).

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

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

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

[18] Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments; *accord Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988).

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

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. The best practice is to begin with an informal request to withdraw the motion, such as a letter or a phone call.[20] If that is unsuccessful, 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."[21]

A. The United States satisfied the procedural requirements to file this Rule 11 motion.

On June 8, 2020, the United States delivered a letter via e-mail to Steven Paul, the attorney at NSDP, who signed the Rule 60 motion.[22] The email and letter were also addressed to all other attorneys at NSDP whose names appeared on the motion.[23] The letter invited Mr. Paul to withdraw the Rule 60 motion without formal motions practice, no later than June 11, 2020.[24]

When he did not do so within the requested time, on June 12, 2020, the United States served a substantively identical version of this motion upon the same attorneys pursuant to Fed.

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

[21] Fed. R. Civ. P. 11(c)(2).

[22] Declaration of Erin Healy Gallagher, June 12, 2020 ("Healy Gallagher Decl.") ¶ 2; Pl. Ex. 977.

[23] Healy Gallagher Decl. ¶ 2; Pl. Ex. 977. Since filing the Rule 60 motion, the signing attorneys have moved to withdraw as district court counsel for the moving Defendants. *See* ECF No. 953.

[24] Pl. Ex. 977.

R. Civ. P. 5.[25] Twenty-one days have passed and the signing attorneys have not withdrawn the Rule 60 motion.[26] Accordingly, the safe-harbor time is over.

B. The Rule 60 motion has no basis in fact or law.

Determining whether a 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 pleading violated Rule 11."[27] We begin with the signing attorneys' factual contentions in the Rule 60 motion, address the legal standards under Rule 60, and note the signing attorneys' failure to comply with prior orders of this Court.

1. The United States' position is, and has always been, that the solar lenses are not "energy property."

As this Court has already determined, "[u]nder § 48, a taxpayer may be allowed an 'energy credit' that reduces his income tax liability in a given year for certain 'energy property' he 'placed in service' during the tax year for which the taxpayer claims the credit. 'Energy property' means equipment with respect to which depreciation is allowed, and "which uses solar

[25] Healy Gallagher Decl. ¶ 6. This version of the motion has been updated to reflect events and Court orders entered since June 12, 2020.

[26] Healy Gallagher Decl. ¶ 7.

[27] *Adamson*, 855 F.2d at 672; *see also United Pac. Ins. Co. v. Durbano Const. Co.*, 144 F.R.D. 402, 408–09 (D. Utah 1992) (Winder, J).

energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat."[28]

This Court concluded that Defendants' customers' lenses failed this test (and that Defendants knew, or had reason to know it), after a trial during which the signing attorneys were counsel of record for all Defendants. Specifically, 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.'"[29] 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."[30] 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.[31]

The United States advocated for the Court to make all of the findings of fact that underlie the conclusions of law that Defendants' customers' lenses were not (and are not) "energy property."[32] The IRS's position throughout the Tax Court litigation against the Olsens, including

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[28] *RaPower-3*, 343 F. Supp. 3d at 1184 (citations and alterations omitted).

[29] *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).

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

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

[32] *E.g.*, *RaPower-3*, 343 F. Supp. 3d at 1121 ("The United States submitted draft findings of fact and conclusions of law before trial, as did Defendants. Then, following trial, revisions and additional findings were delivered to the

during the January 2020 trial, was – and is – entirely consistent with the United States' position in this litigation and this Court's findings and conclusions: the Olsens' lenses were not "energy property." The IRS argued and proffered evidence, at every stage of the Tax Court case, that the Olsens' claimed depreciation deduction was not allowable because they were not in a trade or business related to the lenses, and the lenses were not "placed in service."[33] The IRS argued and proffered evidence, at every stage of the Tax Court case, that the Olsens' 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.[34]

Part of the IRS's evidence on the latter point was testimony from Dr. Thomas Mancini who also testified as an expert in the trial in this case. Dr. Mancini testified as an expert witness in the Tax Court litigation to offer facts and opinion evidence in support of the IRS's position that the lenses were not "energy property," just as he did before this Court. Specifically, Dr. Mancini opined and concluded:[35]

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parties. The United States submitted revised draft findings of fact and conclusions of law, and Defendants objected.").

[33] Pl. Ex. 970, IRS's Pre-Trial Brief (hereafter, "IRS Pre-Trial Brief"), Jan. 6, 2020, at 3 ("Issues"), 7-14; Pl. Ex. 971, IRS's Post-Trial Brief (hereafter, "IRS Post-Trial Brief"), May 5, 2020 at 90-115; *see also generally* Pl. Ex. 972, Tax Court Tr., Jan. 21, 2020 ("T.C. Tr. vol. 1"), at 50:10-60:1 (opening statement by IRS Counsel); Pl. Ex. 973, Tax Court Tr., Jan. 22, 2020 ("T.C. Tr. vol. 2") at 160:6-316:24 (cross-examination of Preston Olsen); Pl. Ex. 974, Tax Court Tr., Jan. 23, 2020 ("T.C. Tr. vol. 3"), 463:5-502:7 (direct examination of Dr. Mancini), 519:24-523:24 (redirect & rebuttal examination of Dr. Mancini), 527:10-531:12 (discussing post-trial briefing required, including the factual and legal issues that go to whether the lenses qualified for a depreciation deduction or the energy credit).

[34] IRS Pre-Trial Brief at 3 ("Issues"), 7-14; IRS Post-Trial Brief at 90-115; *see also generally* T.C. Tr. vol. 1 at 50:10-60:1; T.C. Tr. vol. 2 at 160:6-316:24; T.C. Tr. vol. 3. 463:5-502:7, 519:24-523:24, 527:10-531:12.

[35] T.C. Tr. vol. 3 at 484:6-10, 486:3-9; Pl. Ex. 975, Expert Report of Dr. Thomas Mancini, Tax Court Exhibit 147-R ("T.C. Expert Report"), at 3. In Tax Court, unlike in federal district court, an expert's report is his direct testimony. Tax Court Rule 143(g)(2) ("The [expert] report will be marked as an exhibit, identified by the witness, and received in evidence as the direct testimony of the expert witness . . . ."). The Tax Court also received Dr. Mancini's rebuttal

> **Conclusion 1: Status of IAS Solar Dish Technology**
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> The IAS Solar Dish Technology is in the research Stage 1 of development as described in Section 3 of this report. The "Technology" comprises separate component parts that do not work together in an operational solar energy system. The IAS Solar Dish Technology does not produce electricity or other useable energy from the sun.
>
> **Conclusion 2: Commercialization Potential of the IAS Solar Dish Technology**
>
> The IAS Solar Dish Technology is not now nor will it ever be a commercial-grade dish solar system converting sunlight into electrical power or other useful energy.

These are the exact same conclusions that Dr. Mancini reached, and testified about, in this case.[36]

2. The signing attorneys' assertions that the United States changed its position, and that Dr. Mancini materially changed his testimony, are false.

In spite of the foregoing record, the signing attorneys claim that "the IRS expressly conceded in the Tax Court that . . . lenses qualify as solar energy property under the IRS code and regulations," such that "the lenses qualify for [§ 48] tax credits but may be limited to passive income, depending on the taxpayer's circumstances."[37] The signing attorneys misleadingly

report as testimony. T.C. Tr. vol. 3 at 524:19-526:25; Pl. Ex. 976, Rebuttal Report of Dr. Thomas Mancini, Tax Court Exhibit 148-R. As referenced *supra*, Dr. Mancini testified live as well. T.C. vol. 3 at 463:2-527:9.

[36] *E.g.*, *RaPower-3*, 343 F. Supp. 3d at 1149-51.

[37] ECF No. 931 at 2. The IRS argued, in the alternative, that *if* the Tax Court were to conclude that the Olsens' solar lenses qualified as "energy property," any related deduction should be limited to the extent that their money was "at risk" and any loss should offset only passive income. IRS Pre-Trial Brief at 14-15, IRS Post-Trial Brief at 115-19; T.C. Tr. vol. 1, at 50:10-60:1; T.C. Tr. vol. 3 at 527:10-530:13. As described below, the IRS never limited itself to those arguments. This is consistent with this Court's findings and conclusions (and the United States' advocacy) in this matter. *E.g.*, *RaPower-3*, 343 F. Supp. 3d at 1185-89.

characterize block quotes of argument and testimony from the Tax Court case to conjure this fantasy concession.

For example, the block quotes offered in support of the claim that the IRS "expressly conceded" that the lenses are "energy property" reflect no such concession (express or otherwise). Instead, they reflect IRS Counsel's acknowledgement that the lenses concentrate solar radiation.[38] That has never been in dispute: even broken lenses, hanging out of rusted, unmoving frames, concentrate solar radiation. The United States submitted a trial exhibit with a video clip illustrating this.[39] As this Court concluded, however, the entire time Defendants were promoting their scheme and perpetrating their hoax, their solar lenses never used heat from the sun to accomplish any kind of useful function or application; and they have never been used in a system to concentrate solar radiation to accomplish any kind of useful function or application.[40] IRS Counsel's arguments were the same in Tax Court: "[t]hough petitioners' solar lenses were potentially capable of being used to produce heat from the sun – assuming they ever actually existed, were removed from the pallets, and cut into the proper shape – they cannot be considered solar energy property. They were never used in any system that would use the heat produced for any meaningful purpose (i.e., produce electricity, heat a building, or provide hot

[38] *E.g.*, T.C. Tr. vol. 1 at 15:10-23. As Defendants attempted to do here post-trial, *see* ECF No. 503 & ECF No. 529, in Tax Court the Olsens attempted to use an "expert report" from Johnny Kraczek to support claims that the lenses work to produce heat and/or electricity using a Stirling engine system. Such a system was never in place (or anticipated to be used) at any time relevant to this litigation.

[39] Pl. Ex. 509; *RaPower-3*, 343 F. Supp. 3d at 1183 ("While the solar lenses may be able to concentrate solar radiation sufficient to set wood or shoes smoldering, blacken a rabbit, or burn an IRS agent, that alone is not sufficient to generate 'solar process' heat.").

[40] *RaPower-3*, 343 F. Supp. 3d at 1147-52, 1183-84.

water to a building or structure)."[41] In short, the IRS contends that the Olsens' lenses are *not* "energy property."

The signing attorneys' claim that this Court's findings of fact "relied exclusively on the testimony of Thomas Mancini for findings that the lenses would not generate electricity, either on their own or in combination with other components . . . . [a]nd relied on him for all of the Court's findings that the lenses were not capable of producing heat."[42] This is false. A plain reading of this Court's findings of fact reveals myriad facts *other than* Dr. Mancini's testimony which show that "Johnson's purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy."[43]

Notwithstanding these abundant facts, the signing attorneys distort certain immaterial excerpts of Dr. Mancini's Tax Court testimony in an attempt to undermine his credibility and conclusions here. In voir dire, the Olsens' attorney tried (and failed) to undermine Dr. Mancini's qualifications with respect to whether the purported solar technology would ever be "commercial grade."[44] The motion quotes a portion of Dr. Mancini's testimony during this exchange, in which he was seeking clarification from the Olsens' attorney before responding to a question. Shortly after, Dr. Mancini testified about his experience and understanding of "commercial grade" in the context under discussion.[45]

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[41] IRS Post-Trial Brief at 108-109; T.C. Tr. vol. 1 56:5-59:4.

[42] ECF No. 931 at 5.

[43] *RaPower-3*, 343 F. Supp. 3d at 1147-52.

[44] *See generally* T.C. Tr. vol. 3 at 472:3-484:2.

[45] T.C. Tr. vol. 3 at 480:17-481:20.

The signing attorneys' claim that Dr. Mancini changed his testimony on cross-examination is also false. The Olsens' attorney asked him hypothetical questions about what *could* happen using the lenses to concentrate sunlight; not what *did* happen with the Olsens' lenses.[46] These hypothetical questions are not relevant to – and in no way materially alter – Dr. Mancini's testimony about the lenses or the purported system at issue in this litigation, or the lenses at issue during the relevant tax periods for the Olsens – which Dr. Mancini made clear on cross-examination and on redirect examination in Tax Court.[47]

Further, the signing attorneys offer the non-sequitur that Dr. Mancini "changed his testimony" in his recollection that on a site visit, one solar tower may have been tracking the sun automatically instead of manually.[48] Even if true, this one tiny detail is totally irrelevant in the face of the overwhelming evidence in support of Dr. Mancini's two conclusions, and that showed that "Defendants knew, or had reason to know, that Johnson's purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy."[49] It remains true that the purported solar energy technology "consists, and has always consisted, of separate component parts that do not fit together in a system that will operate effectively or efficiently."[50]

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[46] *E.g.*, T.C. Tr. vol. 3 at 503:21-510:3.

[47] *E.g.*, T.C. Tr. vol. 3 at 503:21-510:3, 516:4-21, 519:24-523:24.

[48] ECF No. 931 at 7.

[49] *RaPower-3*, 343 F. Supp. 3d at 1147-52; *see also RaPower-3*, 960 F.3d at 1250 (rejecting Defendants' challenge to this Court's "determination that they knowingly engaged in a fraudulent tax scheme").

[50] *RaPower-3*, 343 F. Supp. 3d at 1149–50.

For all of these reasons, the record is clear: the United States' position and Dr. Mancini's testimony are and have always been consistent. The signing attorneys' factual assertions to the contrary are false.

3. The legal standard for relief under Rule 60 only magnifies the signing attorneys' glaring fabrications.

Rule 60 "provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances."[51] The signing attorneys purport to seek relief from this Court's final judgment under Rule 60(b)(2) and (3), and (albeit without citation) under 60(d)(3). The signing attorneys do not identify or explain the legal standards for a motion made under these provisions. The Rule 60 motion fails each of them.

"Rule 60(b) relief "is extraordinary and may only be granted in exceptional circumstances."[52] Under Rule 60(b)(2), such relief may be granted when the moving party shows that there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Among other things, for "newly discovered evidence" to justify Rule 60(b) relief, the moving party must show that such evidence "is material" and "that a new trial with the newly discovered evidence would probably produce a different result."[53]

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

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

[53] *Zurich N. Am.*, 426 F.3d at 1290 (alterations and quotation omitted). Additional factors are that "the evidence was newly discovered since the trial; . . . the moving party was diligent in discovering the new evidence; [and] the newly discovered evidence [is not] merely cumulative or impeaching." *Id.* (alterations and quotation omitted).

Under Rule 60(b)(3), such relief may be granted when the moving party shows that an opposing party committed "fraud . . . misrepresentation, or misconduct." A moving party must show, by "clear and convincing proof," that the opposing party committed "fraud, misrepresentation, or misconduct" such that "the challenged behavior must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial."[54] Rule 60(b)(3) is intended to address "claims of fraud between the parties."[55]

Claims of fraud on the *court*, however, fall under Rule 60(d)(3). The Rule imposes no limitation upon a court's power to "set aside a judgment for fraud on the court."[56] Claims of fraud on the court are analyzed separately from claims of fraud between the parties "because they are much more difficult to prove."[57] "Fraud on the court is fraud which is directed to the judicial machinery itself."[58] "Generally speaking, only the most egregious conduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court."[59] A moving party must show "[i]ntent

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

[55] *Zurich N. Am.*, 426 F.3d at 1291.

[56] Fed. R. Civ. P. 60(d)(3). There is no time limit for such a motion, unlike the one-year limitation on Rule 60 motions made under (b)(2) and (b)(3). *Compare* Fed. R. Civ. P. 60(c)(1) *with Zurich N. Am.*, 426 F.3d at 1291. Because it would have to analyze the claims under Rule 60(d)(3) regardless of the potential untimeliness of this motion under Rule 60(b)(2) and (3), we include a discussion of the merits under all three provisions.

[57] *Zurich N. Am.*, 426 F.3d at 1291.

[58] *Zurich N. Am.*, 426 F.3d at 1291 (quoting *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002)) (alterations omitted).

[59] *Zurich N. Am.*, 426 F.3d at 1291 (quoting *Weese v. Schukman*, 98 F.3d 542, 552–53 (10th Cir. 1996)).

to defraud" to obtain relief.[60] "Proof of fraud upon the court must be by clear and convincing evidence."[61]

Judged against these standards, "it is clear that [the Rule 60 motion] has absolutely no chance of success under any existing law."[62] And the motion *must* be judged under these standards; when evaluating a Rule 11 motion, a court must view the factual and legal claims through the lens of the standard for the challenged document.[63] As the foregoing facts show, the signing attorneys offer no "newly discovered evidence" at all, much less "material" new evidence that would probably produce a different result at a new trial. Similarly, the signing attorneys offer no evidence (much less clear and convincing evidence) of any fraud by the Department of Justice that "substantially interfered" with any party's ability to proceed at trial in this litigation.[64] The signing attorneys only passingly assert (but do not offer clear and convincing evidence to meet its heightened burden to show) that the Department of Justice intended to engage in fraud on this Court, such as through an attempt to bribe this Court or an attorney's falsification of evidence.[65]

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[60] *Zurich N. Am.*, 426 F.3d at 1291 ("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)).

[61] *Buck*, 281 F.3d at 1342.

[62] *See Garth O. Green Enters.*, 2017 WL 213787, at *7.

[63] *See Adamson*, 855 F.2d at 673-74 ("For the Secretary's answer [in a Social Security case] to be objectively reasonable within the contemplation of Rule 11, the facts must have been sufficient to allow the Secretary to defend the agency ruling in objective good faith as being supported by 'substantial evidence.' See 42 U.S.C. § 405(g).").

[64] *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).

[65] *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

All of the information about the IRS's litigating position in Tax Court was reasonably available to the signing attorneys. They are aware of the elements to prove that a piece of equipment is "energy property." Clearly, they had access to at least part of the Tax Court transcript before filing the motion in the first place. The signing attorneys could have, and should have, obtained the Tax Court record described above before filing the Rule 60 motion. They had time to review the Tax Court record thoroughly before filing the motion. A reasonable and competent attorney would not level serious (and, ultimately, false) accusations without a careful review of the factual record, and the applicable legal standard (both for what qualifies as "energy property" and for Rule 60 relief). Further, when the United States sent its informal demand that the signing attorneys withdraw the motion, we provided the signing attorneys with the factual record described above.[66] We explained that the United States' position has not changed and cited to the Tax Court record to demonstrate the consistency between the position taken in this litigation and the position taken before the Tax Court. We noted the applicable legal and evidentiary standards under Rule 60 and pointed out the motion's fatal flaws. Then, when they did not withdraw the Rule 60 motion after our informal request, we served them with a substantively identical version of this brief.

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).

[66] *See generally* Pl. Ex. 977.

A reasonable and competent attorney would have promptly withdrawn the Rule 60 motion after the receiving the United States' initial letter and brief.[67] The signing attorneys' attempt to conjure the specter of a changed position or materially different expert testimony collapses in the face of the record as a whole. It is "not objectively reasonable" to "misstate[] facts" known to a filing attorney at the time a motion is filed. [68] It is "not objectively reasonable" to file a motion containing factual assertions contradicted by documents the filing party has, or should have had, in its possession – or to later advocate the same position.[69] Further, it is not objectively reasonable to cling to "little evidence" that may tenuously support a position when "overwhelming evidence" shows contrary facts.[70]

This is not a situation in which reasonable minds can differ, or in which there was not sufficient time for the filing attorneys to explore every factual nuance of an allegation, pleading, or motion.[71] This is not a situation in which the motion was inartful, yet still meritorious and made against a proper party.[72] This is not a situation in which the factual claims and legal "arguments were colorable [or] well-reasoned."[73] Rather, the signing attorneys invite this Court into an alternate reality, untethered to fact or law, as they falsely accuse the Department of

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[67] *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").

[68] *Mountain Crane Serv., LLC v. Wenneshiemer*, 2016 WL 5415665, at *3 (D. Utah Sept. 28, 2016) (Furse, M.J.).

[69] *Mountain Crane Serv.*, 2016 WL 5415665, at *3.

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

[71] *C.f. Agjunction LLC v. Agrian Inc.*, 2015 WL 416440, at *8-9 (D. Kan. Jan. 30, 2015).

[72] *ITN Flix*, 2018 WL 2464502, at *3; *Agjunction*, 2015 WL 416440, at *8-9.

[73] *DiTucci v. Ashby*, 2020 WL 2526945, at *2 (D. Utah May 18, 2020) (Warner, M.J.).

Justice of engaging in some of the most disreputable and disgraceful conduct possible in civil litigation.

Accordingly, the signing attorneys violated Rule 11(b)(2) and (3).

4. The signing attorneys disobeyed the Corrected Receivership Order.

The signing attorneys disobeyed the Corrected Receivership Order by filing the Rule 60 motion. Each of the Defendants on whose behalf they filed the motion is a Receivership Defendant. "Any filing or submission by any Receivership Defendant must contain 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."[74]

The signing attorneys failed to provide an adequate statement regarding the source of funds to file the Rule 60 motion. The motion's conclusory statement "that no Receivership Property has been used to pay for the fees or costs associated with this motion"[75] does not meet the standard set by paragraph 10 of the Corrected Receivership Order. The conclusory assertion does not "identify[] the source of the funds for the [Rule 60 motion] in sufficient detail to show that the funds are not Receivership Property or otherwise derived from the solar energy scheme."[76] This failure is obvious from the plain text of paragraph 10 of the Corrected

[74] ECF No. 491 at 6 ¶ 10.

[75] ECF No. 931 at 9.

[76] ECF No. 491 at 6 ¶ 10.

Receivership Order and the procedural history of this litigation. It is not objectively reasonable to have submitted this filing without the required statement regarding the funds used to file it.

C. Sanctions are necessary to deter the signing attorneys' conduct, and others who consider engaging in similar conduct in the future.

A court may "impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee."[77] Rule 11 sanctions "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated," which "may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[78] "When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on . . . persons, firms, or parties" other than the signing attorney and the attorney's firm.[79]

Among the facts to consider in determining appropriate sanctions are: "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an

[77] Fed. R. Civ. P. 11(c)(1).

[78] Fed. R. Civ. P. 11(c)(4) & (c)(2).

[79] Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments. An award of attorneys' fees and costs to the moving party "should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement." *Id.*

isolated event; . . . whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; . . . whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; [and] what amount is needed to deter similar activity by other litigants."[80]

Here, the Court is familiar with the positions taken by the signing attorneys, and the parties they represent in the Rule 60 motion, throughout this matter and on appeal. This is not the first time that they have "wholly fail[ed] to deal with the voluminous . . . evidence" contrary to their positions.[81] This is not the first time that their legal arguments (or, in the case of the Rule 60 motion, mere legal conclusions) have failed to "grapple with the specific evidence presented in this case."[82] This Court found Neldon, Glenda, LaGrand, and Randale Johnson in civil contempt while all but Neldon were represented by the signing attorneys.[83]

After clear notice from the United States of the fundamental defects of the Rule 60 motion, the signing attorneys *and their clients*[84] failed to withdraw the motion. Although Rule 11 attorney's fee sanctions may not be imposed on a represented party for violating the Rule by

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

[81] *RaPower-3*, 960 F.3d at 1250.

[82] *RaPower-3*, 960 F.3d at 1250.

[83] ECF No. 701 (Neldon Johnson's contumacious conduct began while he was represented by the signing attorneys); *see also* ECF No. 917, ECF No. 917-1 (final draft findings submitted for the Court's consideration).

[84] *See* Healy Gallagher Decl. ¶ 5; Pl. Ex. 978, Email from S. Paul to E. Healy Gallagher dated Jun. 11, 2020 (noting that "counsel and clients [had] discussed [the Rule 11] letter in detail" by that date).

making a frivolous contention of law,[85] the Court's inherent authority to enforce the Corrected Receivership Order may allow such a sanction to be imposed.[86] Further, Glenda Johnson (represented by the signing attorneys) maintained the false factual assertions about the United States' purported "concession" in Tax Court days *after* her attorneys received the United States' Rule 11 letter.[87] They simply will not stop.

For all of these reasons, the following sanctions are appropriate to deter the signing attorneys and their clients, and others who consider engaging in similar behavior. This Court should order:

- 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

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

[86] Rule 11 "does not inhibit the court in punishing for contempt [or] in exercising its inherent powers." Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("[I]t is firmly established that the power to punish for contempts is inherent in all courts." (quotation and alteration omitted)).

[87] *Compare* 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).

- 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.

II. 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 sanctions are warranted against all persons responsible for it. The Court should grant the United States' motion and enforce Rule 11.

Dated: July 13, 2020

Respectfully submitted,

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